

P.E.R.C. NO. 2001-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 152
NEW JERSEY STATE PBA,

Respondent,

-and-

Docket No. CI-H-99-55

KENNETH C. SMITH,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses allegations in a Complaint based on an unfair practice charge filed by Kenneth Smith against PBA Local 152 and the New Jersey State PBA. The unfair practice charge alleged that the respondents retaliated against Smith for successfully pursuing a previous unfair practice charge in 1998. A hearing examiner found that Smith's prior litigation did not trigger the PBA's actions and that instead, Smith's own improper or unprotected conduct led to the disciplinary charges and expulsion. He concluded that Smith's expulsion was not arbitrary, capricious or invidious. The Commission agrees with the Hearing Examiner's recommendation and dismisses the Complaint.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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PBA LOCAL 152 and
NEW JERSEY STATE PBA,

Respondent,

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Docket No. CI-H-99-55

KENNETH C. SMITH,

Charging Party.

Appearances:

For the Respondents, Zazzali, Fagella & Nowak,
attorneys (Paul L. Kleinbaum, on the brief)

For the Charging Party, Kenneth C. Smith, pro se

DECISION

On February 1, 1999, Kenneth C. Smith filed an unfair practice charge against PBA Local 152 and the New Jersey State PBA, alleging that they violated 5.4b(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,^{1/} by retaliating against him for successfully pursuing an unfair practice charge (CI-97-52) against Local 152 in 1998. See PBA (Smith), P.E.R.C. No. 99-18, 24 NJPER 450 (¶29208 1998).

The charge alleges that respondents retaliated against Smith by

^{1/} These provisions 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."

filing three internal union disciplinary charges against him on May 28, 1998 for allegedly making statements contrary to the welfare of the PBA; wrongfully finding him guilty on July 28, 1998; wrongfully denying him an appeal; and violating a previous Commission order. The charge also alleges that respondents retaliated against Smith when they charged him with, and found him guilty of, disorderly conduct as a result of a verbal altercation he had with State PBA officials at an October 13 State PBA meeting. Smith was thereafter expelled from the PBA.

On October 14, 1999, a Complaint and Notice of Hearing issued. On October 25, the respondents filed an Answer denying that they had violated the Act; asserting that Smith had waived certain rights; and contending that the charge was untimely.

On May 15, 2000, Hearing Examiner Arnold H. Zudick granted, in part, respondents' motion for summary judgment. H.E. No. 2000-11, 26 NJPER 255 (¶31100 2000). He dismissed the Complaint with respect to the allegations concerning the May 28, 1998 disciplinary charges and the July 28 decision, finding that they referred to events occurring more than six months before the unfair practice charge was filed.

On July 21, 2000, after granting Smith special permission to appeal, we reinstated the allegations the Hearing Examiner had dismissed, reasoning that the six-month statute of limitations should be tolled for the period Smith was pursuing his internal union appeal. P.E.R.C. No. 2001-1, 26 NJPER 356 (¶31140 2000).

On September 21 and December 13, 2000, the Hearing Examiner conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On March 15, 2001, the Hearing Examiner recommended that we dismiss the Complaint. H.E. No. 2001-17, 27 NJPER 158 (¶32055 2001). He found that Smith's prior litigation did not trigger the PBA's actions and that instead, Smith's own improper or unprotected conduct led to the disciplinary charges and expulsion. He concluded that Smith's expulsion was not arbitrary, capricious or invidious.

On March 21, 2001, Smith filed exceptions objecting to certain factual findings and arguing that the Hearing Examiner disregarded evidence of respondents' retaliatory intent. Smith also contends that the Hearing Examiner erred in concluding that the First Amendment did not bar respondents from filing charges against him based on a letter he wrote to a local newspaper. Finally, Smith maintains that his medication impaired his ability to represent himself pro se.

On March 23, 2001, the respondents replied to the exceptions. They assert that the exceptions do not comply with the specificity requirements of N.J.A.C. 19:14-7.3 and that there is no basis to disturb either the Hearing Examiner's credibility determinations or his legal analysis. They also stress that, based on his own observations of Smith and Smith's responses to his questions, the Hearing Examiner determined that Smith was capable of representing himself.

We adopt and incorporate the Hearing Examiner's recommended findings of fact (H.E. at 4-25) as supplemented here. We start with an overview and chronology.

The State PBA has over 33,000 members, including municipal, county and park police and state and county corrections officers. Corrections officers make up about one-third of the membership, and their withdrawal from the organization would result in significantly lower dues revenue, less money for scholarships, and less support for legislative activities.

The PBA's constitution and bylaws prohibit members from belonging to any other police or law enforcement organization, if the organization's purpose is to represent law enforcement officers in matters affecting their employment or economic welfare. The constitution and bylaws direct that PBA members joining such organizations "shall" be expelled. They also provide that a member knowingly taking action detrimental to the PBA "shall be expelled, disciplined and/or punished."

On May 24, 1998, the Home News Tribune published a letter from Smith suggesting that corrections officers should secede from the PBA -- as corrections officers in New York had done -- so that they could better address corrections issues. The letter noted that "some people think that corrections officers take a back seat to police officers." The letter continued that, without corrections officers' dues, the PBA would lose a lot of clout.

On May 28, 1998, Michael Kaniuk, a member of PBA Local 152 and its delegate to the State PBA, filed internal union disciplinary charges against Smith with the Local 152 president. The charges alleged that, by writing the Home News letter, Smith violated his oath not to issue statements against the good and welfare of the PBA and not to injure another member. Kaniuk also maintained that by encouraging corrections officers to secede from the PBA, Smith created disharmony. Kaniuk requested a complete investigation and hearing to determine whether any punishment was warranted.

Also on May 28, 1998, the Hearing Examiner in CI-97-52 issued her report, which recommended that the Commission find that PBA Local 152 had violated 5.b(1) of the Act when, in a letter notifying Smith that it intended to file internal disciplinary charges against him, it noted that he had filed an unfair practice charge against it. See H.E. No. 98-29, 24 NJPER 304 (¶29146 1998). However, since Hearing Examiner reports are sent by certified mail, the parties did not receive the report on May 28.^{2/}

Kaniuk's charges were referred to the Local 152 Judiciary Committee and a June hearing was scheduled. However, in late May

^{2/} We ultimately adopted the Hearing Examiner's "narrow recommendation" that Local 152 violated 5.4b(1) by referring to Smith's unfair practice charge; however, we made no judgment about the legitimacy of the other asserted reasons for Smith's expulsion. P.E.R.C. No. 99-18, 24 NJPER 450 (¶29208 1998).

and early June 1998, both Kaniuk and Local 152 Judiciary Committee Chairman Pedro Delgado independently recommended to incoming Local 152 President William Tolentino that the State PBA hear the charges against Smith. They both believed that, given the decision in CI-97-52, it would be difficult for Smith to receive a fair hearing at the local level.

Tolentino agreed with Delgado's and Kaniuk's recommendations and, in a June 11, 1998 letter to State PBA President Michael Madonna, Kaniuk requested that the State PBA Judiciary Committee hear the charges. Madonna assigned the charges to that committee as requested to ensure that Smith would receive a fair hearing. On July 21, the State PBA Judiciary Committee held a hearing. Smith did not object to the transfer before or during the hearing.

On August 12, 1998, State Judiciary Committee Chairman Michael Materazzo issued the Committee's unanimous decision finding Smith guilty of the charges; fining him \$200; and suspending him for thirty days. Article 24, Section 4D of the PBA Constitution and Bylaws provides that an "expulsion, suspension, penalty or other discipline" is effective on the fifth day following a written decision, absent a stay.

On August 18, 1998, Smith filed a notice of appeal and, on August 24, State PBA Recording Secretary John Kaiser notified Smith that the appeal would be heard on September 8 by the State PBA Board of Delegates. However, Kaiser forgot to include

standard language advising that the fine had to be paid prior to the appeal.

