H.E. NO. 93-32

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

In the Matter of

MIDDLESEX COUNTY COLLEGE,

Respondent,

-and- Docket No. CI-H-92-78

STEFAN KOPAS, ROBERT DOUGHERTY &
MICHAEL SIMALA,

Charging Parties.

IBT LOCAL NO. 11,

Respondent,

-and- Docket No. CI-H-92-79

STEFAN KOPAS, ROBERT DOUGHERTY &
MICHAEL SIMALA,

Charging Parties.

SYNOPSIS

A Hearing Examiner, in granting two Motions to Dismiss at the conclusion of the Charging Parties' case, recommends that the Public Employment Relations Commission find that the Respondent College did not violate subsections 5.4(a)(1), (3), (5) or (7) of the New Jersey Employer-Employee Relations Act, by its conduct in promulgating a revision in its rules regarding sick leave policy and the administering of discipline by written warnings.

The contested aspect of the Motions before the Hearing Examiner was that involving the Respondent IBT Local No. 11 where the complaint was that the IBT violated its DFR as to the Charging Parties. This violation allegedly occurred when it refused to take their grievances to arbitration. The Hearing Examiner made a lengthy DFR analysis beginning with Vaca and running through recent Commission decisions in the course of granting the Motion to Dismiss.

A Hearing Examiner's decision to dismiss upon Motion of the

Respondent IBT Local No. 11 at the conclusion of the Charging Parties' case is not a final administrative determination of the Public Employment Relations Commission. The Charging Parties have ten (10) days from the date of decision to request review by the Commission or else the case is closed.

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Appearances:

For the Respondent, Middlesex County College
Jackson, Lewis, Schnitzler, Krupman, attorneys
(Jeffrey J. Corradino, of counsel)

For the Respondent, IBT Local No. 11
Schneider, Goldberger, Cohen, Finn
Solomon, Leder & Montalbano, attorneys
(Bruce D. Leder, of counsel)

For the Charging Parties
Stefan Kopas, Robert Dougherty &
Michael Simala, pro se

HEARING EXAMINER'S DECISION AND ORDER ON THE MOTION OF RESPONDENT IBT LOCAL NO. 11 TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 7, 1992, by

Stefan Kopas, Robert Dougherty and Michael Simala ("Charging Parties" or by individual surnames) alleging that the Middlesex County College ("College") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) ("Act"); in that the Charging Parties are employees of the College and that in January 1992 it did restrain and coerce them by adopting a new sick leave/family leave policy, which is discriminatory in nature as to their terms of employment; that the College has refused to negotiate in good faith with the majority representative of its employees, including the Charging Parties; these actions of the College have had a chilling effect upon the Charging Parties; all of which is in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) of the Act.[1/]

The Charging Parties also filed an Unfair Practice Charge with the Commission on April 7, 1992, which was amended on September 24, 1992, alleging that IBT Local No. 11 ("IBT") has engaged in

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

unfair practices within the meaning of the Act, in that the IBT and its representative, Donald Krauchuk, did interfere with, coerce and restrain the rights of the Charging Parties by deliberately delaying arbitration proceedings and refusing the rights of employees to go to arbitration; IBT and Krauchuk refused to negotiate in good faith with the College and failed to protect the employees' working conditions by refusing to process grievances to arbitration in order to settle disputes; at a certain meeting called by Krauchuk, the employees in the unit were promised the full backing by IBT, including arbitration to remedy the change in sick leave/family leave policy by the College [the reference to an exploratory conference and what transpired is deliberately omitted from this recital as not relevant]; all of which is in violation of N.J.S.A. 34:13A-5.4(b)(1), (3), (4) and (5) of the Act.[2/]

A Consolidated Complaint and Notice of Hearing was issued on February 23, 1993. Pursuant to this Notice, a hearing was held on April 23, 1993 in Newark, New Jersey, at which the Charging Parties only were afforded an opportunity to examine witnesses and

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

present relevant documentary evidence. Each of the Charging Parties testified as did one additional witness on their behalf. When the Charging Parties rested, each Respondent made a Motion to Dismiss on the record.

I granted the Respondent College's Motion to Dismiss upon the record without a written submission because the Charging Parties had failed to produce even a scintilla of evidence[3/] in support of the allegations in their Unfair Practice Charge against the College that it had violated Sections 5.4(a)(1), (3), (5) or (7) of the Act. After analyzing each and every allegation and the proofs that the Charging Parties had adduced, I concluded that the College's Motion to Dismiss should be granted (Tr 121-131).

