

P.E.R.C. NO. 84-142

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-83-335-25

PBA LOCAL NO. 98,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a Hearing Examiner's recommendations, finds that the Borough of Sayreville violated the New Jersey Employer-Employee Relations Act when it transferred two detectives to the uniformed patrol division because they filed a grievance demanding cash payment for overtime work and when it refused to negotiate over certain procedures in connection with employee appearances before an accident review board. The Commission ordered the Borough to rescind the transfers and to negotiate, upon demand, over procedures concerning the accident review board.

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PBA LOCAL NO. 98,

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Appearances:

For the Respondent, Robert A. Blanda, Esq.

For the Charging Party, Weinberg & Manoff, Esqs.
(Yale Manoff, of Counsel)

DECISION AND ORDER

On June 15, 1983, PBA Local No. 98 ("Local No. 98") filed an unfair practice charge against the Borough of Sayreville ("Borough") with the Public Employment Relations Commission. The charge alleged that the Borough violated subsections 5.4(a) (1), (3), and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. One count of the charge specifically alleged that the Borough discriminated against two detectives when it involuntarily transferred them to the uniformed

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; and (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."

patrol division, allegedly because of their insistence pursuant to the collective negotiations agreement on receiving cash payment for overtime work. Another count specifically alleged that the Borough refused to negotiate in good faith over certain procedures when it unilaterally established an accident review board for the purpose of determining whether employees should be disciplined for on-the-job automobile accidents.^{2/}

On July 28, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Borough then filed an Answer. It asserted that the two detectives were transferred for reasons of efficiency and as part of a routine and continued pattern of transfers involving different bureaus in the uniform and plain clothes sections. It also asserted that it had a managerial prerogative to set up an accident review board in order to discipline negligent employees.

On February 13, 14, and 15, 1984, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and presented exhibits concerning the allegedly illegal transfers. They also submitted stipulations and exhibits concerning the creation of the accident review board. The parties waived oral argument, but filed post-hearing briefs.

On April 10, 1984, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-53, 10 NJPER _____

^{2/} The charge also alleged that the Borough illegally demoted a detective Green; that allegation was later withdrawn. Further, the charge asserted that employees had been illegally denied representation at hearings before the accident review board; that allegation, however, was not litigated at the hearing.

(¶ _____ 1984). He found that the Borough illegally transferred the two detectives in retaliation for insisting upon their contractual right to overtime cash compensation and that the Borough illegally refused to negotiate disciplinary procedures concerning the implementation of the accident review board. He recommended an order requiring the rescission of the involuntary transfers; back pay for the amount of salary the two detectives lost; negotiations upon demand over disciplinary procedures; and the posting of a notice.

On April 26, 1984, the Borough filed exceptions. The Borough asserts that the transfers were not illegally motivated and were within its managerial prerogative to deploy officers as it sees fit. It also asserts that it should not be required to negotiate disciplinary review procedures for the accident review board until the present contract expires.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 7) are accurate except as specifically modified hereafter.^{3/}

^{3/} The Hearing Examiner found that there had been five or six involuntary transfers out of the detective bureau in the last five years and that the Chief testified that there had been 20 or more transfers, most of which were involuntary, out of the bureau in his 21 years as Chief. These figures appear to be too high in fixing the number of involuntary transfers as opposed to promotions and requests for transfers. The Chief himself emphasized that he was guessing and he could be wrong; further, his figures were for the division as a whole, including the identification, juvenile, and narcotics bureaus -- and not just the detective bureau. The sergeant in the detective bureau testified that there had been only one involuntary transfer from the bureau in the last 20 years. The captain in charge of the uniformed division testified that there had been many transfers out of the detective bureau into the uniformed division in the last 17 years, but could only think of two involuntary transfers.

(continued)

We first consider whether the Borough violated subsections 5.4(a)(1) and (3) when it transferred the two detectives into the uniformed division. Under all the circumstances of the case, we conclude it did.