The minutes of the September 8, 1998 State PBA meeting show that the general meeting started at 10:00 a.m. and that several agenda items preceded consideration of Smith's appeal. Smith was not present when that agenda item was called. However, Madonna stated that the matter would be held in abeyance "to give [Smith] some fair time," given that Smith's notice stated that his hearing was scheduled for 11:30 a.m. After completing seven other agenda items, and just prior to turning to unfinished and new business, the delegates voted to accept the Judiciary Committee report. Smith arrived at the meeting shortly after that vote and, at Smith's request, Madonna allowed the appeal to be rescheduled.

On September 25, 1998, Kaiser advised Smith that his appeal was rescheduled for October 13. This letter, unlike his August letter, stated that, under the PBA Constitution and Bylaws, the \$200 fine had to be paid prior to the appeal before the Board of Delegates.

The October 13 Board of Delegates meeting was scheduled to begin at 10:00 a.m., and Smith arrived before that. Materazzo saw Smith enter the building and confirmed with Kaniuk that Smith had not paid the fine. Materazzo, accompanied by delegate John Sheridan, then approached Smith to tell him that he should not be at the meeting because he had not paid his fine and his appeal could not be heard. Smith immediately jumped from his seat in an

aggressive manner that at least one delegate thought would become a physical confrontation and screamed obscenities.

In response to Smith's behavior, Materazzo asked PBA Executive Vice President Anthony Wieners to intervene. Madonna was called and he also explained to Smith that he would have to leave the meeting because he had not paid the fine and there could be no appeal. Smith cursed at Madonna and continued to scream that no one was going to make him leave the meeting. Smith left only after Madonna said he would call the police and have Smith arrested. As he left, Smith whispered obscenities to Materazzo and said, "I'll get you outside." Madonna stated that he would have considered a request to waive or delay the fine, but Smith did not make one.

On October 16, 1998, Materazzo charged Smith with violating Article 26, Section 1(A) of the State PBA Bylaws -- "Disorderly Persons." Shortly after a December 10 hearing on the charges, the State Judiciary Committee unanimously found him guilty and expelled him from the PBA. On February 1, 1999, Smith appealed that decision. The appeal was initially scheduled to be heard at the April 13 State PBA meeting, but was rescheduled, at Smith's request, for the May 17 meeting. Smith did not appear at the May meeting and the appeal was denied. However, after May 17, Smith sent Kaiser a request to postpone consideration of the appeal pending a response from PERC staff about this charge. Kaiser denied the request, noting that it had not been received until May 25.

Against this backdrop, we turn first to Smith's claim that he was unable to properly represent himself because he was taking medication at the time of the hearing. The record shows that the Hearing Examiner carefully considered this issue and concluded that Smith was fully capable of representing himself (2T3-2T6). Under these circumstances, there is no basis for Smith's contention that his ability to represent himself was "severely impaired." Smith never made that claim to the Hearing Examiner during the hearing or in his post-hearing brief; the Hearing Examiner did not observe any impairment; and Smith has offered no particularized description of his medication or its side effects.^{3/}

We next consider Smith's assertion that, contrary to the Hearing Examiner's conclusion, the May 1998 and October 1998 charges were filed against him in retaliation for his prevailing on his earlier unfair practice charge (CI-H-97-52).

N.J.S.A. 34:13A-5.4b(1) prohibits an employee organization from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." An employee organization violates this proscription when its action tends to interfere with protected rights and lacks a

^{3/} In another exception related to the conduct of the hearing, Smith claims that the Hearing Examiner stated "that he could do nothing about" the fact that respondents' attorney was motioning to his witnesses in an effort to shape their testimony. In fact, the Hearing Examiner stated that he would watch for any such conduct (1T206).

legitimate and substantial organizational justification. FOP, Lodge No. 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1990).

The Hearing Examiner found that there was no evidence that the 1998 internal union disciplinary charges were motivated by Smith's successful prosecution of CI-97-52; that the fine and eventual expulsion were the "inexorable result" of Smith's own actions; and that respondents' actions had a legitimate business purpose and were not arbitrary, capricious or invidious. We agree with this analysis and reject Smith's contention that the 1998 charges, viewed together with the charges that led to his filing CI-H-97-52, show a pattern of respondents' harassing and retaliating against him for exercising his rights under the Act.

As the Hearing Examiner found, the May and October 1998 charges were responses to actions that Smith took in 1998. Therefore, the fact that they were filed close in time to the 1997 charges and to the decision in CI-97-52 does not in itself suggest that they were in retaliation for, or otherwise connected with, CI-97-52 -- especially since, as we discuss later, respondents' actions were reasonable.

Smith also claims that the transfer of the May 1998 charges to the State PBA shows retaliatory intent because the transfer allegedly violated the PBA Constitution, which required that Delgado ask the State PBA to hear the charges. Smith maintains that the transfer was effected at Kaniuk's request and

that his motivation was to ensure that Smith would be penalized for the 1997 decision.

The record does not support these contentions. Smith does not explain why he believes he would have been more favorably treated if Local 152, rather than the State PBA, had heard the charges. The State PBA was not a respondent in CI-97-52 and Tolentino, Delgado and Kaniuk reasonably concluded that the State Judiciary Committee, as opposed to a Local 152 committee, would be better able to consider the 1998 charges without being influenced by Smith's pursuit of CI-H-97-52.

Similarly, we do not find it suspect that the State PBA required Smith to pay his fine before it would hear an appeal of the July 1998 decision finding him guilty of the May 1998 charges. The PBA Constitution and Bylaws direct that a penalty takes effect five days after a written decision, absent a stay, but Sheridan neglected to inform Smith of that requirement when he notified him that the appeal would be heard by the September meeting. We do not deem it evidence of retaliation that Sheridan corrected his error and required Smith to adhere to standard procedures when the hearing was rescheduled for October. The rescheduling occurred at Smith's request and Sheridan stated that if Smith had appeared in time to have his appeal heard in September, he would have been allowed to proceed without paying the fine.

Smith also claims that the October 16, 1998 charges were filed in retaliation for the earlier unfair practice charge and argues that the October 13 altercation was not as described by respondents' witnesses. The Hearing Examiner declined to credit Smith's assertion that Materazzo was acting in a threatening and aggressive manner when he approached Smith on October 13, and we have no basis to disturb that credibility determination. Further, we are unpersuaded by Smith's position that respondents "hand-picked" witnesses who would paint the picture they wanted of the October 13 encounter. Smith was free to call the witnesses whom he claims would have offered a different version.

We also affirm the Hearing Examiner's ruling excluding a tape recording of a 1996 conversation between Smith and Materazzo. While Smith alleges that the tape reveals that Materazzo cursed at him and used racial slurs, we agree with the Hearing Examiner that a 1996 conversation was not probative of what occurred in the October 1998 encounter.

Finally, we agree with the Hearing Examiner that the discipline imposed for the Home News letter and the October 13, 1998 altercation does not violate the Act or the First Amendment.

We and the courts have consistently held that unions may expel or refuse membership to individuals who seek to undermine their majority representative status or otherwise create disharmony among members. See Calabrese v. PBA Local 76, 157 N.J.

Super. 139 (Law Div. 1976); Colasanti; FMBA Local 35 (Carragino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983); CWA Local 1037 (Schuster), P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); see also CWA and NJPEA, D.U.P. No. 98-28, 25 NJPER 213 (¶30097 1998). While Smith did not express support for a rival organization, his urging corrections officers to secede from the PBA was also directed to undermining the PBA's status as majority representative for those employees. The imposition of a fine was not arbitrary, capricious or invidious and does not indicate a retaliatory attitude: given the cases on point, the fine and suspension were not an unlawful punishment for Smith's conduct.

Nor did the fine and suspension violate the First Amendment. The First Amendment generally applies only to governmental entities and, under Calabrese, a union member's right to free speech is limited by the union's right to protect itself against members who seek to undermine its status as majority representative. 157 N.J. Super. at 155-156.


Similarly, Smith's expulsion after he was found guilty of the October 16, 1998 charges was not arbitrary, capricious, or invidious given that the PBA constitution and bylaws proscribe disorderly conduct; Smith's conduct was extreme; and membership organizations have an interest in excluding individuals who create a hostile or adversarial relationship with other members. See Stowell v. N.J. State Ass'n of Chiefs of Police, 325 N.J. Super. 512 (App. Div. 1999).