As to IBT's Motion to Dismiss, I deferred decision, pending briefing, since this motion presented a closer question of law (Tr 115).[4/] Briefs were received by June 2, 1993. Upon the record made by the Charging Parties only, I make the following:

FINDINGS OF FACT

1. IBT Local No. 11 is a public employee representative within the meaning of the Act, as amended, and the individual

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3/ See Dolson v. Anastasia, 55 N.J. 2 (1969) and New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).

4/ I dismissed as not relevant the allegations that IBT violated Sections 5.4(b)(3), (4) and (5) of the Act since they did not pertain to a breach of the duty of fair representation (Tr 117-120).

Charging Parties are public employees within the meaning of the same Act.

2. The Charging Parties, along with approximately 60 other employees, are included within a collective negotiations unit represented by the IBT (Tr 52). The current collective negotiations agreement between the IBT and the College is effective during the term July 1, 1991 through June 30, 1994 (J-1; Tr 34, 35).

3. Charging Parties were among either 11 or 13 unit employees who received a "written/verbal" warning in January 1992 for having violated the sick leave policy of the College (Tr 32-42, 47-49, 56, 57, 64, 65, 75). The use by the Charging Parties of the term "written/verbal" was clarified by counsel for the IBT, who explained that in order to rectify the situation created by individuals denying that they had received a verbal warning, the giving of a verbal warning has by practice been followed by a writing which confirms the verbal warning. [Tr 48, 49]. This was confirmed by Charging Party witness Simala (Tr 48, 49).

4. Although each Charging Party testified that there was a distinction between the "old" and the "new" sick leave policy, the "old" being that contained in the agreement (J-1 at pp. 12, 13), I find it irrelevant to determine what difference, if any, exists between the "old" and "new" sick leave policy for purposes of deciding the issue presented. In other words, whether "new" or

"old," the Charging Parties claim is that the IBT refused to arbitrate their grievances (Tr 32-36, 47-49, 56, 57, 64, 65).[5/]

5. Simala testified that in late February 1992, nine grievants, including Simala and Dougherty, requested a meeting with the IBT Business Agent, Donald Krauchuk (Tr 50, 51, 65). At this meeting, Dougherty asked Krauchuk if the College might be under the impression that the Union would not put up the money to take these cases to arbitration (Tr 65, 66). Krauchuk responded that the Union "...has money put aside for cases just like this..." (Tr 66). According to Simala, Krauchuk stated that he was going to "...take all of us to arbitration...," adding that he was going to consult "his attorney" about an unfair practice or arbitration (Tr 51). Krauchuk also was alleged to have stated that "if necessary" he would park an office trailer on the campus and that he had "...thousands of dollars to spend on cases...like this..." [Tr 50-53, 65, 66].

6. Linda M. Bridge, a witness for the Charging Parties, and a former Shop Steward for the IBT, received a one-day suspension for an infraction of the sick leave policy instead of the written warning that had been given to the Charging Parties and the other grievants (Tr 72, 74, 83). Bridge filed a grievance and attended the February 1992 meeting with Krauchuk along with the other nine or

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5/ Kopas testified that the "old" sick leave policy is found at pgs. 12 & 13 of J-1 and that this "policy" involves the "writing up" of employees who fail to provide a medical note upon request by the College (Tr 38, 39, 47, 56).

so grievants. The primary concern, as Bridge saw it, was the failure of the College to have notified the employees of a policy change. [Tr 73, 74]. When this was discussed with Krauchuk, he told the grievants that there was money set aside to arbitrate and he would, if necessary, place a trailer on the campus (Tr 73). Of all the grievants, only Bridge's case was taken to arbitration, as a result of which she received one-day's pay (Tr 79, 81). Finally, Bridge testified that except for Krauchuk's statement about parking a trailer on the campus, she believed everything else that he said about going to arbitration at the February 1992 meeting (Tr 73, 87).

7. Simala volunteered that he taped the February 1992 meeting with Krauchuk and the other grievants. When Krauchuk observed the recording device which was upon "the table" in full view, he asked Simala why he was taping the meeting and allegedly threatened him by stating that if he "...used the tape against him, he would shove it up my ass..." At the end of the meeting, Krauchuk stated that he would make the tape into a "wafer." [Tr 53, 54]. Regarding Krauchuk's alleged threat to Simala, Simala acknowledged that he did not file a complaint in the Municipal Court but did send a letter to the IBT President, but only with respect to the arbitration issue. Thereafter, he dropped the matter. [Tr 58-61]. Finally, Simala acknowledged that he was not concerned about Krauchuk's threat after thinking about it. Further, he did not believe that the fact that his case did not go to arbitration had

anything to do with Krauchuk's alleged threats regarding the tape recorder incident at the February 1992 meeting. [Tr 61].

