

H.E. NO. 97-6

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF TRANSPORTATION,

Respondent,

-and-

Docket No. CO-H-95-50

IFPTE, LOCAL 195,
ROBERT V. FIORELLO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the State of New Jersey, Department of Transportation did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by not promoting Robert Fiorello to a provisional position. The Hearing Examiner found that although Fiorello was a known union activist, the employer was not hostile toward the exercise of his protected rights and his union activity was not a substantial and motivating factor in the decision to not promote him into the provisional position.

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 Chairman 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.

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Appearances:

For the Respondent,
Peter Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Arnold S. Cohen, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On August 22, 1994, the International Federation of Professional and Technical Engineers, Local No. 195 ("IFPTE" or "Charging Party") filed an unfair practice charge (C-2)^{1/} against the State of New Jersey, Department of Transportation ("DOT" or

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "J" refer to joint exhibits, those marked "CP" refer to the charging party's exhibits, and those marked "R" refer to the respondent's exhibits. The transcript citation "1T1" refers to the transcript developed on January 18, 1996, at page 1. Citations "2T" refer to the transcript developed on February 6, 1996.

"Respondent"). IFPTE asserts that the DOT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1), (2), (3) and (5)^{2/} by denying Robert Fiorello a temporary promotion in February 1994 to the position of construction and maintenance technician II ("tech II")^{3/} in retaliation for prevailing in a grievance arbitration and for pursuing other union activities protected by the Act.

On February 27, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On March 13, 1995, the State filed its Answer (C-3) generally denying that it violated the Act. Hearings were conducted on January 18, 1996 and February 6, 1996, at the Commission's offices in Trenton, New Jersey. The parties examined and cross-examined witnesses, presented relevant evidence and argued orally. At the conclusion of the Charging Party's case, the State made a Motion to Dismiss (1T108-1T110). I

2/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

3/ The technician series will be abbreviated as "tech V", "tech IV", "tech III", "tech II" and "tech I."

denied the Motion (1T112-1T113). At the conclusion of the hearing, the parties waived oral arguments and established a briefing schedule. On May 7, 1996, the State submitted a post-hearing brief; IFPTE did not file a brief.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the State is a public employer and IFPTE is a public employee representative within the meaning of the Act (1T9).

2. Robert Fiorello was hired by DOT on December 23, 1963 (1T15; 1T48). By 1980, he was working as an engineering aide in the Bureau of Materials, Plant Inspection Division. Plant inspection tasks involve testing construction materials such as concrete at their source of production (1T33; 2T100).

3. In 1980, Frank Palise was Fiorello's supervisor. Palise is currently a regional materials engineer in DOT and has held this position in Region III since 1986 (1T114). Prior to 1986, Palise was a project engineer, materials assigned to Region IV, DOT headquarters in Trenton (1T114; 2T87). Palise supervised Fiorello continuously from 1977 until sometime in 1995 (1T16; 1T49; 1T65-1T66).

4. In 1980, Palise reassigned Fiorello to the Bureau of Materials, Project Inspection Division ("projects") due to an

alleged rule infraction^{4/} (1T32-1T33; 1T96-1T97). Fiorello challenged this transfer through a grievance because he believed that he was replaced by an inexperienced engineering aide (1T33; 1T96). Fiorello remained assigned to projects for about one year while the grievance proceeded through arbitration (1T34; 1T97; 2T44). Fiorello prevailed in the arbitration so he was assigned back to plant inspection (1T33; 1T97). Palise has never mentioned this grievance to Fiorello or made any remarks to him about it, nor has Fiorello ever heard Palise talk about it with anyone (1T97-1T98).

5. In 1980, Fiorello requested a six to eight week leave of absence to work for AFSCME which Palise approved^{5/} (1T26; 1T66-1T67). Palise never made any comments about the leave of absence (1T67). While Fiorello was on leave, other employees in a pool of inspectors completed his work (1T67).

6. In 1980, Palise was a project engineer in charge of a unit, and he and Fiorello were both working in DOT (2T87). At that time, the State Employee Association (SEA) represented certain DOT employees (2T49). Fiorello was an SEA member^{6/} (1T90).

^{4/} The record does not state the infraction Fiorello committed.

^{5/} Fiorello testified that Palise had to approve the leave. However, there is no evidence in the record supporting the basis for this assertion. The record is also silent regarding what Fiorello did for AFSCME during his leave.

^{6/} Fiorello thinks that Palise was also an SEA member (1T90-1T91). Palise does not recall whether he was or not (2T50; 2T87-2T88), although he does recall reading Spotlight, the SEA newsletter (2T88). I need not determine Palise's union membership.

7. In July, 1980, the SEA and the State were in contract negotiations and a strike was threatened (2T87). Palise had a vacation scheduled and was concerned that he might have to change it due to the job action (2T51). Before Palise was scheduled to go on vacation, the newspapers and SEA announced that a settlement was imminent (2T51; 2T87). Palise left for his vacation believing that there would not be a strike (2T51-2T52; 2T87).

8. Palise vacationed in Ventnor, New Jersey and had no access to telephones or newspapers (2T50-2T52). During his vacation, he traveled to Trenton for his aunt's funeral and learned that there was a strike (2T51). Upon returning to his vacation home, he called John Archibald, the principal engineer in charge of his office during his absence, who advised him that there was a strike (2T51). Palise remained on vacation during the entire strike, which lasted several days (1T90).

9. Fiorello was told that Palise did not honor picket lines, but Fiorello never saw that for himself (1T90-1T91). Fiorello never filed any grievance with the SEA against Palise for not honoring a picket line (1T91).

10. In the early 1980's, Fiorello served as SEA shop steward (1T32; 1T84). At the time, another plant inspector, Warren Wisdom, had a State truck assigned to him. Palise needed the truck at a project site so he instructed Wisdom to transfer the truck to the job site (1T84; 2T46-2T47). Wisdom thought Palise's decision created a hardship for him, so he filed a grievance (1T31; 1T84;

2T46-2T47). Fiorello represented Wisdom at the grievance hearing. The grievance was denied and was not appealed or arbitrated (1T31; 1T65; 1T85). Since the grievance, Palise has never raised the issue of Fiorello representing Wisdom^{7/} (1T86).

11. In 1985 or 1986, Fiorello worked with another plant inspector, Jim Bohl, at Bituminous Concrete, an asphalt plant in Millstone, New Jersey (1T37; 1T102-1T103). The materials they were inspecting were sent to a project site in Hightstown (1T103). Palise questioned the quality of the product and decided to check the material, although he did not tell Fiorello why he was doing the investigation (1T103; 1T38; 2T31). Palise checked portions of concrete cut out of the roadway and found them to be within specification (1T103). Additionally, his staff tested referee samples at a regional laboratory. The samples passed inspection (1T37-1T38; 1T103). Neither Fiorello nor Bohl were disciplined after this investigation (1T104). The process Palise used to evaluate the quality of the material was proper and "by the book" according to Fiorello^{8/} (1T103).

7/ Fiorello testified that Palise was "disturbed" about the grievance, however I find no evidence to support this characterization (1T85-1T86).

8/ Fiorello accused Palise of acting extra cautiously because Fiorello was involved and Palise had an "ulterior motive" (1T104). Nothing in the record supports this comment. Fiorello felt that it was only necessary to test a sample cut out of the roadway because that method would test everything that came from the plant, but he does acknowledge the method used by Palise was proper (1T104). In testimony, Palise did not recall the particulars of this incident, but assumed that it happened.

12. Every DOT project has a resident engineer. If a resident engineer files a complaint in Region III, Palise investigates it. Routine investigations include looking at the project job records (2T34-2T35).

13. In 1985 or 1986, Fiorello and Bohl were assigned to the Stabola Company asphalt plant in Millstone, New Jersey (1T38; 1T107; 2T31). This company was preparing materials for a project on Route 33 in Hightstown (2T31-2T32). A resident engineer advised Palise of a road problem in Hightstown where Route 33 intersected Route 571. Heavy traffic had caused the road to fail prematurely (2T32-2T33). The failing material was removed and immediately replaced because the problem created a safety hazard (2T33-2T34). Material samples were provided to Palise after the repair was completed (2T34). An analysis of the core samples taken from the road indicated the lack of compliance with the job specifications (2T34). The comparison sample taken at the plant was found to be significantly different from the road sample (2T32).