For all these reasons, we hold that respondents did not violate 5.4b(1). In the absence of exceptions, we also conclude that they did not violate 5.4b(5).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: June 28, 2001
Trenton, New Jersey
ISSUED: June 29, 2001

H.E. NO. 2001-17

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

In the Matter of

PBA LOCAL 152
NEW JERSEY STATE PBA,

Respondent,

-and-

Docket No. CI-H-99-55

KENNETH SMITH,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that neither PBA Local 152 nor the New Jersey State PBA violated the New Jersey Employer-Employee Relations Act by filing disciplinary charges against and eventually expelling Kenneth Smith from the union. The Hearing Examiner found that the Charging Party's conduct violated the Union's constitution and by-laws and at times was of such an egregious nature it justified the Union's action.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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

In the Matter of

PBA LOCAL 152
NEW JERSEY STATE PBA,

Respondent,

-and-

Docket No. CI-H-99-55

KENNETH SMITH,

Charging Party.

Appearances:

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

For the Charging Party, Kenneth C. Smith, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 1, 1999, Kenneth C. Smith filed an unfair practice charge with the Public Employment Relations Commission against PBA Local 152 and the New Jersey State PBA (Union). The charge alleged that the Respondents violated 5.4b(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by 1) retaliating against Smith for successfully prosecuting a prior charge before the Commission (CI-97-52), by

^{1/} These provisions 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."

filing three internal disciplinary charges against him on May 28, 1998 for suggesting in a letter to the editor of a local newspaper that corrections officers secede from the PBA due to its alleged failure to answer important corrections issues; 2) finding Smith guilty on July 21, 1998 of the charges filed against him on May 28, 1998; 3) denying Smith a hearing on his appeal of the decision from the July 21 hearing by allegedly giving him faulty directions causing him to be late to the appeal hearing scheduled for September 8, 1998, and by demanding that he pay the fine levied upon him by the decision from the July 21 hearing prior to the appeal rehearing scheduled for October 13, 1998, which allegedly is not ordinarily required; and 4) violating a previous Commission order, presumably from CI-97-52.

Additionally, Smith recounts in his charge that as a result of a verbal altercation he had on October 13, 1998, regarding his obligation to pay his fine before his appeal of the July 1998 hearing could be heard on October 13, new charges were filed against him ultimately resulting in his expulsion from the PBA. I infer from that element of the charge that Smith was alleging that his expulsion was in retaliation for his success in the prior charge (CI-97-52). Smith did not ask for specific remedies.

A Complaint and Notice of Hearing was issued on October 14, 1999. The Respondents filed an Answer on October 25, 1999, denying that they violated the Act and asserting, in part, that Smith waived certain rights and that the charge was untimely.

On January 3, 2000, the Respondents moved for summary judgment. The Charging Party filed a response in opposition on February 16, 2000. On May 15, 2000, I issued a decision, H.E. No. 2000-11, 26 NJPER 255 (¶31100 2000), granting summary judgment in part, dismissing the complaint regarding the allegations concerning the May 28, 1998 internal disciplinary charges and the PBA's July 21, 1998 hearing regarding those charges because they occurred more than six months before the filing of the instant charge. N.J.S.A. 34:13A-5.4c. The motion was denied regarding the remaining allegations. On July 20, 2000, the Commission, relying upon Clayton v. UAW, 451 U.S. 679 (1981), and Frandsen v. Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees, 782 F.2d 674, 121 LRRM 2465 (1986), issued a decision, P.E.R.C. No. 2001-1, 26 NJPER 356 (¶31140 2000) reinstating those dismissed allegations.

Hearings were then held in this matter on September 21 and December 13, 2000.^{2/} The Respondents filed a post-hearing brief on February 22, 2001. The Charging Party filed a reply brief on March 6, 2001.

Based upon the entire record, I make the following:

^{2/} The transcripts will be referred to as 1T and 2T respectively.

FINDINGS OF FACT

1. On May 28, 1998, a Commission hearing examiner issued a decision, PBA Local 152 (Smith), H.E. No. 98-29, 24 NJPER 304 (¶29146 1998), recommending the Commission find that PBA Local 152 violated 5.4b(1) of the Act by sending a letter to Smith threatening to remove him from the PBA at least in part because he filed an unfair practice charge(s) against the Union. The pertinent facts of that case show that in 1996 Smith circulated a petition regarding the local union leadership; may have disclosed union business to a non-member; tape recorded a union meeting; and accused certain union members of racist acts. Smith brought charges against Local 152 with the State PBA regarding the alleged racist acts, but after a hearing the State PBA dismissed those charges. In February 1997 Smith filed unfair practice charges against Local 152 (CI-97-51 and CI-97-52) regarding the above 1996 events. On March 1, 1997, Local 152's then president, Eugene Conlon, wrote two letters: One, designated as CP-1 in that hearing, was written to the State PBA seeking its assistance on whether it could proceed with a judiciary hearing against Smith. The second letter, designated as CP-2 therein, was written to Smith, notifying him he was charged with violating his PBA oath, and informing him he may be removed from the Union.

The charge in CI-97-52 was amended alleging that Conlon's letter (CP-2) violated the Act. A hearing was held on March 3, 1998 regarding that matter, and on May 28, 1998 the hearing examiner issued her decision. In addition to finding that CP-2

therein violated the Act, she found that certain language in CP-1 therein supported the finding of a violation.^{3/}

Although H.E. No. 98-29 issued on May 28, 1998, the parties did not receive it that day. Such decisions are sent by certified mail and take a number of days for delivery.

On August 20, 1998, the Commission issued a decision in the Smith case, P.E.R.C. No. 99-18, 24 NJPER 450 (129208 1998), adopting the hearing examiner's recommendation and declining to decide whether the PBA had legitimate reasons for seeking Smith's removal from the Union.

^{3/} In the instant hearing Smith argued that CP-1 in CI-97-52 was relevant in this case because the PBA allegedly used the same procedure here as it did there to remove him from the Union. Since CP-1 was included in the record of the prior case I gave the parties the opportunity to refer to that document here (1T229-1T232). CP-1 in CI-97-52 provides:
PBA 152 requests assistance on the issue noted below. On February 18, 1997, Brother Ken Smith filed an unfair practice charge against our Local....

Also included is our letter of intention to remove Mr. Smith from the union. It is at this juncture we seek your advise (sic). As you can see in the unfair labor charge Mr. Smith has also implicated the State PBA as "bias" due to an informal hearing held there in which he felt he was treated unfairly. His purpose at that time was, and is, to challenge the elections of Local PBA 152, June 1996....

From our perspective we are unsure if we can proceed with a judiciary hearing against Mr. Smith as we are the very electorate he is challenging. A committee placed by this Local would of course be appealed. Also, as he has challenged the State PBA as "bias". It appears there would be appealed. [sic]. We are unsure of the appropriate action in these matters, please advise. Thank you.

2. The membership of the statewide PBA consists of over 33,000 members including municipal, county and park police, county and state corrections officers, and other law enforcement employees. The combination of county and state corrections officers accounts for approximately one-third of the statewide PBA membership (2T64-2T65). Corrections officers are active in the statewide PBA. They have their own committee to deal with corrections officer issues, and corrections officers have been appointed to certain positions on behalf of the State PBA (2T65-2T66).

The PBA's Constitution/Bylaws (R-5) prohibit members from also being members of other law enforcement organizations (2T66).

Article VIII, Loss of Membership, provides at Section 1:

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

Article VIII, Section 2 provides that a member knowingly taking action detrimental to the PBA "shall be expelled, disciplined and/or punished":

Any active, inactive, or retired Delegate or member who shall knowingly violate the established principles, By-laws, rules or regulations of this Association, or through the commission of any act, word, deed that may be considered detrimental to this Association, shall be expelled, disciplined and/or punished.

Section 3 of Article VIII provides that any member divulging PBA business to non-members is liable for expulsion, suspension or fine:

Any Delegate or member who divulges the business of this Association or matters debated on to others than members, or to members not in good standing, shall be liable to expulsion, suspension for a period of time, or penalized in any other appropriate manner provided however that any fine imposed shall not exceed \$250.