8. Chronologically, after the meeting of the grievants with Krauchuk in February 1992, Kopas attended a level four grievance meeting on March 5, 1992 where one Joan Davidson was present on behalf of the College and Krauchuk was present for the Union (Tr 19, 20). Prior to the beginning of the meeting, Krauchuk stated to Kopas that his case would not be going to arbitration but, after the meeting, Krauchuk told Kopas that his was a good case and he would be speaking to the IBT attorney about it (Tr 20). On March 29th, Kopas was informed by his Assistant Shop Steward, Robert McLaughlin, that his case was not going to arbitration (Tr 21-23).

9. On March 31, 1992, the three Charging Parties addressed a memorandum to Krauchuk confirming what they had heard about their cases not going to arbitration and that this memorandum was a "formal request" that a written denial of the rejection to arbitration be received within a reasonable time (CP-1; Tr 23-25).

10. On April 6, 1992, the President of the IBT, John D. Guagliardo, responded to Kopas, stating that, after review with our lawyers, it was the Local's decision not to submit his grievance to arbitration because a "verbal written warning" is "word of mouth" and is considered "correctional, not disciplinary" (CP-2). Additionally, if further discipline is imposed then the Union is prepared to represent Kopas through all steps of the grievance procedure including arbitration (CP-2).

11. Each of the Charging Parties, in response to separate questions, acknowledged that he had no right to have every grievance that he might file arbitrated (Tr 40, 58). In the case of Dougherty, the question was put slightly differently, i.e., did he know of any persons who had received either one or two warning letters having had their cases taken to arbitration, to which he responded "...I don't know if (sic) any..." (Tr 69).

ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standard used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

The Motion of the Respondent IBT To Dismiss Is Granted Since the Charging Parties Have Failed To Adduce A Scintilla Of Evidence That It Breached Its Duty Of Fair Representation By Refusing To Arbitration Their Grievances

The decision in this case must of necessity be determined under the holding of the United State Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)[6/] which involved, inter alia, the refusal of a union to process a grievance to binding arbitration, which was the final step in the parties' grievance procedure. Four basic tenets were articulated by the Court in Vaca. The following are those most frequently cited in analyzing DFR cases:

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).

6/ Together with the derivative decisions of the Commission, infra.

In an oft-cited case, Amalgamated Ass'n of Street, etc., Employees v. Lockridge 403 U.S. 274, 77 LRRM 251 (1971), the Court found a lack of proof of a violation of the DFR under Vaca where a union had sought and obtained the discharge of an employee member for non-payment of dues under a collective bargaining agreement. In so holding, the Supreme Court stated that the employee's burden in proving a DFR "...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).

The New Jersey courts have over many years followed the precepts of Vaca in analyzing whether or not the duty of fair representation has been breached. See, for example, the leading case of Lullo v. IAFF, 55 N.J. 409 (1970) where our Supreme Court stated in part:

> ...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...
>
> (55 N.J. at 428). (Emphasis supplied).
>
> [See also, 55 N.J. at 429].7/

Turning now to those DFR decisions of the Commission, which have involved employee complaints regarding representation under the

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7/ 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).

contractual "grievance procedure," the first case of significance was that of N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). There the Commission found no breach of the 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 analyzing whether the union had breached its DFR:

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

The Commission 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 the DFR had occurred when the association, after processing an employee's grievance, declined to proceed to arbitration.

See also: 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]; 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]; TWU Local No. 225, P.E.R.C. No. 85-99, 11 NJPER 231 (¶16089 1985) [union's representa-

tion of suspended employee in the grievance procedure was untainted as was its refusal to submit the matter to arbitration]; 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; and 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].

However, note is taken of the fact that the Commission 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 a grievance on the grounds of untimeliness and a lack of merit. The Association's position that the employee's grievance was untimely was undermined by the strong likelihood that the employer would waive time limits before any arbitrator. Thus, the timeliness defense was rejected. As to the Association's contention that the grievance was without merit, the Assistant Superintendent had made known his conclusion that the grievant was entitled to the relief sought. The Commission found that this fact was strong evidence that the grievance had merit although not necessarily conclusive. A DFR violation was found.

Similarly, the Commission found a DFR violation in ATU, Local No. 819, P.E.R.C. No. 89-135, 15 NJPER 419 (¶20173 1989) [P.E.R.C. No. 90-46, 16 NJPER 3 (¶21002 1989)] where the union had

failed to inform 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.

