P.E.R.C. No. 91-92

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY STATE PBA &
PBA LOCAL NO. 105,

Respondent,

-and- Docket No. CI-H-90-11

ROBERT FRANKLIN, et al.

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission grants the New Jersey State PBA's motion for summary judgement and dismisses an unfair practice charge filed by Robert Franklin and 59 other FOP members who were expelled from the PBA for dual membership. The charging parties presented no evidence that their expulsions were arbitrary, capricious or invidious.

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Appearances:

For the Respondents, Zazzali, Zazzali, Fagella & Nowak, attorneys, (Paul L. Kleinbaum, of counsel)

For the Charging Parties, A. J. Fusco, Jr., attorney (Steven A. Varano, of counsel)

DECISION AND ORDER

On July 21, 1989, Robert Franklin, a member of the Fraternal Order of Police ("FOP"), filed an unfair practice charge against the New Jersey State PBA and PBA Local No. 105. The charge alleged that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1) and (5),[1/] by expelling him

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

from the PBA for violating the PBA's prohibition on membership in other labor organizations and by continuing to collect PBA dues from his weekly pay. On May 11, 1990, the charge was amended to add as parties 59 other FOP members who were expelled from the PBA for dual membership and to allege violations of subsections 5.4(b)(2), (3) and (4) and sections 5.5 and 5.6.[2/]

This case comes to us to review a recommended decision granting summary judgment in favor of the State PBA. H.E. No. 91-19, 17 NJPER 93 (¶22045 1991). We adopt that decision's procedural history.[3/] The Hearing Examiner concluded that the dispute over the interpretation and application of the State PBA's constitution and by-laws was purely an internal union matter and that there was no breach of the State PBA's duty of fair representation.

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2/ The subsections in 5.4(b) prohibit public employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement." Sections 5.5 and 5.6 concern representation fees in lieu of dues. The allegations involving dues collection were dismissed. H.E. No. 90-40, 16 NJPER 207 (¶21081 1990). The case against Local 105 was settled.

3/ We add that on October 31, the State PBA filed a supplemental argument for dismissal claiming that the July 11 settlement agreement gives the charging parties all the relief that they are entitled to and that the case is moot.

On March 14, 1991, the charging parties filed exceptions. They claim that the charging parties' expulsion from the PBA constitutes a breach of the duty of fair representation. They assert that the expulsions were unreasonable, arbitrary and discriminatory, particularly since the State PBA does not expel all dual members.

On March 26, 1991, the State PBA filed a reply and cross-exceptions. With respect to the charging parties' exceptions, the State PBA claims that the charging parties' response to the motion was based solely on the argument that the State PBA breached its duty of fair representation and that they waived their right to challenge the PBA's interpretation and application of its by-laws. The State PBA further argues that there is no allegation or evidence that PBA Local 105 or the State PBA selectively expelled members of the negotiations unit at issue. With respect to its cross-exceptions, the State PBA claims that the Hearing Examiner inadvertently omitted reference to its mootness argument and erred in finding that the issue of untimeliness is moot.

We have reviewed the record before the Hearing Examiner: the unfair practice charge; amended charge; Answer, amended Answer; affidavits of Samuel Love, Frank Ginesi, Frank King and Joseph Esposito; agreed-upon exhibits including Local 105 and the State PBA's constitutions and by-laws; and the June 27 and July 11, 1991 hearing transcripts. The Hearing Examiner's undisputed findings of fact (H.E. at 7-13) are accurate. We incorporate them here.

Summary judgment 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)]

All inferences of doubt are drawn against the movant in favor of the opponent of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Applying these standards, we grant the State PBA's supplemental motion for summary judgment and dismiss the Complaint.

In FOP Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1990), we stated that the standard for testing the legality of expulsions from union membership is whether such expulsions were arbitrary, capricious or invidious. Id. at 127. In Bergen Cty. Sheriff, P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), we held that a union's bylaws may legitimately prohibit a member from belonging to a rival collective negotiations organization. See also Calabrese v. PBA Local No. 76, 157 N.J. Super. 139 (Law Div. 1978). Those cases control the outcome of this case.

The original unfair practice charge alleged that Franklin's expulsion was arbitrary and capricious since he was the only dual member expelled. It further alleged that his expulsion was discriminatory since it was based solely on his affiliation with the FOP. The amended charge alleges that the expulsions of 59 other FOP members were arbitrary, capricious and discriminatory because they were based solely on membership in a rival police organization.

The charging parties have presented no evidence that their expulsions were arbitrary, capricious or invidious. The record does not support the allegation in charging parties' exceptions that some local PBAs have failed to expel dual members. Further, there is no evidence that the respondent State PBA has discriminatorily decided expulsion appeals. To the contrary, an affidavit of the Chairman of the State PBA's By-laws Committee states that dual membership expulsions have been uniformly upheld.

We accordingly grant summary judgment for the respondent.[4/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: April 19, 1991
Trenton, New Jersey
ISSUED: April 19, 1991

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4/ We need not consider the State PBA's other grounds for granting summary judgment.

H.E. NO. 91-19

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Respondent,

-and- Docket No. CI-H-90-11

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Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant the supplemental motion of the New Jersey State PBA for summary judgment since the undisputed facts raised by the Unfair Practice Charge, as amended, and the responding papers satisfy the Commission's standards for the grant of such a motion. In this case, there was no legal support for the theory of the Charging Parties that the Respondent State PBA breached its duty of fair representation as the majority representative. [A settlement agreement reached during the hearing resulted in the withdrawal with prejudice against the Respondent PBA Local No. 105.]

More specifically, the issue was whether or not the State PBA's alleged selective enforcement of its Constitution and By-Laws provision regarding expulsion of PBA members for dual membership in the FOP constituted a DFR or an "internal union matter." The Hearing Examiner reviewed all of the pertinent United States Supreme Court DFR decisions, in addition to those of the NLRB, the New Jersey courts and the Commission. He concluded that since 1944, DFR cases have arisen only in the context of the conduct of the majority representative in either the administration of the grievance procedure or in the negotiation of terms and conditions of employment.

The Hearing Examiner finally concluded that the interpretation and application of the State PBA's Constitution and By-Laws was a purely "internal union matter" under the many decisions of the New Jersey courts and the Commission, specifically, Calabrese v. PBA, Local 76, 157 N.J. Super. 139 (App. Div. 1978) and Jersey City Supervisors Ass'n, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), app. dism. App. Div. Dkt. No. A-768-82T1 (1983).

H.E. NO. 91-19

A Hearing Examiner's Recommended Report and Decision recommending the grant of a motion for summary judgment 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. 91-19

STATE OF NEW JERSEY
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Appearances:

For the Respondents, Zazzali, Zazzali, Fagella & Nowak, Attorneys, (Paul L. Kleinbaum, of counsel)

For the Charging Parties, A. J. Fusco, Jr., Attorney (Steven A. Varano, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION ON MOTION FOR SUMMARY JUDGMENT BY RESPONDENT NEW JERSEY STATE PBA[1/]

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 21, 1989, by Robert Franklin ("Franklin") and amended on May 11, 1990, to add the names of 59 additional individual Charging Parties ("Charging Parties"), alleging that the New Jersey State PBA and PBA Local No. 105 ("State PBA" and/or "Local 105") 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").