If the corrections officers were to leave the PBA it would seriously impact the Union financially, resulting in significantly lower dues revenue, less money for scholarships, and less support for legislative activities (2T67-2T68).

3. On or about May 24, 1998, the Home News Tribune published a letter it had received from Smith suggesting that corrections officers secede from the PBA (CP-2, attachment of 5/28/98). Smith's letter states:

Corrections Issues Getting Scant Attention

Some people think that corrections officers take a back seat to police officers. If I'm not in error, we make up the bulk of the union membership. Without our dues, the Patrolmen's Benevolent Association would lose a lot of clout in Trenton and throughout the state.

We should follow our brothers in New York state and secede from the union. It's time to stop letting important corrections issues go unanswered. Once we get together and start lobbying, things would get done, such as the

20-years-and-out bill or putting an end to the current movement to privatize jail functions. Police officers should start putting corrections issues at the top of their lists.

On May 28, 1998, Michael Kaniuk, State PBA Delegate from PBA Local 152, sent Local 152 President Conlon a memorandum (CP-2, attachment 5/28/98) charging Smith with violating PBA obligations due to his letter to the Home News, and Kaniuk requested that an investigation and hearing be held to determine Smith's punishment. That memorandum provides:

I hereby charge Brother Kenneth Smith with;

- 1) Violation of his obligation as a member, not to injure by word, deed, sign, or token another member of this association as he so did in a printed newspaper article published in The Home News Tribune on May 24, 1998....
- 2) Violation of his oath as a member by issuing a statement against the good and welfare of this association as he so did in a printed newspaper article published in the Home News Tribune on May 24, 1998....
- 3) By uttering and encouraging the seceding of Correction Officers from the State Association there by causing disharmony among the entire association membership.

With these charges I am requesting a complete investigation and hearing to determine the punishment if any for these acts committed by Brother Kenneth C. Smith as soon as possible.

Kaniuk was not aware of the issuance of H.E. 98-29 when he sent his memorandum to Conlon (1T133-1T134).

By letter of May 29, 1998 (CP-2), Local 152 Judiciary Committee Chairman Pedro Delgado notified Smith of Kaniuk's charges and that an investigation would be conducted which might result in a

hearing before the Local's judiciary committee. On June 4, 1998, Delgado notified Smith that a local judiciary hearing on Kaniuk's charges was scheduled for June 12, 1998 (CP-3).

4. Just after Delgado sent Smith CP-2 and CP-3, he met with new Local President William Tolentino to discuss the new charges against Smith (CP-1). Delgado told Tolentino that neither he nor the membership thought Smith could get a fair hearing on the Local level, apparently because of Smith's prior litigation against the PBA. Tolentino agreed. He thought the only way for Smith to get a fair hearing was to do it elsewhere. Thus, he directed Delgado not to conduct the hearing (1T114-1T115, 1T119, 1T121, 1T124-1T125, 1T127-1T129; CP-1).

During that same time period, Kaniuk also spoke to Tolentino about having Smith's hearing heard on the State level rather than the Local level for the same reasons raised by Delgado. Tolentino again agreed, which prompted Kaniuk to send a letter to State PBA President Michael Madonna on June 11, 1998 (R-6) requesting that the State Judiciary Committee hear the matter (1T143, 1T145). A local judiciary chairman, a local union president, and a state delegate all have some independent authority to move a local judiciary hearing to the State Judiciary Committee for hearing (1T114, 1T146-1T147, 1T217, 2T69, 2T74). The State Judiciary Committee has the authority to hear such matters in accordance with the Bylaws (R-5), Article 24 Section 2. That clause provides:

The State Judiciary Committee shall have jurisdiction over the following matters: Appeals from decisions of County Conferences and Local Judiciary Committees; disputes between State Delegates; disputes between State Delegates and their Local Association; disputes between County Conferences or Local Associations; disputes between a State Delegate and another Local Association; disputes between a Local Association and the State Association; disputes between a State Delegate and the State Association; and any other matter assigned to it by the State PBA President and/or Executive Board or required to be submitted to the State Judiciary Committee under these By-laws.

As a result of R-6, and the discussions involving Delgado, Tolentino and Kaniuk, the charges against Smith were transferred to the State PBA Judiciary Committee and a hearing was scheduled for July 21, 1998.

Smith did not object to transferring the case to the State Judiciary Committee, nor did he object during that hearing to their hearing the case (1T131, 1T143-1T144, 1T204). On cross-examination, Smith did not dispute that prior to the hearing he had not objected to the State Judiciary Committee hearing the Kaniuk charges, but he testified he thought he raised such an objection during the hearing (1T91). Kaniuk testified Smith did not raise such an objection (1T144, 1T204). No minutes of that hearing were taken (1T224).

I credit Kaniuk's testimony. I found him to be a reliable witness. I believe Smith was guessing about whether he made such an objection. He said he objected on July 21 to the State Judiciary Committee hearing Kaniuk's charges and that he requested a stay of the penalty at that hearing. But Smith could not have asked for a

stay of the penalty at that time because the decision from the July 21 hearing did not issue that day. Thus, I cannot conclude he even raised an objection at that hearing to the State Judiciary Committee considering Kaniuk's charges (1T101-1T104).

5. The State Judiciary Committee, chaired by Michael Materazzo, held a hearing regarding Smith on July 21, 1998, but did not release its findings that day (1T102-1T103). There are no minutes of the hearing because no minutes are kept of Judiciary Committee hearings (1T224). On August 12, 1998, Materazzo issued the Committee's decision (R-3) unanimously finding Smith guilty of the charges against him, fining him \$200.00, and suspending him from the PBA for thirty days, primarily for encouraging members to secede from the Union and for issuing statements against the good and welfare of the PBA. Smith did not know he had been fined until he received R-3 (1T103).

Smith appealed R-3 to the State PBA by letter of August 18, 1998 (R-4). John Kaiser, State PBA Recording Secretary, responded on August 24, 1998 (CP-7) acknowledging the appeal, suspension and fine, and scheduled the appeal for hearing before the State PBA Board of Delegates for September 8, 1998, at 11:30 a.m. at the Shore Casino in Atlantic Highlands. Normally, when Kaiser sends letters like CP-7 which schedule appeal hearings he will include language notifying the member that the request for appeal does not stay the penalty imposed by the Judiciary Committee, and that any fine imposed by the Committee had to be paid prior to the appeal

proceeding. By oversight, however, Kaiser failed to include such notice language in CP-7. Thus, Smith would have been allowed to pursue his hearing on September 8 without paying the fine (2T53, 2T57).

Despite receiving CP-7 which notified Smith that his appeal hearing before the Board of Delegates was scheduled for 11:30 a.m. on September 8, 1998, he was late for the hearing. The meeting on September 8 was a regular State PBA monthly meeting and minutes are kept of such monthly meetings (1T224). By the time Smith arrived the PBA officers were concluding their own meeting, but the delegates had left. Smith was advised that his appeal could not be heard because he was late and the meeting had ended (1T69-1T71). Smith spoke to PBA President Madonna explaining he was late because he got lost. Based upon that explanation, Madonna allowed Smith's appeal to be rescheduled (2T75). But Madonna's decision to allow the appeal to continue was not a stay of the penalty. Madonna did not waive the fine (2T84). Only the Judiciary Chairman could grant such a stay (1T179). None was granted at that time.

The minutes of the September 8th PBA meeting (R-8) show that the general meeting commenced at 10:00 a.m. The following events occurred before the Judiciary Committee was called to handle the Smith matter: roll call of delegates, minutes of previous meeting, blue mass, legal report, correspondence, president's report, legislative report, and bylaws committee. When it was the Judiciary Committee's turn to proceed Smith was called several times

before it was determined he was not there. President Madonna then made the following statement:

We'll just hold up on that for a little bit, because Pat said in the letter she put 11:30, so he still might come. So we'll hold off on Judiciary to give this gentleman some fair time.