Another case, involving DFR and the grievance procedure, is that of PBA Local No. 183 et al (Brian Moriarity), H.E. No. 92-10, 17 NJPER 518 (¶22258 1991), adopted P.E.R.C. No. 92-81, 18 NJPER 96 (¶23043 1992). There a Sheriff's Officer, who was suspended for three days, failed in his attempt to charge his union with a breach of its DFR. The reason was that the Union's decision not to take the Officer's grievance to arbitration was based upon a good faith determination that it could not be sustained. In affirming, the Commission cited its decision in Local 194 and Vaca v. Sipes, supra, thus, concurring with this Hearing Examiner that the Vaca criteria failed to establish that the PBA had breached its DFR when it refused to take Moriarity's case to arbitration.

The case of ATU, Local No. 821, D.U.P. No. 90-12, 16 NJPER 256 (¶21106 1990) is especially relevant to the case at bar since the union was found not to have breached its DFR when it voted to pursue the grievance of one employee to arbitration but not that of another. Recall here the analogous situation presented by Bridge, who received a one-day suspension with loss of pay. Her case was taken to arbitration while those of the other eight grievants, whose cases also involved a written/verbal warning, were not taken to arbitration. The three Charging Parties were included in the latter group.

* * * *

Having now set forth the controlling principles relevant to deciding the IBT's Motion to Dismiss, my conclusions are as follows:

I.

As previously found, I perceive no distinction whatsoever between whether or not there was a "new" sick leave policy or an "old" sick leave policy in the time frame of the grievances filed by the Charging Parties, and others, in this proceeding. These terms are found to have no bearing on the decision of IBT to take the grievance of Bridge to arbitration and its refusal to take the remaining grievances to arbitration.

II.

The written/verbal warnings received by all of the affected employees except Bridge were necessarily of a lesser level of discipline than the one-day suspension of Bridge. Krauchuk had stated to Simala at the February meeting that he was going to consult his attorney about an unfair labor practice or arbitration. This was hardly a commitment to take all of the cases to arbitration. At the conclusion of the March 5, 1992 grievance meeting with Kopas and Davidson, Krauchuk stated that he had a good case and that he would be speaking to the IBT attorney about it. This again indicated equivocation on the part of Krauchuk about arbitrating the grievance of Kopas.

III.

When the Charging Parties learned from McLaughlin on March 29th that the IBT was not going to arbitrate their grievances, they wrote to Krauchuk on March 31st (CP-1). Guagliardo, the President of IBT, informed Kopas on April 6, 1992 that, following a review with our lawyers, it was decided not to "file" his grievance and, implicitly, those of the other employees like situated, to arbitration. The stated reason was that a "verbal/written warning" is considered "correctional, not disciplinary..." This appears to be a logical distinction.

As noted previously, the fact that the grievance of Bridge on the same subject matter was taken to arbitration was by her testimony "...because it was a suspension..." (Tr 83). The taking of Bridge's case to arbitration, on the basis of a one-day suspension, lends weight to the deliberative process employed by the IBT. This is reflected in the decision by its President not to arbitrate the other eight or nine grievances because they were "verbal/written warnings." Logically, a warning is to be differentiated from a suspension by the monetary loss involved. Also, Guagliardo had advised Kopas that the IBT was prepared to represent him through all steps of the grievance procedure, including arbitration, if further discipline was imposed. There is no breach of the DFR by a union decision to pursue the grievance of one employee to arbitration but not that of another (or others): see ATU Local No. 821, D.U.P. No. 90-12, 16 NJPER 256 (¶21106 1990).

IV.

In late February 1992, Krauchuk convened a meeting with all of the then nine grievants who had filed grievances over their having received a written/verbal warning during the month of January 1992 (Tr 50, 51). According to Simala, Krauchuk stated that he was going to take "all of us to arbitration" and he was going to "...consult his attorney..." on which way to proceed stating, also, that he would park an office trailer on the campus and be there every day and that he had "thousands of dollars to spend on cases...like this..." (Tr 51, 52). The testimony of Dougherty was similar, in that when he told Krauchuk that the College thought the Union wouldn't put up the money to take their cases to arbitration, Krauchuk responded that "...the Union has money put aside for cases just like this..." (Tr 65, 66). The concluding testimony on the February meeting with Krauchuk was provided by Bridge who said that Krauchuk told her at this meeting that there was "...money set aside..." and that if he had to put up a trailer he would do so (Tr 73). On cross-examination, Bridge insisted that she took Krauchuk literally except for his statement that he was going to park a trailer on the campus (Tr 86-87).