14. Fiorello and Bohl had neither completed nor submitted the paperwork involved with the Stabola project. They had been reassigned to another project and may not have had the chance to do so (1T38). Another inspector, Steve Tripani, the team supervisor, discovered their incomplete paperwork in a drawer and gave it to Palise (1T38; 2T36). Palise's review of the information indicated that Bohl and Fiorello should have realized there was a problem (2T32). Palise instructed Tripani, Bohl and Fiorello that they

should have been more aware of what was going on because they probably could have prevented the use of the failing material (2T32-2T33; 2T35). The test results should have raised a flag to the inspectors (2T35).

15. Subsequent action taken by Palise resulted in a penalty assessed to the contractor (2T33). This incident resulted in a verbal counselling imposed by Palise for Bohl, Fiorello and Tripani, the first step of discipline^{9/} (2T35-2T36).

16. In 1988, Fiorello was assigned as an inspector at a concrete plant from 7:00 a.m. - 3:30 p.m. (1T36). His direct supervisor was Frank Feher who reported to Palise (2T29-2T30). At this location, the phone used by inspectors was in the laboratory. To inspect the concrete, Fiorello had to walk from the laboratory to the batch house where the concrete was mixed (1T36). One day between 3:00 - 3:30 p.m., Palise tried to reach Fiorello by phone at the plant, but was unsuccessful (1T36). During this same time period, Feher saw Fiorello at a location 20-30 minutes away from the

9/ Fiorello testified that he "believed" he received discipline resulting from this incident and he "didn't know if it was three days [suspension] or whatever." He thinks it may have been more than three days, but was not sure (1T107-1T108). There is no independent evidence in the record to support Fiorello's claim that he was suspended nor is there any evidence that he was not counseled. Therefore, I find that Fiorello did not received a three day suspension from Palise in this incident.

plant, near the DOT regional office in Howell (2T30).^{10/} Feher reported this to Palise after he checked Fiorello's timesheet (2T30). The sheet reflected an hour of overtime in the same time slot in which Feher saw Fiorello away from his assignment (2T29-2T30).

17. Upon receiving this report from Feher, Palise conducted an investigation and brought charges against Fiorello (1T37; 2T30). Palise reprimanded Fiorello through a written warning^{11/} (2T30). Palise did not impose harsher discipline because he was new to his supervisory position and was trying to act in a positive manner (2T30).

18. Due to the weather, the construction off-season occurs during the winter (1T41). During the winter of 1989, Fiorello, and co-worker Sidney Reed, had a non-construction assignment helping to complete a sign inventory (1T41). Quick completion of this project was necessary to meet a contract requirement (CP-1; 1T41). After the project was done, George Marr, principal engineer, Bureau of Maintenance Support, wrote a May 5, 1989 memo to Joseph Szucsik,

^{10/} Fiorello asserts that he was at the plant, but not near the phone (1T36; 1T37). Fiorello also claims that he spoke to the resident engineer at the plant during this time period. It is not necessary for me to determine Fiorello's whereabouts because it is not relevant to this charge.

^{11/} I do not credit Fiorello's testimony that he got a three or four day suspension (1T100-1T101). Nothing in the record documents these claims. Additionally, when first asked whether he was disciplined, Fiorello testified that "I was reprimanded; I really don't recall how" (1T37).

Assistant Coordinator, Winter Program, about the Winter Assignment Personnel. Marr commended Fiorello and Reed for having put in extra time and effort, although they knew that they would not receive overtime compensation. Marr wrote that "without this extra effort, the project would not have been completed on time." (1T41; CP-1). Reed and Fiorello were given CP-1 and a copy was sent to Palise (1T41; CP-1). Fiorello does not know if CP-1 is in his personnel file (1T41).

19. Fiorello became an IFPTE shop steward in 1989 and has continued to serve in that position (1T75). His duties include representing co-workers in the titles of tech III, IV and V in grievances (1T75; 2T40). His grievance district includes employees in security and at the main DOT building in Trenton (1T75). When necessary, he files grievances with the unit manager supervising the employee involved because techs work in many bureaus (2T40). Most of Fiorello's grievances involve employees in security in the main building (1T75). Grievances filed on behalf of security employees do not involve Palise (1T76).

20. Palise knows that Fiorello is involved with union activity (2T39). Palise has released Fiorello from work to participate in hearings and other union activities (2T40). Since Fiorello has worked with Palise, Fiorello has never heard Palise make any direct anti-union remarks (1T89).

21. When Palise was first assigned to his unit, he had to reassign resources (2T45). Palise took DOT vehicles away from the

Plant Inspection Division and assigned them to the Project Inspection Division (2T44-2T45). Although he felt that everyone, because of their travel requirements, should be assigned a DOT vehicle, he had a limited budget so he placed vehicles where he felt they were most appropriate (2T48). Project inspection tasks required utility vehicles to transport equipment like nuclear gauges around rugged job conditions (2T44-2T45). Most vehicles were already assigned to job site inspections, but several were still assigned to plant inspectors (2T45). Palise gave plant inspectors three months notice prior to the transfer or allowed the affected employees to go with the vehicle to job site inspections (2T45-2T46). Palise gave employees plenty of time because he did not want to "cause any undue hardship for them" (2T46).

22. Fiorello and Bohl filed a group grievance in response to Palise's decision to reassign vehicles in 1989 (1T30; 1T78; 2T44). Fiorello acted as IFPTE shop steward on behalf of Bohl and himself (1T32). They wanted State vehicles to remain assigned to them instead of receiving a fee for mileage reimbursement for using their own cars (1T79; 2T44; 2T46). They were willing to take whatever vehicles the DOT would provide (1T65).

23. Palise denied the grievance and it was further denied by DOT hearing officer Al Purnell (1T31; 1T78; 2T44). The Union further discussed the matter with "higher ups" and was told that "it would be looked into" (1T78-1T79). However, the grievance was never resolved favorably for Fiorello and Bohl and they were never

assigned DOT vehicles (1T79). Palise testified that this subject has been a "running battle" between labor and management since the first grievance (2T46).

24. In 1990, Fiorello held the position of engineering aide I which was reclassified to a tech IV (1T57). Fiorello was on the promotional list for a tech III position when it became available (1T58). Palise made his promotion selection from among three eligible employees (1T57-1T59). He promoted Fiorello and congratulated him on his promotion^{12/} (1T57-1T59; 1T97).

25. Tech III duties are described in the New Jersey Department of Personnel job description (J-2; 1T10). The description states, in part:

Under the general supervision of an engineer or higher level technician in the Department of Transportation, performs technically complex work related to the inspection of road and bridge construction which includes testing the quality of electrical, landscaping or construction materials and/or work for compliance with plans and specifications; and gathers information concerning contractor compliance with EEO and safety requirements; or (B) performs complex investigations and inspection work required in connection with permits and inventories involving the use of State highway right of way; does related work as required.

12/ Fiorello testified that Palise "had to" pick Fiorello and did so "halfheartedly" (1T58). Fiorello stated that Palise had to put aside the ill feelings and personal animus Palise felt toward him when he picked him for the promotion (1T57-1T58; 1T97). Fiorello testified that Palise gave him "cosmetic congratulations", but "in his true spirit" he was being false (1T58-1T59). However, there is no evidence in the record to support any of Fiorello's accusations. I credit Fiorello's assertion only to the extent that they represent Fiorello's mental impressions but not as evidence of hostility.

26. Tech IIIs may work alone or with other techs (1T29). If a tech III is working with a tech II, the tech II is the lead employee, although they both perform the same inspection duties (1T19-1T20). Techs make sure that a supplier adheres to State specifications and uses State specified materials in the material mix (1T29). Tech IIIs check asphalt production (1T29). Techs may also go to a concrete plant to check a State or Federal job (1T29). Fiorello travels throughout his assigned DOT region to perform his duties (1T30). From January to March, tech IIIs work in a field office because inclement weather precludes construction (1T30). Office duties may include completing paperwork and picking up samples (1T30).