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1/ On July 11, 1990, a Settlement Agreement was executed and in ¶12 thereof the Charging Parties withdrew their Unfair Practice Charge, as then amended, with prejudice (C-7, infra at p. 5).

The original Unfair Practice Charge, which was filed by Franklin, alleged that on March 28, 1989, the Local 105 Judiciary Committee voted to expel him from Local 105. This expulsion was based solely upon his membership in the FOP and, further, it was arbitrary since he was the only "dual member" expelled. Franklin's expulsion was affirmed on appeal by the State PBA Judiciary Committee on May 12, 1989. Despite his expulsion, the "PBA" continues to deduct 100% dues from his weekly pay although the "PBA" is not entitled to any dues or the 85% agency fee. The dues are not being applied "in total" to collective bargaining. All of the foregoing is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) and (5) of the Act.[2/]

The amended Unfair Practice Charge, which was filed by 59 additional Charging Parties, alleged that on May 3, 1989, and September 18, 1989, they were expelled from the State PBA and Local 105 and that these expulsions were based solely upon their membership in the FOP. Despite these expulsions the "PBA" continues to deduct dues and agency fees, to which the "PBA" is not entitled.

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

All of the foregoing is alleged to be in violation of N.J.S.A. 34:13A-54(b)(1) through (5); and Sections 5.5 & 5.6 of the Act.[3/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute a violation of the Act, a Complaint and Notice of Hearing was issued on September 15, 1989. Pursuant to the Complaint and Notice of Hearing, a hearing date was originally scheduled for November 1, 1989, in Trenton, New Jersey. The Respondents filed their Answer on November 1, 1989, the hearing on that date having been cancelled. On December 14, 1989, the Respondents filed a Motion to Dismiss the Complaint against the State PBA on the ground that it was not a proper party and, additionally, dismissal was sought as to that portion of the Complaint which challenged the amount of the representation (agency) fee. The Motion was accompanied by the supporting affidavit of the President of Local 105, Samuel Love. On February 5, 1990, Franklin filed a response.

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3/ The subsections in 5.4(b) prohibit public employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission." Sections 5.5 and 5.6 provide, inter alia, for representation fees in lieu of dues, the amount of pro rata returns, payroll deduction, a demand and return system and appeals.

On March 12, 1990, Joyce M. Klein, the original Hearing Examiner, filed her Decision on Motion for Summary Judgment [H.E. No. 90-40, 16 NJPER 207 (¶21082 1990)], in which she treated the Respondents' Motion for Summary Judgment as one for "Partial Summary Judgment" [N.J.A.C. 19:14-6.3(a)(8)], which allowed her to dispose of the motion in part without referral to the Chairman under N.J.A.C. 19:14-4.8(a). The Hearing Examiner decided that the State PBA was a proper party Respondent and, thus, that portion of the Motion was denied. Additionally, the Motion was granted as to the allegation that Franklin's dues were not being applied solely to collective bargaining (see original Unfair Practice Charge, ¶4). Finally, the Hearing Examiner concluded that there was a factual dispute between the parties as to the financial relationship between the State PBA and Local 105, which required a plenary hearing.

On the same date, March 12th, the Hearing Examiner made a Discovery Order, which required the Respondents to produce the names and addresses of those members of Local 105 who had been expelled and those who had not been expelled on the basis of alleged dual membership in the FOP (1 Tr 9, 10). On April 3, 1990, the Hearing Examiner set a deadline of May 11th for any amendment to the original Unfair Practice Charge with an Answer to be filed no later than May 21, 1990 (1 Tr 10).

On April 12, 1990, this matter was reassigned to the undersigned, who promptly reconfirmed the filing dates for any amendment to the Unfair Practice Charge and the answer. On May 11,

1990, the Unfair Practice Charge was amended by the addition of 59 individuals like situated to Franklin, supra, and an Answer was filed to the amended Unfair Practice Charge on June 1, 1990. [1 Tr 10].

On June 12th a Motion to Dismiss the Amended Unfair Practice Charge was filed by the Respondents on the ground of timeliness under Section 5.4(c) of the Act. On June 14th, the Hearing Examiner advised the parties that this Motion must await a final decision on the case as a whole. [1 Tr 11].

Pursuant to the Complaint and Notice of Hearing, hearings were held on June 27 and July 11, 1990, in Trenton, New Jersey, on which dates a settlement agreement and certain stipulations of fact were entered upon the record. Namely, on June 27th, the parties reached a complete agreement, which disposed of the original and amended Unfair Practice Charge by Franklin and the Charging Parties against the Respondent Local 105 with prejudice (C-7, ¶12).[4/] In this agreement Local 105 agreed to reimburse Franklin and all of the other Charging Parties for their membership fees and agency fees; retroactive to March 28, 1989, in the case of Franklin, and retroactive to November 11, 1989, as to all other of the Charging Parties, provided that the specific procedures set forth in the

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4/ Although the transcript of June 27th and ¶12 of the Settlement Agreement refer only to the withdrawal of the "amended unfair practice charge" against Local 105, it is clear beyond doubt that the parties' intent was to withdraw entirely against Local 105 with prejudice (1 Tr 12, 13, 15).

Settlement Agreement were followed by Franklin and the Charging Parties no later than August 31, 1990. [C-7, ¶'s 1-7]. The Agreement was executed by counsel for the parties on July 11, 1990. On the second day of hearing, July 11th, the parties entered into a 10-paragraph stipulation of facts based upon Exhibits J-1 through J-7 in evidence (2 Tr 4-14).

Before a further hearing was scheduled and held, the Respondent State PBA filed a Supplemental Motion to Dismiss and/or for Summary Judgment on August 6, 1990,[5/] in which it contended that the Commission is without jurisdiction over a purely internal union dispute, involving the interpretation of the State PBA's by-laws, specifically, as to dual membership. For reasons known to all parties, no response was filed by the Charging Parties to these Motions until after a hearing on October 31, 1990. At that time the Hearing Examiner directed the Charging Parties to respond by November 23rd and the Respondent State PBA to reply no later than November 28, 1990. This schedule having been adhered to, these matters are properly before the undersigned for decision.[6/]

Based upon the record to date, namely, the allegations in the Unfair Practice Charge, as amended; the affidavits of Samuel

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5/ The term "Supplemental" referred back to the June 12th Motion to Dismiss the amended Unfair Practice Charge on the ground of timeliness, supra (1 Tr 11).

6/ The Chairman referred the Summary Judgment portion of the Respondent's Motion to the undersigned pursuant to N.J.A.C. 19:14-4.8(a) on December 7, 1990.

Love, Frank Ginesi, Frank King and Joseph Esposito and the several exhibits attached thereto, including the Local 105 Constitution and By-Laws; the hearing transcripts of June 27 and July 11, 1990, and the exhibits referred to therein;[7/] and the State PBA Constitution and By-Laws -- the Hearing Examiner now makes the following:

UNDISPUTED FINDINGS OF FACT[8/]

1. The New Jersey State PBA is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.[9/]

2. Robert Franklin and the other 59 charging parties like situated are public employees within the meaning of the Act, as amended, and are subject to its provisions.