The PBA then continued the meeting, hearing from the organization committee, corrections committee, web page committee, legal protection plan, civil service, valor awards, and pension report before returning to the Judiciary Committee business for Smith's case. Smith was called again but since he was still absent the delegates voted to accept the Judiciary Committee's decision from the July 21 hearing. That result was put aside, however, when Madonna allowed the appeal hearing to be rescheduled after Smith finally arrived on September 8.

6. By letter of September 25, 1998 (R-1), Recording Secretary Kaiser notified Smith that his appeal of the Judiciary Committee's decision in R-3 was rescheduled for October 13, 1998 at the Shore Casino. In the second paragraph Kaiser corrected his notice omission from CP-7 by notifying Smith of his obligation to pay the \$200.00 fine issued in August. The letter said:

I wish to remind you that your appeal does not stay the penalty imposed upon you by the State Judiciary Committee. This penalty called for a \$200.00 fine and a 30-day suspension from PBA Local No. 152 effective 5 days from August 11, 1998. You have yet to pay the \$200 fine imposed upon you and it must be paid prior to your appeal before the Board of Delegates on October 13th. [Emphasis was included in the original document.]

Kaiser included the language of the second paragraph because the appeal of the decision from the July 21 hearing did not stay the penalty and he wanted Smith to be aware of that in order for the appeal to proceed (2T53).

Article 24, Section 4D of the Bylaws provides:

The expulsion, suspension, penalty or other discipline shall be effective on the fifth (5th) calendar day following the written decision unless the Chairperson of the Judiciary Committee, after consulting with a majority of the members of the Judiciary Committee, grants a stay pending hearing and appeal (R-5).

To proceed on an appeal without paying a fine a member must request a stay in writing. That requirement was the same for Smith and all other members (1T178-1T183, 1T206-1T208).

Smith never filed a written request for a stay of his fine, nor did he ask for more time to pay the fine (1T93, 1T95, 1T100-1T101, 1T105, 2T59). At several points during his testimony, Smith claimed he made a verbal request for a stay of his penalty, but was consistently confused and could not recall when such a request may have been made (1T93, 1T95, 1T101-1T106). Smith first claimed he made a verbal request for a stay at the hearing on July 21, but later conceded he could not have made such a request that day because he did not even learn of the penalty until R-3 issued on August 12, 1998 (1T93-1T97, 1T101-1T104). He then claimed he made a verbal request for a stay of the penalty at the hearing with John Kaiser, but not at the hearing held about the charges Kaiser filed which was the July hearing. The only other hearing conducted by

Kaiser was a December 1998 hearing (2T39), and when asked if that was the hearing at which he requested a stay of the penalty (from the R-3 ruling), Smith could not recall, he could only assume (1T105-1T106). Smith's testimony about whether he made a verbal request for a stay is too tentative and confused to be reliable. Smith consistently said the union minutes would reflect whether he made a request for a stay (1T93, 1T104-1T106), but minutes did not exist for the Judiciary Committee hearings and the minutes from September 8 and October 13 do not support Smith's contention. Given Smith's unreliable testimony on this point and lacking evidentiary support, I find he did not make a verbal request for a stay of the penalty before or after R-1 issued on September 25, 1998.

7. The meeting scheduled for October 13 was a regular monthly PBA meeting scheduled to begin at approximately 10:00 a.m. Minutes are kept of such meetings but minutes are not taken until the meeting actually begins (1T224). Smith's appeal before the delegates was scheduled for 10:30 a.m. (R-1).

Smith arrived at the Shore Casino early on October 13, prior to the start of the regular meeting. Judiciary Chairman Michael Materazzo saw Smith enter the area where the meeting was scheduled to be held and with the assistance of Officer Kaniuk was able to ascertain that Smith had not paid the \$200.00 penalty (1T165). Materazzo then told PBA delegate John Sheridan that Smith should not be at the meeting and he (Materazzo) was going to ask Smith to leave. Sheridan followed Materazzo to where Smith was sitting (2T9).

With Smith sitting and Materazzo standing, Materazzo, who also regularly "talks with his hands", informed Smith that his appeal would not be heard that day because he had not paid the fine. Materazzo then asked Smith to leave (1T165, 1T171-1T172, 1T192-1T193, 2T9, 2T23, 2T25, 2T27, 2T28). Smith immediately jumped from his seat in a physically aggressive manner that at least one delegate thought would become a physical confrontation, and in a very irate tone screamed "Fuck you. Who the fuck are you?" and other profanities at Materazzo (1T78, 1T165, 1T192, 2T9-2T10, 2T24, 2T30).

When Smith, on cross-examination at this hearing, was initially asked if he started swearing and using profanity after being told his appeal would not be heard because he had not paid the fine, he said that was totally incorrect (1T75-1T76). Then he was asked if it was his testimony that he used no profanity in any of his discussions with any of the individuals and he responded, yes, but immediately said he did say "Fuck you. Who the fuck are you" to Materazzo (1T77-1T78). Smith claimed Materazzo had his hand in his (Smith's) face (1T78).

Materazzo acknowledged he used his hands when he spoke but denied cursing at or using racial obscenities or making any aggressive movements towards Smith (1T165-1T166, 1T154-1T155, 1T170-1T172). I credit Materazzo's version of the incident. Witnesses to the altercation involving Smith and Materazzo on October 13, Officers John Sheridan and Elaine Settle, said Materazzo

did not use profane or derogatory language toward Smith (2T9-2T10, 2T25), and that Smith was the aggressor (2T31). In his brief, Smith claimed Sheridan's testimony was coached, and that Settle's testimony was unreliable. I reject those characterizations. Both officers were otherwise uninvolved observers of the incident and I credit their testimony. There was no evidence Sheridan was coached, and Settle was very clear that Smith was the aggressor in the interaction with Materazzo.

When Smith had Materazzo on cross-examination, the following pertinent interchange occurred:

Smith Q. Do you know, in your best recollection, what prompted me to stand up?

Materazzo A. Apparently, after I told you that your appeal wouldn't be heard because the fine wasn't paid, the penalty wasn't paid.

Q. Right

A. You became very irate and it escalated from that point on.

Q. And you had no part in this escalation?

A. Absolutely not.

Q. But you admitted earlier that you talked with your hands a lot. Is that correct?

A. I don't understand what that has to do with it.

A. I made no aggressive movement towards you. I'm not going to keep saying it. I already said it.

Q. Did you talk with your hands when I was sitting down when you came over to tell me that I couldn't be heard today?

A. It's quite possible. I talk just like I'm doing now.

I believe that this exchange shows the reason for Smith's aggressive behavior was his anger over learning his appeal would not be heard and his perception that Materazzo had his hand in Smith's face. But Smith did not deny the behavior attributed to him.

I conclude that while Materazzo motioned with his hands as he told Smith why he had to leave, Materazzo neither acted in a threatening manner nor spoke to Smith in a derogatory or profane manner that may have instigated Smith's reaction. I find that Smith was the aggressor in the incident and unleashed a series of profane words to Materazzo.^{4/}

8. As a result of Smith's behavior on October 13, Materazzo sought the assistance of PBA Executive Vice President Anthony Wieners. But Smith's behavior continued despite Wiener's intervention and Smith asked to speak to PBA President Madonna (1T166, 1T172-1T173). When Madonna arrived, Materazzo explained that Smith had not paid his penalty, thus, there'd be no appeal. Madonna explained to Smith there could be no appeal hearing because Smith had not paid the fine and he asked Smith to leave (1T167, 2T70, 2T81). Madonna would have considered a request by Smith to

^{4/} In argument (not testimony), Smith intimated that Materazzo cursed or used racial obscenities toward him in 1996 (1T156). Even if that were true, Materazzo did not curse at or use racial obscenities to Smith in 1998. Any inappropriate behavior by Materazzo in 1996 would not have justified Smith's behavior in 1998.

waive or delay the fine, but Smith did not ask Madonna to waive the fine (2T71). Instead, Smith began screaming at Madonna that no one was going to make him leave (2T70), he called Madonna a "fat fuck" or "fat mother fucker" and that he (Madonna) was not going to remove him (1T167, 2T11-2T12, 2T70, 2T82). Madonna had not used profane or derogatory words toward Smith (2T12).