27. Sometime in 1990, Fiorello was reprimanded for leaving his assignment^{13/} (2T80). The discipline against Fiorello was sustained.^{14/}

28. In 1990, Fiorello was granted permanent status as a certified asphalt technologist (1T42). Fiorello received notification of this status in a letter from officers of the New Jersey Society of Asphalt Technologists headquartered in Trenton (CP-2; 1T42-1T44). Fiorello achieved this certification after completing mandatory course work, initial training, passing two

^{13/} Palise could not recall when this incident occurred but was sure this incident was different from the one described in Fact Nos. 16 and 17.

^{14/} The record does not provide a detailed description of this incident. The incident was not refuted on cross-examination.

examinations and further training (1T42; 1T91). The certification indicates that the technologist is responsible for ensuring the asphalt material which he has evaluated complies with governing specifications. He is also considered capable and qualified to make adjustments in a mixture as necessary. The Society encouraged continued educational efforts so that technologists can maintain their expertise (CP-2).

29. In 1990, Fiorello and another tech III, Jim Bohl, were assigned to a plant owned by Trap Rock Industries (2T73-2T76). During this assignment, documents they prepared were found to be incorrect (2T75). Their supervisor, Steve Tripani, brought the problem with the documents to the supervisor of the plants section, Sal Noto, who advised Palise (2T75-2T76). Palise's investigation resulted in disciplinary charges being brought against Bohl and Fiorello for neglect of duty and falsification of documents (2T73; 2T75). Fiorello received a three day suspension, which he appealed. The suspension was reduced to one day (2T75). Fiorello, then on probation in his new tech III position, also had his probationary period extended for three months (2T73-2T74). Bohl was also disciplined^{15/} (2T76).

30. In or about 1990, Palise also tested material samples prepared under Fiorello's responsibility from Trap Rock Industries (1T105). The results of the inspected material indicated that

^{15/} Nothing in the record describes Bohl's discipline.

Fiorello had completed his inspection duties properly (1T105). Fiorello does not know who initiated the inspection or why the inspection occurred. Inspections are often conducted if something does not "look right" or if the "ridability" of the road is bad (1T106).

31. Fiorello received his first Performance Assessment Review (PAR) as a Region III tech III for the rating period of May 19, 1990 through February 28, 1991^{16/} (R-7; 2T60; 2T98). Fiorello was transferred to Projects on November 2, 1990 so his reviewer, Sal Noto, gave him a final rating and closed out the PAR in November, 1990 (R-7). He received a 3 rating and a comment that his work had been satisfactory. Fiorello checked the "agree" box and signed his PAR in February, 1991. Noto signed the PAR in March, 1991 (2T60; R-7).

32. In November 1990, Fiorello was transferred by Palise to projects from plant inspection^{17/} (1T34). Fiorello described the transfer as an "insulting injurious move" because it was to an inactive project (1T34). Further, he did not feel like he was doing what he was trained to do and he felt "his self esteem was shattered" (1T34). Fiorello grieved the transfer (1T32; 1T34; 2T44).

16/ The ratings for a PAR are 1 - significantly above standard; 2 - moderately above standard; 3 - standard; 4 - marginally below standard; and 5 - significantly below standard (2T61).

17/ Fiorello testified that he was transferred in "approximately 1991" (1T34). R-7 clearly says the transfer occurred in November 1990, but that the transfer lasted through 1991 (1T34).

33. Palise indicated on the grievance form that Fiorello was transferred so that he could get a broad level of experience so he could successfully pass future promotional examinations. Further, with Fiorello assigned to a new job, Palise wanted them (Palise and Fiorello) to have a new, positive working experience (2T77-2T78). The transfer was sustained by a hearing officer so Fiorello remained in projects (1T34; 2T77).

34. Within the year, Fiorello developed an allergy on his hands from exposure to wet cement (1T34; 2T77). Various medical treatments were tried, but none were successful so, upon the orders of a DOT doctor, Palise assigned Fiorello back to plant inspection (1T34; 2T77). Palise felt "frustrated" because Fiorello had not had the opportunity to expand his experience level, but he was not resentful that Fiorello filed a grievance (2T77-2T79). Palise believed that this transfer was a negative experience for Fiorello because of the medical situation and the grievance (2T78).

35. Fiorello received his next PAR as a Region III tech III for the period July 15, 1991 through February 29, 1992 (R-6; 2T58-2T59). Fiorello received a final rating of a 2 from Tripani on March 11, 1992, who also wrote that "Mr. Fiorello's performance since the transfer from projects to plants has been above standard" (R-6). Fiorello checked the "agree" box and signed the PAR that same day.

36. The next year, Fiorello received a PAR for the rating period of March 1, 1992 through February 28, 1993 (CP-5; 1T45;

2T57). The PAR covers an eleven month period because Fiorello's immediate supervisor changed from Tripani to Frank Feher (2T58).

37. Fiorello received a six-month interim rating of 2 from Tripani, who was his immediate supervisor on September 21, 1992 (1T46; 2T57). Tripani wrote that "Fiorello frequently exceeds job standards by his working performance" and that he should "attend training classes as they become available" (CP-5). Fiorello received a 2 rating on his final PAR for this period on February 9, 1993 with these remarks added: "Fiorello continues to exceed his job standard by his work performance on the job" and that he should continue to "update his training" (CP-5). Fiorello signed the PAR on February 9, 1993. Tripani signed the PAR on January 13, 1993 when his supervision of Fiorello ended (2T58).

38. At the end of 1992 and lasting into 1993, a medical condition required Fiorello to request a medical leave of absence (1T67-1T68). Palise approved his leave request without any objection (1T68). The leave lasted approximately three months. While Fiorello was out, his work was covered and when he returned, he did not have to make any special effort to "get back on track" (1T68-1T69). Fiorello testified that Palise "had to approve" the leave and "couldn't fight him on it" (1T68). The parties' collective agreement states at Article XXXII, E., that "[a]ll sick leave is subject to approval by the appointing authority and, where appropriate, to approval by the Department of Personnel" (J-1).

39. In 1993, Fiorello had a co-worker named Frank Terranova (1T35-1T36). Both employees were supervised by Palise (1T35; 1T80). Palise disciplined Terranova as the result of a volatile situation^{18/} (1T35; 1T80-1T82; 2T41-2T42). Fiorello represented Terranova as his shop steward in a grievance hearing on the disciplinary action (1T35; 1T80-1T82; 2T42). It was a complicated and emotional case in which Fiorello had to make every effort to keep the grievant calm (1T82-1T83; 2T43). Despite Fiorello's efforts, the Union did not prevail in the hearing and Terranova's discipline was sustained (1T83; 2T42). After the grievance hearing, Palise told Fiorello that he did a good job handling the hearing and keeping everyone, including the grievant, and management, calm (1T35; 1T83; 2T43; 2T83-2T84). Palise "was very impressed" with Fiorello's handling of the situation and said that Fiorello had a "calming effect on this whole affair" (2T43). Fiorello also felt he did a good job (1T83). Fiorello testified that he did not think Palise held it against him that he represented Terranova because he knew it was his (Fiorello's) job (1T83). After the grievance, Palise never again commented about this case to Fiorello (1T83-1T84).

40. In March 1993, Fiorello received a PAR as a Region III tech III for the period March 1, 1992 through February 28, 1993, the same period as on CP-5 (CP-6; 1T47; 2T57-2T58). However, it only

^{18/} Why Terranova was disciplined is not relevant to this proceeding.

covers the month of March 1993 and was prepared because of a change in immediate supervisor from Tripani to Feher (2T58).

41. The PAR was issued by Frank Feher on March 11, 1993; Fiorello signed it the same date (CP-6). Fiorello checked the "agree" box on the PAR. He received a final rating of 1 and remarks on the PAR state:

Based on the fact that Bob continually exceeds his job standards, is knowledgeable in Portland cement concrete inspection and testing, bituminous concrete inspection and testing and soil aggregate testing and has helped on special assignments, his final rating is significantly above standards.

His final development plan included "[t]o continue to receive training to broaden his field of expertise."