3. The State PBA is the collective negotiations representative for a unit of approximately 4800 Corrections

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7/ Exhibits C-1 through C-7 and Exhibits J-1 through J-7.

8/ These undisputed findings are limited to the factual issues, which have survived the Settlement Agreement entered into on July 11, 1990 (C-7). An examination of that agreement discloses that it resolved all of the financial claims of the Charging Parties to reimbursement for membership dues and agency fees deducted after their expulsion from the PBA, retroactive to the several dates of March 28, May 3 and September 18, 1989. The remaining issue pertains to the State PBA's enforcement and/or implementation of its By-Laws with respect to dual membership.

9/ As previously found, the Respondent PBA Local No. 105 is no longer a party to this proceeding by virtue of the Charging Parties' withdrawal of the Unfair Practice Charge, as amended, with prejudice (1 Tr 12, 13, 15, 18; C-7, ¶12). Therefore, any remedy will lie only against the remaining Respondent, New Jersey State PBA.

Officers, which is State-wide.[10/] The Charging Parties are employed in the Department of Corrections and are represented by Local 105. The Charging Parties are also members of the FOP. [J-1; 2 Tr 4-7].

4. On March 28, 1989, the Local 105 Judiciary Committee held a hearing on a charge that Franklin had violated its Uniform Constitution and By-Laws, particularly, Article VI, Section 1, which provides, in part, that:

> 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....

The Judiciary Committee decided on March 28th to expel Franklin based upon his admission that he also belonged to FOP Lodge No. 55. The supporting documentation was produced at the hearing [J-2; 2 Tr 7,8].

5. On April 24, 1989, counsel for Franklin addressed a letter to the Judiciary Committee Chairman of Local 105, to which he attached an 11-page list of individuals from four FOP lodges, who were active, dues-paying FOP members and yet continued to be active members of Local 105, i.e., thereby "...maintaining a dual membership status..." [J-4; 2 Tr 9-11]. He requested that each of

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10/ Of these 4800 Corrections Officers, approximately 500 are agency fee payers (Love Aff. ¶2).

these individuals be brought up on charges by the Local 105 Judiciary Committee for expulsion. Following the receipt of J-4, Local 105 expelled 23 individuals May 3, 1989, for violating the dual membership prohibition in its By-Laws, all 23 having been officers of FOP lodges at the time (J-6; 2 Tr 9, 10).

6. Franklin appealed his expulsion to the State PBA Judiciary Committee, which unanimously affirmed his expulsion by decision dated May 12, 1989 (J-3; 2 Tr 8)[11/] The decision noted that Article VI, Section 1 of the Local 105 Constitution and By-Laws is identical to Article VIII, Section 1 of the State PBA Constitution and By-Laws, both articles prohibiting dual membership in the PBA "and any other police or law enforcement organization."

7. Article VIII, Section 1 of the Constitution and By-Laws of the State PBA, upon which this decision is based, provides, in part, as follows:

> Any individual member of any local association who shall join or become a member of any other police 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...

8. In response to the March 12, 1990, Discovery Order of Hearing Examiner Klein, supra, counsel for the Respondents provided

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11/ In addition to Franklin, eight other Local 105 members appealed their expulsion by the Local 105 Judiciary Committee for dual membership to the State PBA Judiciary Committee. In each instance the appeal was denied. [J-7; 2 Tr 13, 14].

the Charging Parties with a list of the names and addresses of 107 Corrections Officers who were expelled from Local 105 on September 18, 1989 [J-5; 2 Tr 11]. The names of 29 Corrections Officers who had not been expelled because each had indicated that he or she had resigned from the FOP were also provided.

9. The State PBA maintains a By-Laws Committee, one function of which is to provide advice on the interpretation to be placed upon specific provisions of the State and Local By-Laws. With respect to the prohibition on dual membership, the decision to discipline a member who is charged with violating this prohibition lies with the local PBA in the first instance. Thereafter, an aggrieved member has the right to appeal to the State PBA Judiciary Committee. The State PBA Judiciary Committee has upheld the expulsion of dual members in every instance where the discipline has been appealed. [King Aff. ¶'s 2, 4 & 5; Ginesi Aff. ¶'s 5-7].

10. Joseph Esposito is a police officer employed in the Township of Edison. He is also a member of FOP Lodge No. 101 and a Trustee of the State FOP. He has also been a member of PBA Local No. 75. On June 12, 1990, the PBA President, Joseph Tauriello, directed Esposito to attend a meeting on June 14th, regarding his dual membership status but he was unable to attend. Around that time he had a conversation with Tauriello, who allegedly stated to Esposito that he, Tauriello, had no objection to dual membership but had no control over the issue since "...the expulsions were being dictated by the State PBA..." Esposito also averred that his

examination of the minutes of a June 14, 1990, Local 75 meeting with State PBA representatives reflected that one representative said that local members who joined the FOP should be expelled and their names sent to the State Judiciary Committee.[12/] Thereafter, Esposito was expelled from Local 75 for dual membership. [Esposito Aff. ¶'s 2-4, 6 & 8].

11. Article XV of the State PBA Constitution and By-Laws provides for a Judiciary Committee, at both the State and local levels, and empowers the President at each level to appoint a Judiciary Committee to hear all appeals and to investigate charges and conduct hearings and to render written decisions.

12. Article XVIII, which deals with the chartering of local associations, provides, inter alia, in Section 2 that the charter of a local association may be revoked for failure to comply with the By-Laws of the State PBA.

13. Article XXIV, which mandates the exhaustion of remedies, provides, in part, that the State PBA Judiciary Committee shall have jurisdiction over appeals from decisions of local judiciary committees (§3). Additionally, no member shall be expelled, suspended, penalized or otherwise disciplined by a local association unless and until written charges are personally served upon him (¶4A).

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12/ These last two allegations by Esposito would normally be excluded as prejudicial hearsay but are considered in this decision in order to satisfy the above requisites for the disposition of motions for summary judgment.

**STANDARD APPLICABLE TO MOTION FOR SUMMARY JUDGMENT**

The standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment is governed by N.J.A.C. 19:14-4.8(b), namely, "...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..." (emphasis supplied), summary judgment may be granted and the requested relief may be ordered. The Commission has followed the applicable New Jersey Civil Practice Rule (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.

"Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co., 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co., 2d. ed. (1978) at p. 434].

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 hearing: 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); and Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

ANALYSIS

Initially, the Hearing Examiner has determined that the Undisputed Findings of Fact leave no doubt whatsoever that there exists "...no genuine issue of material fact..." Therefore, holding an additional plenary hearing would serve no useful purpose.

Further, since there are no genuine issues of material fact to be resolved, the instant dispute is ripe for decision under the above standard pertaining to motions for summary judgment. For the reasons more fully set forth hereinafter, the Hearing Examiner has concluded that, based upon the record, the Respondent State PBA's Motion for Summary Judgment must be granted and the Complaint must be dismissed in its entirety.[13/] (C-7, supra). In so concluding, the Hearing Examiner has viewed the moving papers in the light most favorable to the Charging Parties and has given them the benefit of all favorable inferences. Also, all doubts have been resolved against the Respondent State PBA.

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13/ It will not be necessary to decide the Respondents' Motion to Dismiss the Amended Unfair Practice Charge since the issue of alleged untimeliness is moot.