The New Jersey Supreme Court has recently confirmed that this Commission has been using the proper legal standards for analyzing allegations that an employer has discriminated against an employee in order to discourage protected activity. In re Township of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), aff'g App. Div. No. A-859-81T2 (6/21/82), aff'g P.E.R.C. No. 82-3, 7 NJPER 600 (¶12267 1981) ("Bridgewater"). There, the Supreme Court, in affirming the Commission's determination that an employee had been illegally transferred and demoted, articulated these standards:

...Under that test, the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial

3/ (continued)

The captain in charge of the detective bureau testified that there had been no more than one or two involuntary transfers out of the detective bureau. The deputy chief testified that there had been only one or two involuntary transfers out of the detective bureau since 1977, one of which occurred because the employee was not doing his job and the other of which may in fact have been requested. No exhibits were presented documenting the incidence of involuntary transfers. Accordingly, we find that the number of involuntary transfers out of the detective bureau in the past five years was certainly no more than five or six and most probably less; in any event, involuntary transfers were sporadic rather than routine.

reason for the employer's action. [NLRB v. Transportation Management, ___ U.S. at ___, 113 LRRM 2857 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. Id.^{4/} (Slip opinion at pp. 9-10).

In the instant case, Local No. 98 established that the insistence of the two detectives upon their contractual right to cash payment for overtime work was a substantial and motivating factor in their involuntary transfers. The Borough and its agents

^{4/} These standards stem from Mount Healthy City Bd. of Ed. v. Doyle, 419 U.S. 274 (1977) and were first articulated in adjudicating questions of federal constitutional violations and remedies. The National Labor Relations Board, with the endorsement of the United States Supreme Court, then applied these standards in adjudicating unfair labor practice charges. Wright-line, Inc., 251 NLRB No. 159, 104 LRRM 1169 (1980), modified 661 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. 102 S.Ct. 1612 (1982) ("Wright-Line"); NLRB v. Transportation Management Corp., ___ U.S. ___, 113 LRRM 2857 (1983). At the same time, this Commission and the appellate courts of this State had adopted and were applying the Wright-Line standards. See East Orange; Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36, 37 (¶14017 1982); In re Logan Twp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd App. Div. No. A-696-82T2 (10/7/83). Bridgewater now confirms the applicability of the Wright-Line standards in the New Jersey public sector.

in the police department perceived a need to reduce the amount of money paid to employees taking overtime. The two detectives were consequently ordered to work overtime and take compensatory time off rather than be paid. The employees worked the overtime assignments, but refused to waive their contractual right to receive payment rather than additional time off. The Hearing Examiner credited, and so do we, direct testimony establishing that several of their superiors warned them that if they persisted in seeking payment, problems would result and they would probably be transferred. The Borough initially rejected the demand for overtime payment, but then complied with the contract. The transfers, however, followed hard on the heels of the overtime payment dispute.

After Local No. 98 established that retaliation against the detectives for their protected activity was a substantial and motivating factor, the burden shifted to the Borough to demonstrate by a preponderance of the evidence that it would have made the transfers even absent the protected activity. The Borough did not meet this burden. There is no dispute that both detectives had performed their jobs excellently for several years: 5 years in one case, 13 in the other. Their commanding officers in the bureau, when informed of the transfers, pleaded for their retention. The Hearing Examiner did not credit, nor do we, the Chief's vague explanation that the transfers were made to "change personnel" and were "necessary." The transfers were not part of a pattern of routinely transferring many or all employees into and out of various departments. Contrast In re Borough of Highland Park,

P.E.R.C. No. 83-27, 8 NJPER 556 (¶13255 1982). Instead, as the captain in charge of the detective bureau testified, the Chief had never advised him before these transfers of a desire to "try new men" in a particular bureau; and the transfers were in fact isolated and directly responsive in timing and motivation to the overtime payment controversy. Accordingly, under all the circumstances of this case, we conclude that the Borough would not have transferred these detectives if they had not asserted their contractual rights. Thus, we conclude that these transfers violated subsections 5.4(a)(1) and (3).^{5/}

We next consider whether the Borough violated subsections 5.4(a)(1) and (5) when it refused to negotiate over disciplinary review procedures concerning the accident review board. Under all the circumstances of this case, we conclude that it did.