42. Sometime in 1993, Fiorello received a 30 year service award as a state employee (1T99). At the presentation in the main building, Palise complimented Fiorello indicating in his remarks that "Bob's good. Whenever we need him, he's reliable" (1T99). This was one time Fiorello could recall that Palise made a positive statement to him about non-union activities (1T99-1T100).

43. In 1993, Fiorello was preparing information for his resume for an advanced position (1T39; 1T54). He asked his immediate supervisor, Sal Noto, for permission to review his personnel file in Region III headquarters in Freehold. Noto granted Fiorello's request (1T39; 1T49-1T50; 2T62).

44. Region III personnel files are currently kept in a separate room in a locked file cabinet.^{19/} They are considered part of Palise's general files and are different from his project files (1T50; 2T62). Palise adds documents to the personnel files, but does not remove documents. Documents remain in the file until the employee retires (1T50; 2T64). Personnel files are also kept in the Human Resources office in Trenton, but Fiorello did not go to the central DOT office to look at his file (1T49-1T50; 1T55-1T56). Once before, he had tried to get information from the Trenton office, but, since he was not successful, he did not try again (1T56).

45. In 1993, Fiorello reviewed his personnel file in the Region III office (1T39-1T40; 1T50-1T51; 1T55). This was only the second time Fiorello looked in his file since 1980; employees do not often review their files (1T50-1T51; 1T55; 2T65). Normally files are accessible to an employee or a supervisor after asking Palise's secretary for assistance (2T65).

46. Fiorello was looking for a specific two page report sent to the DOT from the Federal DOT (1T51; 1T53). Fiorello and another inspector were favorably mentioned in the report resulting from their work in a federal investigation at a plant sometime in 1978, 1979 or 1980^{20/} (1T39-1T40; 1T51-1T55). The report was not

^{19/} In 1987, the location of the Region III headquarters changed. Prior to 1987, the files were not kept locked (2T64).

^{20/} Fiorello could not specifically recall when this happened, although he admits that it was a while ago (1T40; 1T54).

sent to Fiorello, nor was he copied on the report (1T51-1T52). Fiorello saw the report because someone had shown it to him and had given him a copy of it (1T52-1T53).

47. Investigations and project reviews are done by the Federal government on state projects (2T62). Palise files these reports in the respective project file (2T62-2T63). Reports with favorable or negative comments do not necessarily go into an employee's personnel file (2T63). Palise might write a note on the report to the supervisor(s) or employee(s) involved acknowledging their work (2T63). If he writes a separate memo commending the employee(s), it would go into their personnel file (2T63).

48. Fiorello reviewed his personnel file and did not find the report about the favorable investigation (1T40; 1T55). He questioned Palise about the absence of the report (1T40). Palise asked Fiorello when the report occurred and Fiorello responded a while ago. Fiorello thought everything was retained in his personnel file^{21/} (1T40). Palise advised Fiorello not to be alarmed about it since it was a while ago, perhaps even before Palise worked in Region III headquarters. Fiorello was unhappy with Palise's attitude that the absence of the report was unimportant (1T40; 1T56; 1T57). Fiorello had lost his personal copy of the report.

21/ Palise testified that he could not recall anything about this incident, however agreed that Fiorello might have been involved in an investigation with the Federal DOT (2T62; 2T64).

49. In June 1993, Fiorello received his tech III PAR (CP-4, 1T46-1T47; 2T55-2T56). Although the rating period indicates it was to be from March 1, 1993 through February 28, 1994, it actually covers a three month period from March 1, 1993 to June 25, 1993 because Fiorello's supervisor changed (2T54-2T56). Feher retired at the end of June 1993 and Tripani became Fiorello's supervisor (CP-4; 2T55-2T56). Fiorello was rated by Feher on June 25, 1993 and Fiorello signed it that same day (1T46). Fiorello received a 1 as his final rating for this three month period (2T55).

50. Fiorello received another PAR as tech III for the period from July 1, 1993 through February 28, 1994 (CP-3; 1T45; 2T53; 2T55). Remarks in the October, 1993 interim assessment state: "[c]onsidering the job in its entirety, Mr. Fiorello has done an excellent job." Additionally, he should "update his training" (CP-3; 2T93). His interim rating was a 1 and he marked the "agree" box and signed it on October 13, 1993 (2T86; 2T93). He was rated by Tripani.

51. Fiorello received a final PAR on March 28, 1994 in which he received a rating of 1 with these remarks:

Since the changes in supervision have taken place, I have not had the opportunity to work with or supervise Mr. Fiorello. However, based on conversations with Mr. Fiorello's other supervisors and his performance in the past when I have worked with him, a rating has been given below (CP-3).

Fiorello signed the final PAR on March 28, 1994 agreeing with it (2T53). The supervisor rating him was John Panico (CP-3; 1T45-1T46).

52. In 1993, while still serving as shop steward, Fiorello became the IFPTE chapter president^{22/} (1T25-1T26).

53. Various training opportunities are available to DOT employees (1T27; 2T94-2T97). There are mandatory and discretionary training programs (1T27-1T28; 1T91-1T92; 2T94-2T96). Plant inspectors attend mandatory asphalt technology training and project staff attend mandatory concrete and soil testing training (1T27). Training received to become a certified asphalt technologist is mandatory (CP-2; 1T91). A two week mandatory training program is also required to become a plant technician (1T95). Some mandatory technical training occurs, usually in the winter, to reinforce employee duties (2T95-2T96). Examples of this include fire extinguisher and right to know trainings (1T28; 2T95).

54. Many optional courses are available to employees as discretionary training (1T27-1T28; 1T92; 2T95-2T97). Examples of discretionary courses have included the following: additive mixture training; asphalt maintenance course; maintenance course for maintenance equipment; maintaining paving machines and procedures course; computer course; additives course regarding asphalt, concrete and chemicals; managerial and supervisory training courses; civil service examination performance enhancement course and remedial math for technicians (1T27-1T28; 1T92; 1T94; 2T95-2T97).

^{22/} At the hearing on January 18, 1996, Fiorello testified that he had been chapter president for about three years, so I find that he became chapter president in or about 1993 (1T25).

55. Employees access training programs in several ways. Supervisors can recommend that an employee receive additional training in a developmental plan in a PAR (2T93-2T94; CP-3). Certain jobs require annual training (1T27-1T28; 2T95). Supervisory employees receive training geared towards their supervisory responsibilities (2T96). Management has recommended training for employees needing remedial math training or for those who have done poorly on civil service examinations (2T96-2T97). Employees may also express an interest in a particular training program (2T94-2T96). Palise determines which employees under his supervision receive training (1T27; 2T96). Palise encourages employees to be released from work for training which will improve their abilities on the job (2T96).

56. Training course lengths vary from a few hours to a two week session (1T95). Other training programs are available when Human Resources indicates they are offered or if a special need is demonstrated (2T95-2T97).

57. Fiorello has attended various training programs. The training to become a certified asphalt technologist was mandatory and so was the two week training he received to become a plant technician (1T91; 1T95). Fiorello has also taken two or three discretionary courses during the past three or four years including a course on maintenance equipment and a course on maintaining paving machines and procedures (1T28; 1T92-1T93). Although he considers them "few and far between," Fiorello has attended at least one

discretionary course per year during the past seventeen years (1T92-1T93; 1T96). Fiorello believes that he is entitled to attend more than one discretionary course per year (1T28; 1T93-1T96). Fiorello brought this to the attention of his immediate supervisor, Tripani, who said that he would see what he could do.^{23/} Fiorello never directly mentioned his desire for more training to Palise, however, he believes that since Palise has been Regional Director, he has not gotten his fair share of non-mandatory training (1T28-1T29; 1T94-1T95). Fiorello believes this is because he was involved in protected union activity (1T96).

58. DOT Region III has two separate divisions: the Bureau of Construction Operations and the Bureau of Materials Operations (1T115). In January 1994, Palise managed the Bureau of Materials Operations ("Materials") (1T18, 1T115; 2T6). Michael Gross, a higher level supervisor than Palise, managed the Bureau of Construction Operations (1T115; 2T9). In 1994, Fiorello was a tech III and continued to serve as the IFPTE chapter president (1T15-1T16; 1T25).