The Positions Of The Parties

The basic position of the State PBA is that the Commission has no jurisdiction over the subject matter of the Unfair Practice Charge, as amended, since it involves a dispute regarding the expulsion of the Charging Parties for dual membership in the FOP, which involves the interpretation and/or application of its Constitution and By-Laws (hereinafter "By-Laws").[14/] The State PBA cites a host of court and Commission decisions in support of its position.

The response of the Charging Parties is that they are challenging neither the internal union affairs of the State PBA nor the interpretation and/or application of its By-Laws. To the contrary, they claim that the Commission has jurisdiction of the Unfair Practice Charge, as amended, since it alleges a violation by the State PBA of its duty of fair representation. The Charging Parties cite a single decision for this proposition, namely, Tp. of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶10008 1978) where the Director of Unfair Practices ("Director") refused to issue a complaint even though the union had negotiated a contract which provided that all unit members except the charging party would receive salary increases. The refusal to issue was based upon: (1) the "...wide range of reasonableness" given to the negotiations

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14/ The Hearing Examiner notes here that the parties' settlement (C-7, supra) has rendered irrelevant those decisions of the Commission dealing with representation fees and the availability of union membership on an equal and non-discriminatory basis (see infra at p. 38).

representative "...in serving a unit it represents..." and (2) the absence of facts indicating arbitrary, discriminatory or bad faith conduct by the union. [5 NJPER at 16, 17]. The Charging Parties also cite Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) for the well-known proposition that "...A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith..." (64 LRRM at 2376).

The State PBA replies that the case before the Hearing Examiner "is not a fair representation matter" since the Charging Parties have not alleged that the State PBA "...did not properly represent them..." as was the case in Springfield, supra.[15/] Rather, the Charging Parties have "repeatedly" asserted that the State PBA has not consistently enforced its dual membership prohibition. Conversely, when the State PBA has enforced this prohibition, the Charging Parties complain about its enforcement (Esposito Aff. ¶8).

* * * *

In order to afford Charging Parties the benefit of every favorable inference and resolve all doubts against the State PBA, as

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15/ It is true that neither the original Unfair Practice Charge nor the subsequent amendment facially appears to allege a breach of the duty of fair representation by the State PBA. However, for purposes of this decision, the Hearing Examiner assumes, arguendo, that the Complaint is susceptible of such an interpretation, at least given the State PBA's status as the Charging Parties' exclusive collective negotiations representative: J-1, Article I.

required by the above standard on motions for summary judgment, the Hearing Examiner finds it necessary to review at length the origins and the current state of the law regarding the duty of fair representation ("DFR "). This undertaking is also warranted by the uniqueness of the DFR theory advanced by the Charging Parties in this case, i.e., that selective enforcement by the State PBA of the dual membership provision in its By-Laws constitutes a breach of the DFR and a violation of Section 5.4(b)(1) of the Act.

DFR: Judicial Origins

The doctrine of DFR was originated by the United States Supreme Court in Steele v. Louisville & N. R. Co., 323 U.S. 192, 15 LRRM 708, 711, 712 (1944), which was a case of first impression under the Railway Labor Act. The question was whether that Act imposed a duty upon a railway craft union, designated as the exclusive bargaining agent, to represent all employees without regard to "...their union affiliations or want of them..."[16/] The Supreme Court, after stating that the Railway Labor Act imposed a duty upon the statutory representative "...to protect equally the interests of the members of the craft...," continued:

> ...We hold that the language of the Act..., read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of

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16/ The Firemen's Union had given notice to the railway employers of its intention to amend the existing collective bargaining agreement in a way that would have ultimately excluded all "negro" firemen from "the service."

> a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them... (15 LRRM at 712). (Emphasis supplied).

Subsequently, the Court extended the DFR doctrine to labor organizations subject to the provisions of the National Labor Relations Act: Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953); Syres v. Oil Workers, Local 23, 350 U.S. 892, 37 LRRM 2068 (1955); Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964); Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965); Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Amalgamated Ass'n of Street, etc., Employees v. Lockridge, 403 U.S. 274, 77 LRRM 2501 (1971); and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 LRRM 2481 (1976).

In Huffman, a union had negotiated seniority provisions in a collective agreement, which prejudiced the rights of certain veterans. The Court recognized the necessity of allowing the bargaining representative a "...wide range of reasonableness..." in negotiating the provisions of a collective bargaining agreement. More specifically, the Supreme Court held:

> ...Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and clases 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 to a statutory bargaining representative in serving a unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
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> (345 U.S. at 338, 31 LRRM at 2551)(Emphasis supplied).

Humphrey was similar to Huffman, in that the union there made a seniority dovetailing decision, the effect of which was to favor one group of unit employees over another. The Court concluded that the union had the right to take a position favoring one group over another, but that it must do so "...honestly, in good faith and without hostility or arbitrary discrimination..." (375 U.S. at 350, 55 LRRM at 2038). (Emphasis supplied).

Although not decided until 23 years after Steele, Vaca has become the most significant of the United States Supreme Court's DFR decisions. It involved, inter alia, the refusal of a union to process a grievance to binding arbitration, the final step of the grievance procedure. Among the Vaca tenets most frequently cited in analyzing DFR cases are these:

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

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

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

> 4. ...Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration... (386 U.S. at 192, 64 LRRM at 2377). (Emphasis supplied).

In Lockridge a union procured the plaintiff's discharge for nonpayment of dues under the collective bargaining agreement. The Supreme Court, after finding a lack of proof of a violation of DFR under Vaca, stated that the employee's burden "...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives..." (403 U.S. at 301, 77 LRRM at 2512).

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Two years after its enactment in 1968, Chapter 303 was upheld by the New Jersey Supreme Court in Lullo v. IAFF, 55 N.J. 409 (1970) where it relied upon federal precedent, particularly, the 35-year history of decisions interpreting the National Labor Relations Act. The Court focused upon Section 5.3, especially: (1) the provisions dealing with the designation of an exclusive negotiations representative by a majority of unit employees; and (2) the responsibility of the majority representative to represent the interests of all employees without discrimination or regard to organization membership (55 N.J. at 419).

The Court in Lullo adopted and applied the exclusivity principle and the concomitant of majority rule to the public sector in the State of New Jersey, which is "...now at the core of our

national labor policy..." (55 N.J. at 426).[17/]. Significantly, the Court simultaneously embraced the doctrine of DFR, citing Vaca and other sources. The Court held that although the exclusive representative:

> ...has the sole right to negotiate...a contract respecting the terms and conditions of employment and the processing of grievances for all employees in the unit, the right to do so must always be exercised with complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees. This is true not only in the negotiating of the employer-employee agreement but in its administration as well...All must be treated fairly and evenly, particularly, with respect to employment of procedures established therein to adjust and settle individual grievances. Vaca v. Sipes, supra...
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> (55 N.J. at 427, 428). (Emphasis supplied). [See also, 55 N.J. at 429].[18/]

In 1981, the Supreme Court in Saginario v. Attorney General, 87 N.J. 480 again reviewed federal DFR precedent,[19/] observing that nowhere did Vaca suggest that an employee should be allowed to intervene in an arbitration since "...it would undercut the legitimacy of the arbitration..." (87 N.J. at 488). Only when a

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17/ See also, generally, 55 N.J. at 421-427