The above conduct of Krauchuk fails to demonstrate "bad faith" within the meaning of Vaca (386 U.S. at 190, 64 LRRM at 2376), particularly, since he stated clearly to Simala that he was going to "consult his attorney." Such an important qualification or condition precedent would suggest to any reasonable person that the

spending of "thousands of dollars" and the taking of everyone's case to arbitration was nothing more than puffery or exaggeration.

Thus, when the IBT had decided by April 6, 1992 not to take the warning cases to arbitration, except for that of Bridge, there had been no breach of the IBT's DFR. Krauchuk's conduct, even under the scintilla standard, supra., was that of "puffing," which was not to be taken seriously. Even assuming that Krauchuk's remarks were flawed, they were never ratified by the conduct of the President of IBT nor by its lawyers. Guagliardo timely communicated to Kopas on April 6th that the union, following a review with its lawyers, was not going to take his (and the other cases) to arbitration.[8/]

The above conduct of IBT fails to meet any of the Vaca criteria for the finding of a breach of the duty of the IBT's DFR. Its conduct vis-a-vis the Charging Parties, and others in the grievant group, was manifestly honest, in good faith and without hostility or arbitrary discrimination: Humphrey v. Moore, 375 U.S. 335, 350, 55 LRRM 2031, 2038 (1964). See also, Local No. 194, 5 NJPER at 413; Sports Arena Local No. 137; Fair Lawn Ed. Ass'n.; and AFSCME, Council 52; all previously cited.

8/ The Charging Parties had received informal notice from an Assistant Steward on March 29th, that their cases were not going to arbitration.

V.

At the same February 1992 meeting between the nine grievants and Krauchuk, Simala volunteered at the hearing that he had taped the meeting. When Krauchuk asked him why he was taping the meeting (the tape device was on a table in direct view), Krauchuk allegedly "threatened" Simala, stating that if he used the tape against him he would "shove it up my ass..." (Tr 53, 54). Later in the meeting, Krauchuk referred to making the tape into a "wafer" (Tr 54). On cross-examination, Simala acknowledged that he never filed a complaint in Court that a threat had been made against him. He did write a letter to the IBT President but this concerned Simala's dissatisfaction with the failure of the IBT to arbitrate, not the taping incident. [Tr 58-61]. Finally, Simala testified that he had not been concerned about the "threat" and that he did not believe "for one second" that the reason his case did not go to arbitration had anything to do with the tape recorder incident in February (Tr 61).

Considering the provocative nature of Simala's conduct in taping Krauchuk's meeting in February 1992, Krauchuk's response in having threatened Simala appears to have had some justification, especially given Simala's failure to have taken any action either in Court or within the union. At the instant hearing, Simala indicated that, upon reflection, he had not been concerned about the threat. Further, he did not believe "for one second" that the IBT had retaliated against him by not having taken his case to arbitration. [Tr 61]. Once again, Vaca teaches us that in the absence of

"...hostility or discrimination" and by exercising "...its discretion with complete good faith and honesty," in the absence of arbitrary conduct, an exclusive representative has not breached its DFR by refusing to arbitrate a specific grievance or grievances: Vaca, 386 U.S. at 177, 64 LRRM at 2371.

VI.

Two of the Charging Parties acknowledged on cross-examination that neither had the right to have every grievance filed proceed to arbitration (Tr 40, 58). In the case of Dougherty, he acknowledged that none of the grievants who had received "warning letters" had their cases submitted to arbitration (Tr 69). Ever since Vaca it has been clear that the law in the private sector as well as under Commission precedent is that an employee has no absolute right to have his grievance taken to arbitration. Therefore, a union does not necessarily breach its DFR by refusing the employee's request (386 U.S. at 191, 64 LRRM at 2377). See also, Local No. 194; Willingboro Ed. Ass'n.; Sports Arena Local No. 137; and Fair Lawn Ed. Ass'n.; all previously cited.

* * * *

The facts and the law having been analyzed in detail, I have no hesitation in concluding that there is not even a scintilla of evidence that the requisites necessary to establishing a breach by the IBT of its DFR have been "proven" within the meaning of the

above standard applicable to deciding the instant Motion to Dismiss.

* * * *

Accordingly, upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Parties only, I make the following:

RECOMMENDED ORDER

The Respondent, IBT Local No. 11, did not violate N.J.S.A. 34:13A-5.4(b)(1), (3), (4) or (5) by its conduct herein and its Motion to Dismiss is hereby granted and the Complaint is Dismissed.

Alan R. Howe
Hearing Examiner

Dated: June 18, 1993
Trenton, New Jersey