^{23/} Fiorello testified that other plant inspectors have received more non-mandatory training than him, but he equivocated so much in his responses to questions that I do not credit his testimony. As an example, when asked if Bill Young had more than two or three courses and what they were, Fiorello responded "possibly, yeah; I can't specify, but I believe he's had more; I believe so." He goes on to say "I'm talking on the average and whatever. I can't specify over the past 17 or 18 years."

59. In January 1994, two provisional tech II positions became available in Materials, Region III (1T16; 1T59; 1T114-1T115; 2T6; 2T98-2T99; 2T114). One position was in projects and the other in plant inspection (1T16; 1T59; 1T115).^{24/} This was a promotional opportunity for employees in the tech III title (1T115). The positions were provisional because they were pending a Department of Personnel (DOP) promotional examination. Palise was responsible for filling the two provisional positions (2T6-2T7). When test results came out, the promotional appointments would expire (1T72; 2T8).

60. The duties of a tech II are described in the DOP job description as follows:

Under the general direction of an engineer or other supervisor, performs one of the following functions: (A) supervises a unit engaged in activities related to the inspection of complex road and bridge construction which includes testing the quality of electrical, landscaping, or construction materials and/or work for compliance with plans and specifications; and gathers information concerned with contractor compliance with EEO and safety requirements; (B) supervises a unit engaged in activities related to permit application review, inspection of permit sites and/or controlling the use of State right of way; does related work as required.
[J-3]

Two additional pertinent examples indicate supervisory responsibilities:

As may be required, trains and supervises subordinates in the performance of their duties;

^{24/} Other tech II positions were posted as available for the Construction Unit.

Supervises the work operations and/or functional programs and has responsibility for employee evaluations and for effectively recommending the hiring, firing, promoting, demoting and/or disciplining of employees. [J-3]

The tech II and tech III perform many of the same job inspection duties; however, a tech III is supervised by a tech II (1T19-1T20). Tech IIs receive a higher annual salary than tech IIIs (1T23-1T24). Additionally, tech IIs are preferred for overtime opportunities because they can work without supervision. When selected for overtime work, tech IIs make more money because their hourly rate is higher than tech IIIs (1T24).

61. A job posting was prepared for the available provisional tech II positions by the Human Resources department (1T116-1T117). The posting was sent to all tech IIIs in the region (1T59; 1T116). Employees also received verbal notification of the vacancy from their supervisors (1T16). A job posting was also hung on a bulletin board (1T59). An eligible employee had to notify the Personnel/Human Resources office of their interest in the position (1T59-1T60). Employees also informed their immediate supervisor (1T60).

62. Fiorello was interested in the tech II position (1T17). He advised Human Resources (1T59-1T60). He also notified his immediate supervisor, Tech I Steve Tripani (1T17; 1T60). Fiorello did not notify Palise or Sal Noto, Tripani's supervisor, believing that Tripani would report up through "the proper channels" (1T17; 1T60). Other than notifying Tripani and Human Resources,

Fiorello did not do anything else to make his interest known because, "I thought my background, whatever, my experience would magnify itself without too much bravado on my part" (1T17).

63. Palise and Gross reviewed the responses to the posting received by Human Resources and decided to have everyone come to a meeting in the Region III headquarters conference room in Freehold. There, Palise and Gross explained the tech IIs job responsibilities (1T115-1T116; 1T118). A DOT memorandum dated January 4, 1994 was prepared by Personnel Administrator Lorraine Maher with a distribution list of all employees who had indicated interest in the job posting (R-1; 1T116-1T117; 1T128). The list was routed to 39 employees, including Fiorello, and copied to Palise and Gross (1T117; R-1). The text of R-1 advises employees that:

Interviews are being conducted by Mr. Gross and Mr. Palise for Tech II on Thursday, January 13, 1994 in the first floor conference room, Freehold Regional Headquarters located at Rt. 79 and Daniels Way, Freehold.

The interviews have been scheduled for 10:30 a.m. If you cannot be present for the scheduled interview, please call my office so that we may make other arrangements. Failure to report for your interview or contact my office will indicate that you are no longer interested in being considered for this position.

64. On January 5, 1994, Maher sent out a second DOT memorandum (R-2; 1T117-1T118, 1T128). The text of R-2 mirrors the text of R-1. It was distributed to two employees, Sahlin and Schaller, and copied to Palise and Gross (1T118). They had expressed interest in the job posting after Human Resources had prepared R-1 (1T117-1T118).

65. On January 13, 1994, Palise and Gross met in the Region III headquarters first floor conference room with all of the employees on the distribution list of R-1 and R-2 (1T118; 1T115-1T116; 2T9-2T10). First, Gross explained the responsibilities of the positions as well as the process that would be followed (1T118-1T119; 2T9). Then Gross and Palise talked about their individual units (2T9-2T10). Gross indicated that a questionnaire would be given to each employee on which they were to list their work experience (1T119; 2T10).

66. A two-page questionnaire was distributed to each employee in attendance (1T119; 2T10). The first page, prepared by Gross, involved construction experience (1T119; 2T10). The second page, prepared by Palise, involved materials, inspection and testing experience (1T119; 2T10). Employees filled out the pages of the questionnaire for the section in which they were interested. Employees interested in materials filled out the materials section only (1T120; 2T11). Fiorello completed the materials questionnaire^{25/} (R-3; 1T119-1T120; 1T128; 2T10-2T11). Approximately 7-9 employees expressed an interest in materials, including some tech IIIs already working in materials and a few from construction^{26/} (1T120; 2T11-2T12).

25/ Fiorello testified that he does not recall attending this meeting or completing the questionnaire (1T61-1T62).

26/ Palise did not recall the total number of employees interested in the positions, but he thought the majority were interested in construction (1T120-1T121).

67. During the group session, Palise took the completed questionnaires from employees who expressed an interest in the materials positions (1T122). He decided to only interview employees who indicated materials and inspection experience (1T62; 1T121-1T122; 2T11-2T13; 2T99). Gross interviewed employees interested in the construction positions (1T121).

68. Palise considered Fiorello eligible for an interview because he met the necessary experience standards (R-3; 1T122; 2T11). Fiorello indicated that he had two to four years of materials field testing experience, 28 years experience in plant inspection and testing and zero years in central lab. Further, he had 22 years of experience as an engineering aide I in materials and 2 years experience as a tech III in materials. Fiorello indicated that he had completed nuclear gauge safety and operations training given by the state police and DOT, and possessed a DOT certification. He also had other training and certifications including A.C.I., S.A.T., S.A.T. Asphalt Paving Construction tech and mix design^{27/} (R-3).

69. On January 13, Palise conducted the interviews allotting 20 minutes to one-half hour for each (1T20; 1T62-1T63; 1T122; 2T11-2T12). He took notes during each interview (1T122-1T123). He did not refer to the employees' completed R-3 forms during the interview (2T12-2T13). Palise followed the same

^{27/} These acronyms are not explained in the record.

interview process with each candidate (1T125; 2T12). When the candidate came in, Palise introduced himself and explained the job, reinforcing his remarks from the group meeting. Then he asked each candidate the same specific questions (1T123-1T124; 2T12). Palise also asked each employee if they had any questions or comments (1T124). Palise interviewed 12 candidates (2T17; R-5B).

70. Palise's interview of Fiorello lasted one-half hour (1T20-1T21). Palise told Fiorello that the purpose of the interview was to pick the best qualified person for the tech II position (1T21-1T22; 1T64). Palise advised Fiorello that the position was a provisional appointment (1T72). Fiorello responded to Palise's questions (1T21; 1T124). Palise took notes on Fiorello's answers (R-4; 1T123-1T125; 1T128; 2T13-2T14).

71. Palise asked Fiorello what qualified him for the provisional tech II position (1T19; 1T21; 1T63). Fiorello responded "I think my qualifications speak for themselves" (1T19). Fiorello explained his background included all phases of testing and noted that he was a lifetime asphalt technology technician (1T19). Palise told Fiorello that he was qualified and had the training courses and experience to become a provisional tech II (1T20; 1T26-1T28; 1T47-1T48; 1T64; 1T69; 1T99-1T100).