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

19/ The case involved a unit member (Saginario) who, when he was promoted, had his promotion attacked by his union through the grievance procedure. The grievance proceeded to arbitration without notification to Saginario or participation by him. The union's position was sustained by the arbitrator.

breach of DFR occurs does an employee have a cause of action against his union or his employer. Id. The Court ultimately concluded that Saginario's case was not one "...of fair representation in the classic sense of Vaca but rather one in which the organization position was advanced in good faith, was not arbitrary, and favored another employee..." (87 N.J. at 492).[20/]

* * * *

Finally, the Appellate Division in Belen v. Woodbridge Tp. Bd. of Ed., et al, 142 N.J. Super. 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976), referred to Lullo, Vaca and Huffman, supra, in setting forth the standard for evaluating the conduct of a majority representative in negotiating agreements. After noting that Section 5.3 confers broad power upon a union to represent members of the unit and to negotiate their terms and conditions of employment, the Court stated that with this power "...comes the obligation to represent all employees 'without discrimination.'...." Since the facts in Belen closely approximated those in Huffman, i.e., a negotiated agreement disparately affected one group of employees in relation to another, it was held:

> ...[T]he mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of

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20/ But, however, since "...There is a direct conflict of interest...," the Court remedied the situation by allowing Saginario to participate in a new arbitration proceeding either through his personal representative or pro se (87 N.J. at 492, 493, 495, 496).

> labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman...
>
> (142 N.J. Super. at 490, 491).

As is apparent from these decisions of the United States Supreme Court and the New Jersey courts, DFR is not only firmly rooted in the law but it has been confined to two basic areas: (1) cases arising from the conduct of the majority representative in administering the negotiated grievance procedure; and (2) cases arising from the conduct of the majority representative in negotiating terms and conditions of employment.

DFR: Decisions Of The Board And The Commission

A. The Board

In Miranda Fuel Co.,[21/] the NLRB decided for the first time under the National Labor Relations Act that a union's breach of the duty of fair representation was an unfair labor practice under Section 8(b). A Board majority, relying upon Steele and Huffman, held that:

> Section 7...gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or

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21/ 140 NLRB 181, 51 LRRM 1584 (1962), enf. den. 326 F.2d 172, 54 LRRM 2715 (2nd Cir. 1963)

> classifications which are irrelevant, invidious, or unfair...
>
> (140 NLRB at 185, 51 LRRM at 1587)(Emphasis supplied).

The Board has consistently followed its Miranda DFR principles over the years since 1962. For example: Brown Transport Corp., 239 NLRB No. 91, 100 LRRM 1016, 1019 (1978)[arbitrary and unexplained failure to represent grievant]; Graphic Communications Int'l Union, etc., 287 NLRB No. 107, 128 LRRM 1176 (1988)[union threatened refusal to process future grievances of employee who circulated petition challenging a union election and filed unfair labor practice charges]; OCAW, Local 5-114, 295 NLRB No. 76, 131 LRRM 1734 (1989)[disparate treatment of non-member was arbitrary and discriminatory]; and Occidental Chemical Corp. et al, 294 NLRB No. 46, 132 LRRM 1060 (1989)[union would be "crazy" to file grievances for non-members who "never paid any union dues"].

B. The Commission

Just as the above decisions of the courts and the NLRB have to date limited DFR to cases involving either the conduct of a union in the negotiation of terms and conditions of employment or in administering the negotiated grievance procedure so, too, have the decisions of the Commission and the Director.

I. DFR - Negotiations

The Commission's first "negotiations" decision was that of Hamilton Tp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978) where it relied upon Huffman and Belen in concluding that the Association had adequately represented the interests of certain

social workers during the overall negotiations on behalf of all unit members.

In FMBA Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982), the Commission found a DFR violation when a union deliberately excluded an employee's job classification from submission to interest arbitration, citing Hamilton Tp., Huffman and Belen.[22/]

In AFSCME Local No. 2293, P.E.R.C. No. 82-87, 8 NJPER 223 (¶13092 1982) no violation of DFR was found where the union unintentionally misinformed certain employees concerning their placement on a new salary guide.

In PBA Local No. 156, P.E.R.C. No. 82-116, 8 NJPER 359 (¶13164 1982) no DFR violation occurred where the union refused to pay a police officer's bill for attorney's fees incurred in unfair practice and civil service hearings since there was no practice of automatic approval.

The Commission in Local No. 3, AFL-CIO, etc., P.E.R.C. No. 83-108, 9 NJPER 146 (¶14069 1983) found a DFR violation where the union excluded head cooks from a salary bonus provision in the contract because they had sought representation by another union: FMBA Local No. 12 and Vaca.

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22/ The Commission also cited Miranda for the proposition that both Sections 5.4(b)(1) of our Act and 8(b)(1)(A) of the NLRA "indisputably" encompass violations of the "...duty of fair representation..." (8 NJPER at 99).

In IBEW Local No. 210, D.U.P. No. 83-11, 9 NJPER 300 (¶14139 1983) the Director refused to issue since the factual allegations were insufficient to establish that the union had negotiated salary increases that benefited its supporters in comparison to others in the unit: Huffman.

A complaint was dismissed in PBA Local No. 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983) since the union did not violate its DFR by negotiating an agreement that eliminated differential pay for certain employees in order to secure a larger salary increase for all employees: FMBA Local No. 12, Huffman and Belen.

In Union Cty. College AAUP, P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985) the union exercised its "wide range of reasonableness" when it filed a grievance challenging the appointment of one unit member but not that of another because an important matter of contractual principle was involved.

See also: Bridgewater-Raritan Ed. Ass'n, D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986)[the Director declined to issue on charge that union violated its DFR in negotiating agreement that resulted in increase of teachers' workday by 30 minutes]; CWA Local No. 1035, P.E.R.C. No. 86-123, 12 NJPER 378 (¶17148 1986)[union did not prefer its members over non-union members by seeking the upgrading of all job titles in negotiations ]; AFT Local No. 481, P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986)[no DFR by merely proving a disparity in wages]; and Jersey City POBA, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986)[no breach of DFR by having negotiated a mid-term wage freeze in order to avoid layoffs].

In Sussex-Wantage Ed. Ass'n, et al, P.E.R.C. No. 88-113, 14 NJPER 346 (¶19133 1988) no DFR violation was found where the association filed a grievance to assure that staff assignments were made on an equitable basis. Likewise, in Essex Cty. Voc. Adm'rs & Sup'rs Ass'n, et al, P.E.R.C. No. 89-6, 14 NJPER 508 (¶19214 1988) the Commission concluded that there was no violation of DFR when the association agreed to exclude all directors from its unit. In Old Bridge Ed. Ass'n, P.E.R.C. No. 89-48, 14 NJPER 689 (¶19293 1988) the Commission held that there was no DFR violation where the association agreed to rescind future increases in the doctoral differential in order to gain salary increases for other unit members.[23/]

The above decisions of the Commission and the Director comport with the tenets of Huffman, Humphrey and Belen in analyzing union conduct in the collective negotiations context. It would appear that none of these decisions support the theory of the Charging Parties that the State PBA breached its DFR by selective enforcement of its By-Laws as to dual membership.