Madonna responded to Smith's behavior by telling him to leave or he (Madonna) would call the police and have him (Smith) arrested (1T167, 2T12, 2T70, 2T82). As Smith began leaving the area he walked over to Materazzo and whispered in his ear, "You old white mother fucker. I'll get you outside" (1T167). In his brief Smith denied making the threat to Materazzo, and even claimed Materazzo gave no such testimony. Smith's assertion is not believable. I credit Materazzo's testimony.

Smith left the area but never paid the fine (2T77). None of the altercations were in the minutes of the October 13 meeting because they occurred before the meeting began (2T17, 2T30).

Smith denied calling Madonna a "fat fuck" (1T77). I do not credit his testimony. Generally, I did not find Smith to be a reliable witness. His testimony was often confused and misleading, and in this instance blatantly false. I credit Materazzo and Madonna that Smith made the remark, and particularly credit Officer Sheridan who was simply an observant bystander who heard Smith make the profane remark to Madonna (2T12).

The minutes of the October 13 meeting (CP-8) show that when the Judiciary Committee business arose, Materazzo (who is referred to in CP-8 as "Carteret" (1T60)) explained that Smith had been given notice to pay his fine (from the July hearing) but had not paid prior to that date, thus there was no appeal. He said:

When you receive the meeting notice for this month's meeting there was notice of appeal there. The notice of appeal was for Kenneth Smith of Local #152. As per the letter he was sent, I'll just read it to you in brief. He was reminded that the penalty was not stayed pending the appeal. The penalty should have been paid, as of this date. He showed up this morning, he was sitting in the lobby, and he had not paid the penalty. The letter to him says it must be paid prior to his appeal which is today, October 13th. It was not paid, therefore, there is no appeal.

9. As a result of Smith's conduct on October 13, 1998, Materazzo on October 16, 1998 filed PBA charges against Smith (R-7) alleging he violated Article 26, Section 1(A), Disorderly Persons, of the State PBA By-Laws, R-5. The charges were filed with President Madonna; but in his cover letter to R-7, Materazzo requested that a Judiciary Committee be appointed by First Vice-President Al Reed, because Madonna, Vice-President Wieners, and Materazzo himself were all potential witnesses in the matter (1T212, R-7). The actual charges are as follows:

The undersigned State Delegate, Michael Materazzo, hereby charges Kenneth Smith, member, PBA Local 152 with improper conduct by being obnoxious, abusive and disorderly on Tuesday, October 13, 1998, at the State PBA meeting at the Shore Casino, Atlantic Highlands, N.J.

Officer Smith was abusive towards the undersigned and others by cursing and creating a disturbance as other Delegates were signing in. His abusive language and actions caused him to be ejected from this meeting by State President Michael Madonna.

All of the above cited actions meet the criteria so defined in the N.J.S.P.B.A. By-Laws, more specifically, Article XXVI, Disorderly Persons, Section 1(A).

The language of Article 26, Section 1(A) provides:

Any Delegate or member of this Association present at any meeting of this Association who becomes obnoxious, abusive or disorderly in his language or conduct shall be ejected from any such meeting by order of the President.

In response to R-7, a judiciary committee chaired by John Kaiser was appointed to hear Materazzo's charges which was scheduled for December 10, 1998 (1T81, 1T216, 2T39). No minutes were taken of that Judiciary Committee meeting consistent with PBA practice (1T220).

Smith appeared and testified at the December 10 hearing. He did not challenge the committee's right to conduct the hearing. He denied using profanity or derogatory terms or committing, saying or doing any of the actions he was accused of on October 13 as testified by Madonna, Materazzo, John Sheridan, and Elaine Settle, the same witnesses who testified at this hearing (2T43, R-9). Shortly after the December hearing, Kaiser issued the Committee decision (R-9) unanimously finding that Smith was guilty of the charges filed. The Committee unanimously voted to expel him from PBA Local 152. That decision was based upon Smith's total denial of

everything that occurred and the testimony of the other witnesses (2T43). The decision notified Smith of his right to appeal that decision.^{5/}

By February 12, 1999, Smith filed a timely appeal of the decision in R-9. On March 4, 1999 (CP-5), Smith was notified that his appeal hearing was scheduled for 11:00 a.m. on April 13, 1999. On March 23, 1999 (R-2), Smith requested that his April 13 appeal hearing be rescheduled. By letter of March 26, 1999 (CP-6) Smith was notified that his appeal hearing was rescheduled for Monday, May 17, 1999 at 11:00 a.m. The PBA did not receive any written or verbal communication from Smith between March 26 and May 16, 1999 (2T49-2T50).

^{5/} The decision cited Smith's appeal rights set forth in Article 24, Section 5D of the bylaws as follows:
The appeal must be in writing and delivered or mailed, Certified Return Receipt Requested, to the President of this Association and the State Recording Secretary within the 30-day period following the decision of the State Judiciary Committee. Failure to submit an appeal within the 30-day period aforesaid shall preclude any further appeal and the decision of the State Judiciary Committee shall be final and binding. The Recording Secretary shall enter the matter on the Agenda of the next succeeding monthly meeting, where in that case the appeal shall be heard at a following monthly meeting designated by the President of this Association. The decision of the State Judiciary Committee shall be final and binding unless the decision is vacated by a two-thirds vote of all State Delegates attending said meeting.

In May 1999 Smith mailed two letters to PBA Recording Secretary John Kaiser in the same envelope. The letters and a photocopy of the envelope were admitted into evidence as R-10. Both letters were dated May 12, 1999. The first letter was a cover letter from Smith to Kaiser requesting an adjournment of his May 17 appeal hearing and referring to the other letter which was a letter from Smith to the Commission staff agent who was handling the case at that time. The pertinent language in the R-10 cover letter provides:

Enclosed please find a copy of a letter sent on this date to P.E.R.C. I respectfully request an adjournment of the appeal hearing (which you finally scheduled) until I receive a reply to my letter from P.E.R.C..

The Commission was listed on the cc's of the cover letter.

The letter by Smith to the staff agent which was attached to the cover letter provides:

My complaint against the PBA has been docketed with P.E.R.C. Subsequent to my applying to P.E.R.C., I, of course, notified the Union of my new complaint for, among other things, retaliation. The PBA has now sent me a notice to appear for the appeal of the charges they lodged against me. However, this appeal hearing is nothing more than a sham and has been scheduled by the PBA as a pretext for them to try and defend the complaint I have filed with P.E.R.C.. Why else have they now suddenly changed the requirements of the appeal hearing and no longer require me to pay my imposed fine in advance of being heard. The only explanation for this is my new complaint with P.E.R.C.

I am notifying the PBA by letter (copy enclosed) that I am requesting an adjournment of this sham appeal hearing until I have a formal response to this letter from P.E.R.C. as to whether or not I

should be attending this PBA appeal hearing which, as aforereferenced, is purely a sham. Therefore, I would greatly appreciate your advising me of whether my case with P.E.R.C. will suffer if I refuse to attend this sham appeal hearing.

Thank you very much for your courtesies in this matter.

John Kaiser did not receive the R-10 letters until May 25, 1999. Although the letters were dated May 12, the date stamp on the envelope to Kaiser shows it was not mailed until May 21, 1999 (2T49-2T50).

Since the R-10 cover letter listed the Commission on its cc's, and the other letter was addressed to a Commission staff agent, I took administrative notice of the Commission file in this case to determine if and when the Commission received those letters. N.J.A.C. 19:14-6.6. Both letters were received by the Commission on May 24, 1999. The date on the date stamp of the envelope mailed to the Commission was too faint to read.

Based upon Kaiser's testimony which I credit, and the mailing and receipt dates on the R-10 documents, I find that Smith mailed R-10 well after his appeal hearing scheduled for May 17. Smith was not present for his appeal hearing on May 17, and had not otherwise contacted Kaiser prior thereto to adjourn or reschedule that hearing, thus his appeal was denied (2T50). In his brief, Smith claimed he did not pre-date the letters. I do not credit that assertion.