72. In response to Palise's questions, Fiorello made comments which Palise recorded in his notes^{28/} (R-4; 1T124-1T125;

^{28/} The record does not indicate what the questions were which elicited these responses.

2T13-2T16). Palise wrote notes saying "involved in work; willing to learn more; willing to teach others; likes what he does; brings a broad spectrum" (R-4; 1T124; 2T13-2T14).

73. Palise asked Fiorello if he would have any problems rating subordinates (2T14). Fiorello responded that he "has no problem rating others" (R-4; 1T124; 2T14). Fiorello added that he "could supervise because he has always worked easily under supervision; the record speaks for itself" (R-4; 2T15).

74. Palise asked all candidates, including Fiorello, "if you came on board and took this position, it would be either in projects at the project site level or in the plant level, which may be different from what your present experience is, would it be acceptable" (2T15). Fiorello responded yes and Palise noted "still interested in provisional appointment" (R-4; 1T124-1T125; 2T15).

75. Palise asked Fiorello, and the other candidates, for their last full PAR rating (1T125; 2T15-2T16). Fiorello responded "Rating 1" (1T125; 2T15-2T16). Palise ended the interview by telling Fiorello that he had more interviews to do (1T21-1T22). Fiorello was not told how or when he would be notified of a decision (1T22; 1T70).

76. During the interview, Palise made no reference to Fiorello's position as a union official, a shop steward, or as the representative of employees who had filed grievances (1T63). Palise did not make any off-hand remarks or jokes relating to Fiorello's union activity during the interview (1T63). Palise did not tell

Fiorello about which job aspects he was considering or that he was going to rate employees numerically (1T22; 1T72). Palise may have told Fiorello that other supervisors would give him input into the selection process^{29/} (1T22; 1T70).

77. Since Palise told Fiorello that he was qualified for the position, Fiorello felt confident during and after the interview that he would be selected (1T21; 1T48; 1T69). Fiorello testified that "he [Palise] did not leave me thinking or feeling that I would not get the position" (1T21). Fiorello discussed his interview with other employees. Fiorello and Sidney Reed spoke about their interviews (1T70). Reed felt that the selection "could go either way" but he was less confident of getting the position than Fiorello (1T70). Employees Fiorello spoke to indicated that Palise had told them "I didn't have this or I failed that" (1T69). Fiorello did not have any comments like that from Palise so he assumed "I had the credentials along with everything else for this provisional [position]" (1T69).

78. Palise interviewed 12 candidates for the two tech II positions in materials (2T17). Then, Palise selected five candidates based on their experience level and interviews for his final consideration (2T16). These final candidates were Robert Fiorello, Peter Maher, Sidney Reed, William Young and Matthew Smyth (R-5B; 2T17-2T19; R-5A). Only candidates with materials testing

^{29/} Fiorello testified that in decision making, Palise listens to others' opinions and then makes up his mind (1T71).

experience and currently assigned to Region III, materials, were given final consideration (2T16; R-5D; 2T24; R-5C; 2T27). The seven candidates excluded were those who did not meet Palise's criteria or no longer were interested (R-5D; 2T24; R-5C; 2T27).

79. Palise then decided to consult supervisors Glenn Gibbs and Sal Noto for their input and recommendations (2T16; 2T99; 2T104; 2T114-2T115). Palise told Gibbs who the five candidates were, that he had held interviews and that the candidates were going to be discussed in a meeting (2T121; 2T116; 2T115). Palise did not tell Noto who the candidates were prior to the meeting, but Noto knew that there were many people eligible (2T102). Palise asked Noto to bring his "knowledge of the personnel involved" to the meeting (2T102). While Gibbs cannot recall exactly what Palise said, he believes he was also asked to bring any information he knew about the candidates (2T116).

80. Glenn Gibbs is a DOT Region III principal engineer, materials (2T114). In January 1994, Gibbs supervised the plants section of the materials division (2T114; 2T100). Palise has supervised Gibbs for 16 years and has promoted him to various positions (2T121). Gibbs supervised two other supervisory employees; Steve Tripani and Lieu Stoetsel (2T117). Three of the final candidates, Fiorello, Young and Smyth, worked within Gibbs' jurisdiction in plants (2T116). Gibbs got information about Smyth from Stoetsel and information on Fiorello and Young from Tripani (2T117). Gibbs also knew the other two candidates, Reed and Maher (2T119).

81. Sal Noto is a DOT Region III principal engineer, materials (2T98). Palise supervises Noto (2T99-2T100). In January 1994, Noto supervised the projects section of the materials division (2T100). Noto supervised Reed and Maher (2T103). Noto was not supervising Fiorello at this time, however, during his career, Noto had been assigned to plants and had supervised Fiorello (2T105; 2T108). When Noto supervised Fiorello, Fiorello was a union representative (2T106-2T107). Noto never refused to excuse Fiorello for a day of union business leave (2T106-2T107). Noto knew that Fiorello had previously filed a grievance of his own, but Noto did not recall if he was involved in resolving it (2T106).

82. Palise's meeting with Noto and Gibbs lasted between thirty minutes and an hour (2T101; 2T117-2T118). They discussed all of the candidates for the provisional positions (2T101). Palise wanted their opinions as to who they would select (2T104). Palise advised Noto and Gibbs that the five candidates for final consideration were Fiorello, Young, Smyth, Reed and Maher (2T103). Palise did not express any preference for anyone (2T121). The two candidates selected for the provisional positions were chosen during the meeting (2T109).

83. Palise asked Gibbs who he thought was most qualified (2T108; 2T120). Gibbs gave his opinions about Young, Fiorello and Smyth, the three working in his section (2T37; 2T82; 2T107-2T108; 2T118). Gibbs heavily weighed the information provided from their supervisors and through his own experience (2T118). He was not

asked by Palise for information regarding Reed or Maher, nor did he offer it (2T118). Palise asked Gibbs to rate the three candidates (2T120). Gibbs placed the candidates in the following order: Young, Fiorello and Smyth (2T120). Gibbs preferred Young because he was the fastest, most "accurate and willing to learn" (2T88-2T89; 2T91).

84. Palise then presented the candidates to Noto. Noto was most concerned with getting one of the "projects" employees appointed to the projects position (2T104-2T105; 2T109-2T110; 2T119). Noto tried to convince Palise to select Reed since he was very qualified and had worked in projects for many years (2T105). Noto wanted his choice, Reed, and kept emphasizing that Gibbs should pick who he wanted in plants (2T106).

85. In his own mind, Noto considered Reed, Young, Fiorello and Maher and thought they could all have done the job (2T111). However, Noto thought selecting Young or Fiorello for projects could present problems (2T111). Noto did not know Young nor had Young worked in projects, so Noto felt Reed was better qualified than Young (2T110-2T112). Noto also considered Fiorello's prior medical problem with his hands and he did not want to "pick a man that can't be in the [plant]" (2T111-2T112). Noto also thought that if Young and Fiorello were selected, then none of the promotees would have a "projects" background (2T108). Noto may have participated in the discussion with Palise and Gibbs about Fiorello, but he was not sure if he expressed his opinion regarding whether Fiorello was qualified

for the plant position ((2T106; 2T112). At the end of the meeting, it was clear that Gibbs wanted Young, and Noto wanted Reed (2T109). Noto was happy because he had gotten who he wanted for projects (2T109; 2T113). Noto was not concerned about Fiorello and Young because he had gotten his preference (2T113).

86. After the individual interviews and discussions with Gibbs and Noto, Palise completed a two page status of interview form (2T16-2T17). This form is used to select candidates for provisional and permanent appointments (2T70). Palise must use the form to ensure minority candidates are not arbitrarily overlooked and that decisions are made objectively (2T70-2T71). There are no instructions or guidelines for its completion (2T71).

87. Palise completed a handwritten version of the form (R-5B; R-5D; 2T17; 2T20; 2T98) which his secretary later typed (R-5A; R-5C; 2T19; 2T98). R-5C is the typed version of R-5D and is a complete listing of factors used to evaluate candidates (2T20). Palise indicated that he completed 12 interviews (R-5A; R-5B; 2T17).