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23/ See also Camden Council No. 10., P.E.R.C. No. 89-54, 14 NJPER 697 (¶19299 1988)[union did not breach its DFR by negotiating lower salary increase for a single employee since action was not retaliatory and was consistent with its past negotiations practice of opposing dual titles]; Jersey City Ed. Ass'n, D.U.P. NO. 89-10, 15 NJPER 188 (¶20079 1989)[absence of equality in negotiations of salary guides among differing groups of employees is not a breach of DFR]; Furniture Workers Local No. 440, P.E.R.C. No. 89-99, 15 NJPER 258 (¶20107 1989)[no violation of DFR where union insisted that an "upgrade" be handled consistent with the contract's "posting" requirement].

II. DFR - Grievance Procedure

The Commission's first "grievance procedure" decision was that of AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978) where the Hearing Examiner's decision was adopted in the absence of exceptions and the complaint dismissed.[24/] This case has been cited over and again in cases involving the application of Vaca in assessing the conduct of a union in administering the grievance procedure.

In N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), the Commission found no breach of DFR where the union competently represented the complaining grievant at an administrative hearing and thereafter concluded that proceeding to arbitration would be a "can't win" situation. The Commission there "identified" certain principles in considering the DFR:

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

The Commission in LPN Ass'n, P.E.R.C. No. 80-133, 6 NJPER 220 (¶11111 1980) found that the union did not violate its DFR where

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24/ Relying essentially on Vaca, no breach of DFR was found where a non-member's grievance was settled at Step 2 since there was little likelihood of success at Step 3: H.E. No. 79-25, 4 NJPER 483 (¶4220 1978).

the grievant elected to have her own attorney present at a civil service hearing and declined to wait for the association's attorney not was the union's conduct improper because its lay president provided incorrect information as to the grievant's right of appeal.

In Middlesex Council No. 7, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Dkt. No. A-1455-80 (1982), certif. den. (1982), the Commission cited Local No. 194 in finding no DFR violation where the union made every effort to assist an employee whose grievance was ultimately filed out of time.

In Woodbridge Tp. AFT, P.E.R.C. No. 81-66, 6 NJPER 565 (¶11286 1980) the union did not violate its DFR by having provided more information to members concerning a grievance than to non-members since there was no problem in the processing of the grievance with due diligence.

The Commission again relied upon Local No. 194 and Vaca in Willingboro Ed. Ass'n, P.E.R.C. No. 82-61, 8 NJPER 38 (¶13018 1981) in deciding that no breach of DFR had occurred when the association, after processing an employee's grievance, declined to proceed to arbitration.

No Complaint issued in Operating Engineers, AFL-CIO, D.U.P. No. 83-4, 8 NJPER 592 (¶13276 1982) because the union had not violated its DFR by failing to insist on a three-member panel to review an employee's discharge grievance.

Also, see: Camden Council No. 10, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983)[DFR violated when union president while

serving as employer's Personnel Assistant refused to process an employee's grievance]; Sports Arena Local No. 137, D.U.P. No. 84-3, 9 NJPER 463 (¶14197 1983)[no DFR violation when union refused to submit grievance to arbitration]; OPEIU Local No. 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983)[no breach of DFR where a union unsuccessfully used a stratagem in the grievance procedure to gain the reinstatement of an employee with a poor record];[25/] Fair Lawn Ed. Ass'n, P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984)[no violation where union in good faith refused to take non-member's compensation grievance to arbitration since it lacked merit]; Union Council No. 8, P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985)[no breach of DFR where employee failed to request representation then filed his own appeal without informing union]; TWU Local No. 225, P.E.R.C. No. 85-99, 11 NJPER 231 (¶16089 1985)[union's representation of suspended employee in the grievance procedure was untainted as was its refusal to submit the matter to arbitration].

In PBA Local No. 711, P.E.R.C. No. 86-73, 12 NJPER 25 (¶17009 1985) the Commission concluded that there was no DFR

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25/ The Commission noted in this case that Vaca has been interpreted by the NLRB to mean that mere proof of negligence, standing alone, does not establish a breach of the duty of fair representation: Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977)[violation - negligence found]; Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050, 1052 (1980)[no violation], rev'd on other grounds, 680 F.2d 598, 110 LRRM 2928 (9th Cir. 1982) and Local 8-398, OCAW, 282 NLRB No. 61, 124 LRRM 1048 (1986)[no violation]. See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42, 45 (¶17016 1985), adopted P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

violation where the union failed to appoint a grievance representative for each shift since no employee had been prevented from obtaining representation. However, in Trenton Ed. Secys. Assn., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986) the Association was found to have violated its DFR by refusing to process grievance on the erroneous ground of untimeliness and lack of merit. On the other hand, the Association's refusal to arbitrate a grievance resulting from the College's non-negotiable refusal to assign an employee to a specific position in Camden Cty. College Faculty Ass'n, D.U.P. No. 87-10, 13 NJPER 166 (¶18074 1987) was not a breach of its DFR.

No DFR violation occurred where a union investigated the merits of a discharge and determined that it could not be successfully challenged: AFSCME Council No. 52, P.E.R.C. No. 88-6, 13 NJPER 640 (¶18240 1987). Likewise, in Distillery Workers Local No. 209, P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987) there was no DFR violation where the union processed an employee's grievance but, after a vote of membership, decided not to proceed to arbitration. Also the union in N.J. Tpk. Employees Union, Local No. 194, P.E.R.C. No. 88-61, 14 NJPER 111 (¶19041 1988) did not violate its DFR when it advised an employee to file his complaints in letter form instead

of on a grievance form because the employee's "complaints" were duly considered by the employer.[26/]

But the Commission found a DFR violation in ATU, Local No. 819, P.E.R.C. No. 89-135, 15 NJPER 419 (¶20173 1989) and P.E.R.C. No. 90-46, 16 NJPER 3 (¶21002 1989) where the union had failed to inform the grievant at the terminal step of the grievance procedure of his right to appeal the decision of the Executive Board not to arbitrate to the general membership. However, in ATU, Local No. 821, D.U.P. No. 90-12, 16 NJPER 256 (¶21106 1990) a union did not commit a DFR violation by voting to pursue one employee's grievance to arbitration but not that of another. Similarly, in ATU, Local No. 819, D.U.P. No. 90-13, 16 NJPER 298 (¶21122 1990) there was no breach of DFR where the union first abandoned a grievance and then

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26/ Similarly, see: AFSCME Council No. 52, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988)[union did not breach its DFR when it refused to proceed to arbitration, following full representation in the grievance procedure]; AFT, Local No. 2364, P.E.R.C. No. 89-26, 14 NJPER 605 (¶19256 1988)[union did not violate DFR when it refused to arbitrate denial of promotion]; AFSCME Council No. 52, P.E.R.C. No. 89-71, 15 NJPER 71 (¶20027 1988)[no violation of DFR where union refused to arbitrate suspension grievance since refusal was not motivated by grievant's reputation as "troublemaker" or his candidacy for union office]; Utility Workers Union, Local No. 534 (D'Arrigo), P.E.R.C. No. 89-105, 15 NJPER 218 (¶20091 1989)[no violation of DFR where refusal to arbitrate termination grievance was based upon mandatory civil service review]; Union Council No. 8, P.E.R.C. No. 90-84, 16 NJPER 211 (¶21084 1990)[union did not violate DFR when its president was late for disciplinary hearing since employee was represented by his own attorney]; and Newark Teachers Union, P.E.R.C. No. 90-87, 16 NJPER 252 (¶21101 1990)[no breach of DFR where employee failed to allow union reasonable time to decide whether to file a termination grievance and instead filed UPC.

upon reconsideration filed for arbitration after the employee filed a UPC.[27/]

The decisions of the Commission and the Director, cited above, have followed faithfully the Vaca precepts, supra, in evaluating union conduct in the administration of the grievance procedure. Once again, it does not appear to the Hearing Examiner that any of these decisions support the Charging Parties' theory that the State PBA breached its DFR by selective enforcement of its By-Laws as to dual membership.