Kaiser responded to R-10 by his own letter of May 26, 1999 (R-11). He noted that R-10 had not been received until May 25, therefore, he denied Smith's R-10 request to adjourn the May 17 hearing.

ANALYSIS

Pursuant to N.J.S.A. 34:13A-5.4b(1), a public sector labor organization or union is prohibited from interfering with, restraining or coercing those public sector employees it represents in the exercise of the rights guaranteed to them by the Act. This prohibition is commonly referred to as a union's "duty of fair representation".

Smith cited four ways in which Local 152 and/or the State PBA allegedly violated its duty of fair representation (5.4b(1)) to him. First, by filing the May 28, 1998 disciplinary charges against him allegedly in retaliation for his success in CI-97-52. Second, by finding him guilty of those charges on July 21, 1998. Third, by denying his appeal of the decision from the July 21 hearing, and fourth, by allegedly violating the Commission's order in CI-97-52.

The Commission has held that a union violates its duty of fair representation "when its actions tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by the Act, provided the actions lack a legitimate and substantial organizational justification." FOP Lodge 12 (Colasanti et al.), P.E.R.C. No. 90-65, 16 NJPER 126, 126-127

(¶21049 1990); Accord, PBA Local 152 (Smith), 24 NJPER at 451; New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n.1 (¶10285 1979). The issue here is whether Local 152 and/or the State PBA's actions violated that duty based upon the facts as found above. I find they did not. Smith's conduct gave the Union substantial justification for its actions.

Smith is alleging that the actions taken against him by the Union in 1998 were in retaliation for his having filed and successfully prosecuted CI-97-52. That prior litigation obviously created friction between the parties that had not abated during the time of the relevant events. Nevertheless, while I recognize that the Local and State PBA may have been relieved that the events of 1998 ultimately led to Smith's expulsion from the Union, I find that those events and the expulsion itself were not created, instigated or planned by the Union and were not violations of their duty of fair representation. The difference between the events of CI-97-52 and the events of the instant charge is that here Smith engaged in unprotected and/or improper conduct of his own making that inexorably led to the Union's actions.

In his charge, Smith alleged that the "true reason" for the Union filing the three disciplinary charges against him on May 28, 1998 was retaliation for his "successful recent award by PERC". But neither the facts nor the law supports that allegation.

Smith's charge refers to the events of May, July, September, October and even December of 1998, and was not filed

until February of 1999. Obviously, Smith prepared the charge after the May 1998 events and did so with the benefit of hindsight. He claimed the disciplinary charges of May 28, 1998 (CP-2 attachment) were in retaliation for the "recent award by PERC". But that could not have happened.

The PERC decision regarding CI-97-52, P.E.R.C. No. 99-18, 24 NJPER 450, did not issue until August 1998. It was the hearing examiner decision that issued on May 28, but since such decisions are sent by certified mail to the parties, neither the Union nor Kaniuk could have received it on May 28 when it issued which was also the day Kaniuk issued the the internal union disciplinary charges against Smith. In his post hearing brief, Smith argued that the Union did receive H.E. 98-29 because it was posted as required. The issue here wasn't whether it was received, it was whether it was received on May 28 prior to Kaniuk issuing the disciplinary charges. I found it had not been received by that date. Smith did not otherwise establish that the PBA had knowledge of the hearing examiner's decision when the disciplinary charges issued. Consequently, I find the disciplinary charges were not in reaction to the hearing examiner's decision.

More importantly, the PBA did not act inappropriately by issuing the disciplinary charges. Those charges were issued in response to Smith's own letter to the newspaper encouraging members to secede from the Union. Smith's letter violated Article VIII, Section 2 of the Union's Constitution/Bylaws because by advocating

the secession of the corrections officers who accounted for nearly one third of the statewide PBA membership, Smith was not just taking action which could have been detrimental to the Union, it could have been catastrophic. At the very least, Kaniuk's charges against Smith accurately allege that Smith's letter was against the good and welfare of the Union and caused disharmony amongst the Association membership which violated Article VIII.

As a member of the PBA, Smith was obligated to avoid creating such disharmony within the Association. The courts have held that constitutions and bylaws of voluntary associations become part of a contract entered into by a member when joining such associations. Calabrese v. Policeman's Benev. Ass'n., Local No. 76, 157 N.J. Super. 139, 147 (Law Div. 1978); North Jersey Newspaper Guild, Local No. 173, American Newspaper Guild v. Rakos, 110 N.J. Super. 77, 86-87 (App. Div. 1970), certif. den. 56 N.J. 478 (1970).

A union may fine or expel a member to ensure compliance with its constitution and rules. North Jersey Newspaper Guild, Id. at 86. Since Kaniuk's charges were not filed in reaction to the decision in CI-97-52, and were intended to obtain Smith's compliance with the PBA constitution, those charges did not violate the PBA's duty of fair representation to Smith.

In this same section of the charge and again in his brief, Smith also alleged that the Union's charges against him violated his First Amendment free speech rights. That allegation lacks merit. Smith, like many other people, assume their First Amendment rights

are absolutely protected in every circumstance. They are not. In Reid v. Barrett, 467 F.Supp. 124, (D.N.J. 1979), aff'd. 61 F.2d 1354 (3d Cir. N.J. 1980), the court made the point:

First Amendment guarantees, however fundamental, are not absolute. One may not freely express oneself whenever, however, and wherever one pleases.

That same perspective had earlier been expressed in Gish v. Bd. Ed. of Paramus, 145 N.J. Super. 96, 104 (App. Div. 1976), certif. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977) which held:

The right to speak freely has long been recognized as being not without some restriction. Whether or not it is constitutionally permissible may depend on its timing, its substance, its purpose, its truthfulness and other factors. It is certain that the guarantee is dependent on the circumstances of each particular instance.

The Court in Calabrese put those legal holdings into practice in the labor relations context by balancing a member's free speech rights with a union's right to enforce its rules, the court said:

The right of freedom of speech of the union members is limited by [the] union's power to enforce reasonable rules as to responsibility of members toward organizations as an institution and to prevent interference with union's contractual and legal obligations. [157 N.J. Super. at 154-155].

In this case, the PBA's charges against Smith were intended to enforce its constitution and its very viability against the secession campaign advanced by Smith. While Smith had the right to

have his letter published, the First Amendment does not protect him from the Union's efforts to enforce its rules. Calabrese.

Having found that Smith's letter violated the PBA's constitution, and that the Union was entitled to file charges against him, Smith's allegation that the PBA violated the Act by finding him guilty of those charges as a result of the July 21, 1998 hearing is unpersuasive. Smith never denied he authored and sent the letter.

Under Article VIII Section 2 of its bylaws, the PBA could have expelled Smith because of his letter. It did not. Instead, the July 21 Judiciary Committee issued a relatively mild penalty, a 30-day suspension from the Union and a \$200 fine. Although that penalty may have been light in recognition of the parties prior Commission litigation, it was, nevertheless, a balanced response to Smith's letter and reasonable under the circumstances.

Smith did not allege in this charge that Local 152 or the State PBA violated the Act by having the State Judiciary Committee, rather than Local 152's Judiciary Committee, conduct the July 21 hearing on the disciplinary charges Kaniuk filed; but Smith did raise that issue during the unfair practice hearing and in his brief. Since Smith did not make such an allegation in his charge, I am inclined to summarily dismiss it. Notwithstanding the failed pleading, however, I found that Smith did not object to transferring that matter to the State Judiciary Committee nor did he object before or during that hearing to the State Judiciary Committee

hearing that matter. In his post-hearing brief, Smith also claimed that Kaniuk never consulted Delgado about moving the hearing, that Delgado never asked Tolentino to move it, and that neither Delgado nor the membership wanted Kaniuk's charges moved to the State PBA for hearing. While some of those claims may be accurate, they do not support the finding of a violation. There is no evidence concerning whether Kaniuk spoke to Delgado, but Kaniuk did ask Tolentino to move the hearing, and Delgado did tell Tolentino that he did not believe Smith could get a fair hearing from the local judiciary committee. Based upon those interchanges, I found nothing improper with the hearing being moved to the State level. Since no objection was made, and since the Union's bylaws authorize such action, Smith did not prove that the Union acted inappropriately by the manner in which the disciplinary charges were handled. I did not credit Smith's assertion that he objected to the procedure at the July 21 hearing.