88. Beneath the candidate list on the Status of Interview form, Palise indicated that candidates 3 and 4 were selected (R-5A; R-5B; 2T19). A reason for selection or non-selection is indicated beside each candidate (R-5A; R-5B; 2T18-2T19). The reason for selecting Reed indicates "ranked second highest" (R-5A; R-5B; 2T19). The reason for selecting Young indicates "ranked highest" (2T19; R-5A; R-5B). The reason given for non-selection next to Fiorello, Maher and Smyth is "did not rank high enough" (2T18-2T19; R-5A; R-5B).

89. Palise reached his selection decision listed on R-5A and R-5B after evaluating the five final candidates in the categories listed on R-5D and R-5C. Palise wanted to select someone who would use the experience gained from the provisional promotion to become the permanent appointee after passing the DOT administered examination (2T71).

90. The only selection factor listed on R-5C and R-5D which Palise used was "job performance" (2T21).^{30/} Palise had no guidelines to follow as to which category to use for evaluating candidates; he used the factors which he felt best addressed his needs (2T71). Palise used three of the six subcategories listed within the "job performance" selection factor: rule compliance, production and other, which he made into understanding of job technology (2T22). He did not use safety, accuracy or interpersonal skills (R-5C; R-5D).

91. Within the "rule compliance" and "production" categories, a candidate could receive rating points of "1" - satisfactory; "2" - marginally above satisfactory and "3" - significantly above satisfactory. In the factor other/understanding of job technology, an employee could receive 1 point. The maximum

^{30/} Palise did not use the "test score" or "seniority" factors because he was only selecting for a provisional appointment (2T21; 2T67). Palise noted that most of the candidates had the same amount of seniority (2T69-2T70), but I find that Fiorello served longer as a tech III than Young (2T91). Palise also did not use the education/training factor (2T92; 2T21).

score a candidate could receive was a 7 (2T22-2T23). At the bottom of the page is an area for further comments (R-5D; R-5C).

92. In the rule compliance category, Palise established that to get 3 points, a candidate needed to have "no record of any type of problems relative to complying with rules ... [or] disciplinary problems or anything along that nature" (2T28). The problem areas which Palise considered were those which were in the employee's written record (2T36). Young and Smyth had no rule compliance incidents so Palise gave them each 3 points (2T26-2T28).

93. Reed received two points because Palise had experienced problems with him "relative to reporting to work on time, calling in and following rules relative to reporting his absences in a timely manner. He was disciplined" (2T28-2T29; R-5D; R-5C). Maher also received two points. Palise had similar problems with Maher in his previous work location and "even when Maher worked for me, he had problems coming to work on time" (2T29; R-5D; R-5C). Fiorello also received two points. Palise felt that "the experiences that [he] had with him relative to previous disciplinary infractions" were similar to Maher and Reed^{31/} (2T25; 2T29; 2T73-2T74).

94. Palise based his ratings in the production category primarily on the discussion he had with Gibbs and Noto (2T37; 2T52; 2T67-2T68; R-5C; R-5D). Palise also considered each candidate's PAR

^{31/} Fiorello's disciplinary history has been described above.

ratings for the period during which the candidate was a tech III (2T36; 2T52-2T53; 2T61; 2T66-2T68; 2T73). To Palise, PARs indicated people's efficiency on the job, although he recognized that they were somewhat subjective (2T53; 2T66).

95. Young received 3 points in the production category (R-5D; R-5C; 2T26; 2T37). Gibbs provided information about Young to Palise which Gibbs had gotten from Young's direct supervisor, Tripani (2T37; 2T81-2T83). Noto was not in a direct supervisory line with Young, nor did Young ever work in projects (2T83; 2T112). However, Noto expressed to Palise that he was aware of Young doing a good job (2T82). Gibbs and Noto told Palise that Young, compared to everybody else including Fiorello, was their first choice. They recommended Young because "he does the job fastest. I go in there and I don't have to remember, worry about checking the numbers; he is more aware of what is going on, he is more willing to learn than everybody else" (2T88-2T89). Young's willingness to learn and "attitude" were emphasized (2T91-2T92).

96. Palise also checked Young's PAR ratings (2T89). There were two PAR ratings considered by Palise (CP-7; CP-8; 2T91). CP-7 covers a period from June 15, 1992 to August 31, 1992 (2T89-2T91; 2T97). Young had a "3" rating because he had just been promoted from a tech IV to a tech III and had just changed to this new job (2T89-2T90). CP-8 is a PAR for the period August 1, 1992 to August 1, 1993 (2T90-2T91; 2T97; CP-8). Young received a final rating of "1" (2T91). Palise determined that Young had an average rating of

"1" for his time as a tech III, or at least, he considered Young's average to be higher than Fiorello's during his tenure as a tech III^{32/} (2T89-2T90).

97. Fiorello received 2 points from Palise in the production category (R-5D; R-5C; 2T25). Noto and Gibbs clearly had a preference for Young and Reed over everybody else, including Fiorello (2T88-2T89). Gibbs provided information about Fiorello which he got from Tripani, Fiorello's direct supervisor (2T38; 2T81; 2T83).

98. Palise also checked Fiorello's PAR ratings for the period during which he was a tech III (2T89). He had an average rating of "2" over the years (2T89; 2T60). Palise checked several PARs for Fiorello (CP-4; CP-5; CP-6; R-6; R-7; 2T55; 2T57; 2T58; 2T59; 2T60). On CP-4, CP-5, CP-6, R-6 and R-7, Fiorello was rated "1", "2", "1", "2", and "3", respectively. Palise did not consider CP-3 because it was not in Fiorello's file at the time of review^{33/} (2T54; 2T85-2T86).

99. Palise also did not consider Fiorello's duties as a shop steward and union activist (2T84). Palise did not consider Fiorello's calming effect in the Terranova grievance incident,

^{32/} Young served as a tech III for a shorter period of time than Fiorello (1T73-1T74; 2T91).

^{33/} Fiorello received a final rating of "1" on CP-3 which ran from July 1, 1993 - February 28, 1994 (2T54-2T56; 2T85-2T86). However, it was not completed until after the decision was made on the provisional appointments (2T86).

although he conceded that an "employee who is able to work and remain calm would be a positive factor in supervision" (2T84-2T85). Further, at the time of the promotion, Palise and Fiorello were not involved in anything "across the table" (2T40).

100. Palise also considered Reed, Smyth and Maher and checked their PARS^{34/} (2T61; 2T66-2T67). Since Reed was heavily recommended by Noto, Palise gave him 3 points in production (R-5D; R-5C; 2T26; 2T37; 2T81; 2T83). Smyth received 2 points in production (R-5D; R-5C; 2T38). Palise had independent knowledge about Smyth because he was working in Palise's office (2T38). Maher received 2 points in production (R-5D; R-5C). Noto provided information on Maher (2T38).

101. The third subcategory under job performance is understanding job technology (R-5C; R-5D; 2T22). Palise relied on his personal knowledge of each candidate as well as the forms which they completed indicating their materials experience and training levels (2T38; 2T92). An employee could score a "0" or a "1" (2T38). Fiorello, Reed and Young all received 1 point (2T39; 2T26; 2T25; 2T91-2T93). Maher and Smyth received a "0" because they were recently assigned to the unit from other areas and had minimal materials experience (2T39; 2T26-2T27).

102. After Palise rated the candidates, he totaled their scores (R-5C; R-5D; 2T25-2T27). Fiorello received 5 points; Maher

^{34/} No discussion of their PARS is included in the record.

received 4 points; Reed received 6 points; Young received 7 points and Smyth received 5 points (2T25-2T27). Palise decided to select Young and Reed for the provisional appointments (R-5B; R-5A; 2T27; 2T19).

103. Palise wrote a confidential memo to Personnel Administrator Lorraine Maher, on January 14, 1994, indicating his recommended selections for the provisional appointments. (R-5; 1T126; 2T6; 2T98). He attached the status of interview forms (R-5A; 1T126; R-5C; 2T6; 2T98).

104. The provisional appointments were offered to and accepted by Young and Reed (2T39). The appointments began at the end of February, 1994 (1T18).