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Since The Charging Parties' Position That The State PBA Breached Its DFR Is Without Judicial Or Administrative Precedent, The Issue Of Selective Enforcement Of Its By-Laws Must Necessarily Involve A Purely Internal Union Dispute.

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27/ To the same effect: AFSCME Local No. 2215, P.E.R.C. No. 90-115, 16 NJPER 388 (¶21159 1990)[no DFR violation where union gave employee wrong advice regarding shift assignment grievance but no harm resulted since union represented employee after she filed her own grievance]; ATU, Div. No. 821, P.E.R.C. No. 91-26, 16 NJPER 517 (¶21226 1990)[no DFR violation in refusing to pursue arbitration of discharge for fighting, following an untainted vote of the membership]; AFSCME, Council No. 71, D.U.P. No. 91-8, 16 NJPER 524 (¶21230 1990)[no breach of DFR when union attorney first spoke to employee only minutes before disciplinary hearing]; CWA Local No. 1082, P.E.R.C. No. 91-32, 16 NJPER 538 (¶21241 1990)[no DFR violation where evidence was insufficient to establish that union failed to investigate properly the merits of one grievance and improperly assessed the strength of another]; AFSCME, Local No. 1761, P.E.R.C. No. 91-33, 16 NJPER 538 (¶21242 1990)[union did not violate DFR by allowing grievance to lapse where it had resolved the dispute and believed in good faith that it was settled]; and AFSCME Council No. 52, P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990)[bare claim that union refused to arbitrate employee's overtime grievance was not a violation of its DFR.

The Hearing Examiner now turns to the validity of the State PBA's "internal union dispute" defense to the Unfair Practice Charge, as amended, and the controlling authorities. This follows from his conclusion that none of the decisions of the several courts or those of the Commission and/or the Director afford a scintilla of support for the Charging Parties' theory that this case involves a breach by the State PBA of its DFR.

In reviewing the relevant decisions of our State courts and the Commission dealing with the jurisdictional defense raised by the State PBA, a good starting point is Jersey City Supervisors Ass'n, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), app. dism. App. Div. Dkt. No. A-768-82T1 (1983). There temporary CETA employees sought relief from the Commission regarding their right to hold elected office. The union had denied them the right to hold office based upon its constitution and by-laws, which mandated that only permanent employees of Jersey City were eligible for elected union office. The Commission, in dismissing this aspect of the unfair practice charge,[28/] stated that it was "...reluctant to intercede in what is only an intra-union dispute..." (8 NJPER at 565). It cited Calabrese v. PBA, Local 76, 157 N.J. Super. 139, 146, 147 (App. Div. 1978) where the Court stated that private organizations"...must have considerable latitude in rule-making in

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28/ A separate part of the unfair practice charge involved a meritorious claim that the union had violated the Act by collecting representation fees from non-members without making membership available on an equal basis (8 NJPER at 565).

order to accomplish their objectives, and their private rules are generally binding on those who wish to remain members."[29/]

The Commission's essential reliance upon Calabrese in Jersey City is particularly relevant to the instant case due to their factual similarity. In Calabrese the plaintiffs had been PBA members for a number of years but then joined the FOP. Shortly thereafter the membership of their PBA Local voted unanimously to expel them under their Local by-laws, which prohibited dual membership.[30/] Following the institution of litigation by the expelled members, an internal union hearing was held pursuant to the Local by-laws. Subsequently, a unanimous decision was rendered by the State PBA, upholding the expulsions. [157 N.J. Super. at 142, 143, 148-152].[31/]

The Court's statement of the law in Calabrese is a classic treatise on voluntary associations, i.e., labor organizations, and is conclusive on the case at bar. For example: (1) the rules of private organizations are "...generally binding on those who wish to

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29/ The Commission also cited Barnhart v. UAW, 12 N.J. Super. 147 (App. Div. 1951) where the Court stated that: "...Courts are loathe to interfere with the internal management of an unincorporated, voluntary association..." (12 N.J. Super. at 152).

30/ This provision of the by-laws in Calabrese is substantially identical to that of Local 105 in the instant case: Compare Finding of Fact No. 4, supra, with 157 N.J. Super. at 143, 144.

31/ The State PBA by-law provision involved in Calabrese is also similar to that in the instant Article VIII, Section 1. See Finding of Fact No. 7, supra.

remain members..."; (2) the constitution and by-laws of a voluntary association "...become part of the contract entered into by a member when he joined such association..."; (3) forfeiture of membership clauses either for acts against the organization or which interfere with its performance of its legal and contractual obligations, "...have been found to be reasonable..."; (4) advocacy of dual unionism or the creation of a rival organization "...has been held to be...in violation of membership responsibilities..." since otherwise "...members could campaign against the union while remaining a member..." and, thus, be "...privy to the union's strategy and tactics..."; (5) the "...freedom of speech of union members is limited by (the) union's power to enforce reasonable rules...toward the organization as an entity "...and to prevent interference with (its)...contractual and legal obligations..."; and, finally, (6) a union must have the power to remove "...discordant elements in order that harmony may prevail..." and, thus, it may provide in its by-laws "...for expulsion of members transgressing their (by-laws) reasonableness. Barnhart... (supra)..." [see 157 N.J. Super. at 147, 154-156]. Acting upon these principles, the Court granted summary judgment for the PBA, thereby sustaining the automatic expulsion of the plaintiffs because of dual membership in the FOP.

In a series of subsequent decisions to Jersey City the Commission and/or the Director have consistently refused to take jurisdiction of unfair practice charges based on facts indicating

the presence of an internal or intra-union dispute. In some of these decisions a judgment call had to be made as to whether the facts involved a DFR or an internal union dispute.

For example, in Jersey City POBA, D.U.P. No. 85-2, 10 NJPER 475 (¶15212 1984) the Director refused to issue on allegations of union interference with a member's freedom of speech by (1) denying him access to membership lists and (2) maintaining a by-laws provision which established an "attendance quota" for candidates for union office. These concerns are "...exclusively internal union matters..." which do not state "...a complaintable charge before this Commission..."

Again, the Director refused to issue in ATU Local No. 824, D.U.P. No. 85-9, 10 NJPER 600 (¶15279 1984) based upon allegations that the union charged newly hired individuals from a bankrupt company a higher initiation fee than that provided in the union's by-laws. This was found to be a strictly "...internal matter which does not fall under the guise of the Act..." (10 NJPER at 601).