Smith's allegation that the PBA gave him faulty directions to Atlantic City and intentionally caused him to be late on September 8 is specious. There was no evidence that Smith ever received directions from someone in the PBA, and no evidence that anyone intended to cause his late arrival that day. In fact, the record shows that despite Smith's failure to arrive at the Judiciary Committee hearing on time, Madonna delayed that hearing to give Smith more time to appear, and subsequently allowed Smith to present his appeal on October 13. Madonna's actions demonstrated his efforts to provide, not deny, fair representation.

Smith's claim that the PBA violated the Act by insisting he pay the \$200 fine from the July 21 hearing before his appeal of that decision was heard similarly lacked merit. Smith did not prove that the PBA's insistence was in reaction to the Commission's decision in CI-97-52, or for any other reason which might have been in violation of the Act. The record shows that PBA bylaws require that union penalties be paid prior to an appeal unless a stay is granted, and that PBA Secretary Kaiser in CP-7 merely inadvertently failed to remind Smith to pay the penalty prior to the September 8th hearing. Since Smith's appeal was not heard in September, Kaiser corrected his error in R-1 by notifying Smith to pay the fine before the October 13 scheduled rehearing date.

Smith argued that since he did not have to pay the penalty prior to September 8 -- because he had not been given such notice prior to that date -- he should not have been required to pay the penalty prior to the October 13 rehearing. He claims he assumed he did not need to pay the penalty prior to October 13 because he did not need to pay it prior to September 8, and/or that the PBA waived any right to impose its rule because it had not done so before September 8. In his brief, he claimed that Kaiser and Madonna had granted him a stay. Those arguments are unpersuasive.

First, I do not believe Smith assumed he did not have to pay the fine. He received R-1, and I believe he simply chose to ignore the requirement. Second, my authority to decide this case does not enable me to substitute my judgment or Smith's opinion on

whether the PBA should have required prior payment of the penalty. Rather, my authority is limited to deciding whether the imposition of the penalty requirement was done for reasons violative of the Act. I find it was not. Notwithstanding Kaiser's inadvertent error, the record shows it was PBA practice to require prepayment of penalties. Smith did not produce any evidence that the PBA does not regularly apply and enforce its prepaid penalty provision. Consequently, Kaiser's omission did not become a waiver on behalf of the PBA. Once Smith failed to appear on time on September 8 and a new hearing was scheduled, Kaiser corrected his mistake.

Smith could have, but never did request a stay, delay or waiver of the penalty. His claim that he did was not believable, and I believe Madonna's assertion that he would have considered such a request but that he had not waived the fine. Madonna had delayed the September 8 meeting to give Smith more time to appear, and had granted him a new appeal hearing even though none was required, thus I believe he would have made some adjustment to allow Smith's hearing to proceed on October 13 had Smith acted professionally and made an appropriate request.

In his brief, Smith also argued that the issuance of R-1 on September 25 denied him the proper amount of notice to pay his fine and that the three weeks time prior to the October 13 hearing was not in accordance with Union bylaws. Those are unsupported claims. Smith did not establish that the Union had a specific length of time for such notices or that his three week notice violated a particular

bylaw. There was no evidence or even argument that the time provided was insufficient for Smith to pay the fine or request a stay.

Smith's broad allegation that the PBA violated a previous Commission order is wholly unsupported. The Commission's decision in CI-97-52 (24 NJPER 450) included a cease and desist order and a requirement to post the order. I find no evidence that the PBA's actions between May 28, 1998 and May 26, 1999 (R-11) regarding Smith were taken in violation of the Act. The PBA was not retaliating against Smith for his success in CI-97-52. It was responding to Smith's inappropriate and often caustic behavior. If the PBA had a more retaliatory attitude, it could have expelled Smith in July 1998 in reaction to his letter to the Home News and denied him any further appeal hearing after he failed to timely appear on September 8. It did neither. Perhaps the PBA was just being cautious in response to the decision in CI-97-52, but given Madonna's gracious handling of the September 8 meeting regarding Smith and approving his request for a new hearing, I believe the PBA was simply trying to be fair.

The incident that ultimately led to Smith's expulsion from the PBA was his explosive and profane behavior on October 13 which was entirely of his own making. Smith was not a credible witness. He first denied cursing, then admitted cursing at Materazzo but not Madonna. I found he cursed at both men, and also threatened Materazzo. Even if Smith were right that his fine should have been

stayed on October 13, the Union's request for payment of the penalty did not justify, excuse, ameliorate, or moot his profane behavior that day.

At the Judiciary Committee meeting of December 10, Smith denied using profanity on October 13, but Materazzo, Madonna, Sheridan and Settle, the same witnesses in the instant case, testified against him and the Committee credited their testimony as I have done here. It recommended expulsion.

The Court in Calabrese explained the law in New Jersey, it stated:

A union must have the power to relieve itself of its discordant elements in order that harmony may prevail, and therefore, it has the right to provide by its constitution and by-laws for expulsion of members transgressing their reasonableness. Barnhart v. United Auto., etc., Local 669, 12 N.J. Super. 147, 153 (App. Div. 1951). [157 N.J. Super. at 156]. See also Colasanti.

That holding directly applies in this case.

The Commission has consistently held that the standard for testing expulsions is whether they were arbitrary, capricious or invidious. Colasanti, 16 NJPER at 127; CWA Local 1037 (Schuster), P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); FMBA Local No. 35 (Carrigino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983); CWA (NJPEA), D.U.P. No. 98-28, 25 NJPER 213 (¶30097 1998); AFSCME (Smith), D.U.P. No. 92-28, 18 NJPER 370 (¶23163 1992). The PBA's action did not violate any of that standard.

Whether Smith made profane remarks to Madonna or not is not the real issue here. Smith admitted he made profane remarks to Materazzo, and I found he threatened Materazzo; and it was Materazzo (not Madonna) who filed the charges against Smith that led to his expulsion at the December 10th hearing, based upon his behavior at the October 13th meeting. It is not logical that the PBA would have expelled Smith in retaliation for CI-97-52 at that point because it did not need to--Smith's behavior on October 13 was egregious enough to warrant expulsion on its own.

In Stowell v. New Jersey State Association of Chiefs of Police, 325 N.J. Super. 512 (App. Div. 1999), the Court upheld a member's expulsion from the Association, for writing letters with an accusatory tone, to--and about--another member. The Court said:

Even if all the statements in those two letters were warranted, it is understandable that the Association would feel that the continued membership of a person who directs these kind of hostile comments at an active member would not be conducive to "congenial social intercourse" within the organization. [Id. at 518.]

The result is the same here. Smith's profane language and behavior toward Materazzo and Madonna transcended the bounds of reasonableness. That behavior, together with Smith's call for secession from the PBA, made him incompatible with members within the PBA.

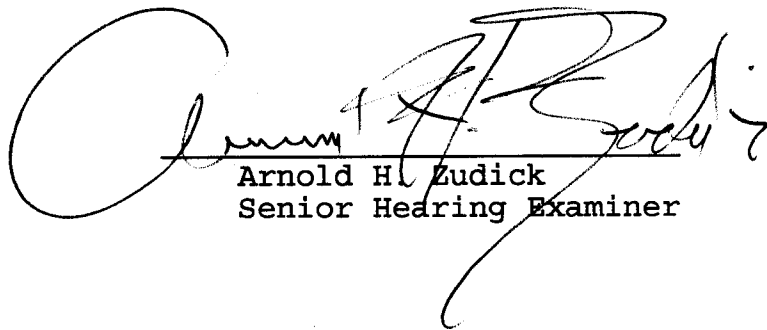
Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSION OF LAW

Neither PBA Local 152 nor the New Jersey State PBA violated 5.4b(1) or (5) of the Act by the actions it took against Smith between May 28, 1998 and May 26, 1999.

RECOMMENDATION

I recommend the Complaint be dismissed.



Arnold H. Zudick
Senior Hearing Examiner

Dated: March 15, 2001
Trenton, New Jersey