105. After Fiorello learned of the appointments, he thought he should have been chosen instead of Young (1T74). He testified that "I was the most qualified guy to get that position through my knowledge, training, and my experience" (1T64). Fiorello characterized himself as "having been around and seen it all, that helps considerably in being an inspector" (1T64). "I thought I was, above and beyond, the number one qualified guy" (1T64). However, Fiorello did acknowledge that Young met the job qualifications of a tech III conceding that "maybe we're equal on paper, but not realistically" (1T74-1T75). Fiorello had been a tech III longer than Young and had more plant inspection experience. Young had previously been a construction repairer (1T73-1T74). Furthermore, Fiorello thought that he was not selected because of his union activity (1T65).

106. The provisional tech II appointments lasted from the end of February 1994 until December 1994 (1T23). Palise was involved in the selection process when a certified test list was issued by DOP and two permanent positions became available (2T8; 2T72). Palise conducted interviews (2T72). He made the selections based on the test scores and interest expressed by the employees (2T72-2T73). He did not consider seniority, education or training (2T22).

107. The two provisional appointees took the exam, but did not score highly (2T78-2T79). None of the people in Palise's unit, including Fiorello, scored high enough to be selected (2T79). Palise promoted two employees from outside of his unit, although he would have preferred to promote from within (2T79).

ANALYSIS

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as

pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the Commission to resolve.

IFPTE asserts that Palise denied Fiorello the provisional promotion to the position of tech II because of Fiorello's union activity and membership. In this case, there is no direct evidence of anti-union motivation. Fiorello confirms this in his testimony. When Fiorello was asked whether, since 1977, he has ever heard Palise make any anti-union remarks, Fiorello responded "no." Consequently, IFPTE must rely on circumstantial evidence to show that Fiorello's protected conduct was a substantial or motivating factor in Palise's decision not to promote Fiorello.

The evidence demonstrates that Fiorello has engaged in protected activity and that Palise knew of this activity. Palise has supervised Fiorello since 1977, and he testified that he was familiar with Fiorello's union activity. Fiorello's protected

activity began as far back as 1980 when he took a leave of absence to work for AFSCME, which Palise approved. In 1989, Fiorello became an IFPTE shop steward and continued to hold the position through 1993 when he became the IFPTE chapter president. As a union representative, Fiorello represented co-workers Wisdom, Bohl and Terranova in grievances challenging decisions made by Palise. Furthermore, he has filed his own grievances appealing disciplinary actions and transfers imposed by Palise.

However, the charging party must also prove that the employer was hostile toward the exercise of protected activity. I find no evidence of hostility.

IFPTE argues that Palise was hostile toward Fiorello because Fiorello won an arbitration victory in 1980 which challenged Palise's decision to transfer Fiorello from plants to projects. Timing can be an important factor in assessing motivation. City of Margate, H.E. No. 87-461, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶19183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). However, this incident happened 13 years ago, and, according to Fiorello's own testimony, Palise never mentioned the incident again. This incident is too remote in time, and the record contains no other evidence to support the notion that Palise harbored hostility toward Fiorello.

Moreover, in 1980, Palise granted Fiorello's request for a union leave of absence to work for AFSCME. Palise never mentioned

anything about this leave during it or after it. Fiorello's work was completed by others while he was on leave so that it would not be waiting for him upon his return.

When the SEA strike occurred in July 1980, Fiorello argues that Palise had an anti-union attitude toward the strike and that he would not honor the picket line. The evidence in the record proves otherwise. Palise was out of town on vacation during the strike, near neither a work area nor a picket line.

In the grievance situations in which Fiorello represented Wisdom and Terranova, both disciplines imposed by Palise were sustained, so he had no reason to be angry with Fiorello or hostile toward his exercise of his protected rights. Further, Palise never mentioned the Wisdom case after it was completed, over ten years ago. Additionally, in the Terranova case, Palise complimented Fiorello on what a good job he did handling a volatile grievant during the hearing.

Later, Fiorello filed his own two grievances, one involving discipline in the Trap Rock incident and the other involving his transfer to projects. Both times, Palise's decisions were sustained. Palise said he felt frustrated when Fiorello had to be transferred back to plants after developing a medical condition, but the frustration was because Fiorello was not getting the opportunity to expand his experiences. The record contains no evidence that Palise was resentful or hostile.

In 1990, Fiorello was promoted by Palise from a tech IV to a tech III. While Fiorello testified that "Palise had to do it" (1T57-1T58; 1T97), there is no evidence in the record to support that assertion. Further, a promotion is a positive acknowledgment of an employee's work, and, even assuming arguendo that Palise had to promote Fiorello, a promotion is not indicative of hostility.

The record is clear that the use of state vehicles in projects versus plants has been an ongoing issue throughout Palise's tenure as a supervisor. As early as Wisdom's grievance in 1980, plant inspectors have wanted state vehicles. Palise testified that he was frustrated by not having enough vehicles (2T46-2T48). However, nothing in the record indicates hostility directed toward Fiorello for his involvement in discussions or grievances about this ongoing problem. Further, whenever the matter was formally addressed in a grievance, Palise prevailed. Fiorello was treated the same as other tech IIIs in the "plants" section.

Fiorello asserts that Palise "had to" approve his request for a medical leave in 1992-1993. However, nothing supports this assertion in the record. The parties' collective agreement can be read to require employees seeking sick leaves to obtain prior approval, thus making such leaves optional.^{35/} The record supports that Palise behaved the same way toward this request for a

^{35/} I do not hold that sick leaves of absence are or are not optional. Such contract interpretations should be made through the negotiated grievance procedure. I merely find that Fiorello's assertion is not dispositive of the matter.

leave of absence as he did when Fiorello requested and was granted union leave in 1980. Fiorello's work was completed by others while he was out, and Palise never mentioned the leave afterward. Palise's behavior does not demonstrate hostility.

IFPTE argues the alleged removal of a report from Fiorello's personnel file complementing him in 1993 demonstrates hostility. However, there is no evidence in the record that Palise removed the report.

Finally, in the circumstances surrounding the interview of Fiorello and decision by Palise to fill the provisional positions, Palise never asked Fiorello about his union activities, nor is there any evidence to show that they were considered by Palise. Fiorello went through the same application process and was given the same opportunity for the position as all of the other eligible employees. Fiorello was interviewed, rated and discussed by all of the supervisors involved. Neither Gibbs nor Noto pressed for Fiorello's selection. There is no evidence, and no claim by the charging party, that either Gibbs or Noto were hostile toward union activity.

Therefore, based upon the evidence in this record, I find that Palise was not hostile toward Fiorello in his exercise of protected activity. Without proof of hostility, the charging party did not meet its burden under Bridgewater to support an inference that protected conduct was a substantial or motivating factor in Palise's provisional promotion decision. Consequently, I find that

the State did not violate section 5.4(a)(3) of the Act when Fiorello was not selected for promotion to the available provisional position.

IFPTE also alleges that the State violated sections 5.4(a)(1), (2) and (5) of the Act. IFPTE has not introduced any evidence showing that the State interfered with, restrained or coerced Fiorello in the exercise of the rights guaranteed to him by the Act. On the contrary, Fiorello has exercised his rights many times. Further, there is no evidence that the State dominated or interfered with the formation, existence, or administration of IFPTE, nor has the State refused to negotiate in good faith with IFPTE concerning terms and conditions of employment of employees in that unit, or refused to process grievances presented by IFPTE.

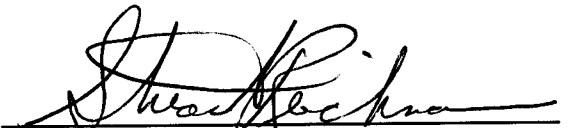
Accordingly, on the basis of the entire record and the analysis set forth above, I make the following:

Conclusions of Law

The State of New Jersey, Department of Transportation, did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (5) by denying Robert Fiorello a provisional promotion in February 1994.

Recommendations

I recommend that the Commission **ORDER** that the Complaint be dismissed.


Stuart Reichman
Hearing Examiner

Dated: August 23, 1996
Trenton, New Jersey