Since 1984, no fewer than eight cases have involved unfair practice charges, which directly or indirectly alleged a DFR violation based upon a union's failure to provide an employee with legal representation. In each instance the DFR issue was considered and rejected by either the Commission or the Director on the uniform ground that the matter of providing legal representation for an employee is "internal" and is governed by the internal procedures of the organization.

Thus, in Bergen County Community College Faculty Ass'n, P.E.R.C No. 84-117, 10 NJPER 262 (¶15127 1984) the Commission relied directly upon Jersey City in holding that the union was not obligated to finance a federal lawsuit against an officer of its local affiliate and that the heart of the unfair practice "...concerns a fundamental issue of internal union governance and does not implicate the duty of fair representation..." (10 NJPER at 263). Thereafter, the Director, relying upon Bergen County Community College, refused to issue in the remaining seven cases.[32/]

The remaining category of "internal union" decisions where either the Commission or the Director declined jurisdiction involved contract ratification.[33/] In State Trooper (NCO), Ass'n, D.U.P. No. 88-7, 14 NJPER 14 (¶19004 1987) the Director concluded that the Commission lacked jurisdiction to resolve contract ratification

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32/ See: Camden County College & Ass'n etc., D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989); PBA Local No. 105, D.U.P. No. 90-1, 15 NJPER 457 (¶20186 1989); NJEA (Esser), D.U.P. No. 90-9, 16 NJPER 161 (¶21065 1990); Piscataway Tp. Teachers Ass'n, D.U.P. No. 90-10, 16 NJPER 162 (¶21066 1990); AFSCME Council No. 71, D.U.P. No. 91-8, 16 NJPER 524 (¶21230 1990); NJEA (Lindsay), D.U.P. No. 91-9, 16 NJPER 525 (¶21231 1990); and PBA Local No. 326 et al, D.U.P. No. 91-11, 16 NJPER 571 (¶21250 1990).

33/ See: Newark Building Trades Council, D.U.P. No. 82-34, 8 NJPER 333 (¶13151 1982)[the Act fails to prescribe any procedure for contract ratifications and is considered "...an internal union matter..."]; and Camden County College Faculty Ass'n, D.U.P. No. 87-13, 13 NJPER 253 (¶18103 1987)[ratification process affects all members of the unit and is "...essentially an internal union matter..."].

disputes, relyiong upon Quinn v. Local No. 822, AFT, Middlesex Cty. Chanc. Div., Dkt. No. C-2188-75 (1976)[see 14 NJPER at 15].[34/]

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As a postscript to this decision, the Hearing Examiner refers again to the fact that when the Charging Parties withdrew their Unfair Practice Charge, as amended, on July 11, 1990, as to Local 105, this obviated the need to consider those Commission decisions which have dealt with representation fees and the availability of union membership on an equal and non-discriminatory basis [supra at pp. 5, 7 & 14]. For example, in PBA Local No. 134 (Neely), P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd. 227 N.J. Super. 1 (App. Div. 1988), certif. den. 111 N.J. 591 (1989) the union violated the Act by demanding that Neely resign from the FOP before applying for admission to PBA Local No. 134 since the union continued to collect a representation fee from Neely [unlike the current posture of the case at bar where the entire matter of representation fees has been settled].[35/]

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34/ See also: Hoboken Teachers Ass'n et al, P.E.R.C. No. 90-53, 16 NJPER 27 (¶21013 1989), recon. den. P.E.R.C. No. 90-72, 16 NJPER 140 (¶21055 1990)[alleged irregularities in contract ratification vote are an intra-union dispute]; and Hoboken Teachers Ass'n, D.U.P. No. 90-14, 16 NJPER 375 (¶21149 1990)[local union's charge that statewide affiliate unlawfully assisted dissident group "...concerns an intra-union dispute about the management of the Association..." (16 NJPER at 376).

35/ See also, PBA Local No. 199 (Rasheed), P.E.R.C. No. 81-14, 6 NJPER 384 (¶11198 1980); PBA Local No. 25 (Racaniello),

Footnote Continued on Next Page

CONCLUSION

1. The Charging Parties' theory of this case is that the State PBA has breached its duty of fair representation as their majority representative by the manner in which it has interpreted and applied its By-Laws with respect to the expulsion of PBA members because of dual membership in the FOP.[36/] Yet the Charging Parties insist that they are not challenging the State PBA's internal union affairs or the interpretation or application of its By-Laws.

2. The State PBA contends that the Charging Parties' sole objective is to interfere with the manner in which it interprets and applies its By-Laws with respect to the expulsion of members in cases of proven dual membership, and that this constitutes an internal union dispute over which the Commission has no jurisdiction.

3. It is the conclusion of the Hearing Examiner that summary judgment must be granted in favor of the State PBA under the Commission's standard [supra at pp. 12, 13] because: (1) no genuine issue of material fact exists; (2) the Charging Parties' DFR theory

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35/ Footnote Continued From Previous Page

P.E.R.C. No. 83-6, 8 NJPER 433 (¶13202 1982); Jersey City Supervisors Ass'n, supra; FMBA Local No. 35 (Carragino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983); PBA Local No. 134 (Saleem), P.E.R.C. No. 86-38, 11 NJPER 596 (¶16212 1985); CWA Local No. 1037 (Schuster), P.E.R.C. No.86-78, 12 NJPER 91 (¶17032 1985); and Police Supervisors Ass'n (Santa Maria), P.E.R.C. No. 89-60, 15 NJPER 21 (¶20007 1988), aff'd. 235 N.J. Super. 123 (App. Div. 1989).

36/ The Charging Parties' authority for this proposition is Tp. of Springfield and Vaca [supra at pp. 14, 15].

is inapposite; (3) the "internal union dispute" defense is applicable and the State PBA is, therefore, entitled to judgment as a matter of law.

4. Not one of the decisions of the Courts, the Board or the Commission set forth above remotely supports the Charging Parties' theory that the State PBA, as the Charging Parties' majority representative, has breached its duty of fair representation. In every instance where a DFR has been found it has arisen in the context of the majority representative's conduct in either the administration of the grievance procedure or in the negotiation of terms and conditions of employment [supra at pp. 16-32].

5. On the other hand, the decisions of the New Jersey Courts and the Commission lend overwhelming support to the "internal union dispute" defense of the State PBA, especially, Calabrese and Jersey City and their progeny [supra at pp. 33-38]. Calabrese appears to be "on all fours" since it was decided upon a factual record almost identical to the case at bar [supra at pp. 34, 35]. The rationale of the Commission's decisions, ranging from Jersey City POBA, ATU Local No. 824, Bergen Cty. Comm. Coll. and State Trooper (NCO) Ass'n, fully support the Hearing Examiner's conclusion that this case predominantly involves the internal union affairs of the State PBA rather than a breach by it of its DFR.[37/]

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37/ As previously noted, the "membership" decisions [supra at p. 38] have no application to this case due to the withdrawal with prejudice as to Local 105.

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Based upon the undisputed facts previously found, and the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent State PBA did not, and has not, violated N.J.S.A. 34:13A-5.4(b)(1) to (5), 5.5 or 5.6 by its interpretation or application of Article VIII, Section 1 of its Constitution and By-Laws in any manner involving the instant Charging Parties.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Respondent State PBA's Supplemental Motion for Summary Judgment be granted and that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: February 5, 1991
Trenton, New Jersey