Local No. 98 did not challenge, nor could it, the right of the Borough to determine that an accident review board should exist and should be empowered to recommend or mete out discipline. Local No. 98 instead asked that the Borough negotiate over certain procedural protections -- such as the right to a statement of charges before a hearing and representation during a hearing -- for officers who might be disciplined as a result of accident review board proceedings. These procedures were mandatorily

^{5/} The Borough has a managerial prerogative to make transfers in general, but it may not make transfers for reasons and motivations which the Act proscribes. Local 195, IFPTE v. State, 88 N.J. 393 (1982).

negotiable under N.J.S.A. 34:13A-5.3.^{6/} See In re City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983). Local No. 98 made this demand at the appropriate time: immediately after the Chief announced that the accident review board was being re-created in order to make recommendations concerning possible discipline of officers involved in accidents.^{7/} The Borough responded with a blanket refusal to negotiate any procedures. Given the Board's blanket refusal to negotiate over any mandatorily negotiable procedural proposals which Local No. 98 made at an appropriate time, we conclude that the Borough violated subsections 5.4(a)(1) and (5).^{8/}

We next consider the appropriate remedies for these violations. Neither party has excepted to the Hearing Examiner's

^{6/} We need not determine whether, as the charge alleged, officers involved in accidents were entitled to representation before the accident review board as a matter of law under the Weingarten doctrine. See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); In re East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Docket No. A-280-79 (6/18/80). The stipulations did not evidence any specific accident review board proceedings where there was a denial of representation. It suffices for purposes of this case to say that an employee representative's demand that the employer negotiate over possible representation is mandatorily negotiable.

^{7/} The Borough was not entitled to refuse to negotiate the procedures in question until the expiration of the parties' contract. N.J.S.A. 34:13A-5.3 requires public employers to negotiate over proposed new rules governing working conditions before they are established. In this case, the proper time for negotiation over procedural protections was before the start of any accident review proceedings considering the possibility of discipline.

^{8/} The Hearing Examiner specifically observed that it would be inappropriate for the Borough to insist upon the inclusion of Local No. 98's president upon the accident review board because of the apparent conflict of interest with unit employees subject to such proceedings which such placement would raise. We agree with this general precept, although we see no need to rule on the formal legality or negotiability of such placement at this time.

remedial recommendations. We believe they are reasonable and necessary to effectuate the purposes of the Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1 (1978). Accordingly, we enter the following order.

ORDER

A. The Borough of Sayreville must cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by transferring employees such as Michael O'Hara and Douglas H. Olsen from the detective bureau to the uniformed division because they applied for overtime payment under the agreement, or by refusing to negotiate with the PBA regarding disciplinary review procedures in the course of implementing an accident review board;

2. 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 the Act, particularly, by transferring employees such as Michael O'Hara and Douglas H. Olsen from the detective bureau to the uniformed division because they applied for overtime payment under the agreement; and

3. Upon demand, refusing to negotiate in good faith with the PBA regarding disciplinary review procedures in connection with the implementation of the accident review board.

B. The Borough must take the following affirmative action:

1. Forthwith rescind the involuntary transfers of Michael O'Hara and Douglas H. Olsen from the detective bureau

to the uniformed division and reinstate them to their former positions in the detective bureau;

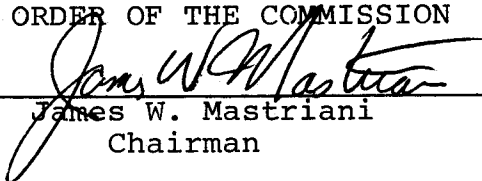
2. Forthwith make payment to O'Hara and Olsen of their \$250 annual stipend, calculated from the date of the involuntary transfers on February 28, 1983 together with interest at the rate of 12% annum since that date;

3. Upon demand, negotiate in good faith with the PBA regarding disciplinary procedures in connection with the implementation of the accident review board;

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provide by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Borough to insure that such notices are not altered, defaced or covered by other materials; and

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Borough has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hipp, Wenzler, Newbaker, Suskin and Butch voted for this decision. None opposed.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by transferring employees such as Michael O'Hara and Douglas H. Olsen from the detective bureau to the uniformed division because they applied for overtime payment under the agreement, or by refusing to negotiate with the PBA regarding disciplinary review procedures in the course of implementing an accident review board.

WE WILL NOT discriminate 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 the Act, particularly, by transferring employees such as Michael O'Hara and Douglas H. Olsen from the detective bureau to the uniformed division because they applied for overtime payment under the agreement.

WE WILL, upon demand, negotiate in good faith with the PBA regarding disciplinary review procedures in connection with the implementation of the accident review board.

WE WILL rescind the involuntary transfers of Michael O'Hara and Douglas H. Olsen from the detective bureau to the uniformed division and reinstate them to their former positions in the detective bureau.

WE WILL make payment to O'Hara and Olsen of their \$250 annual stipend, calculated from the date of the involuntary transfers

BOROUGH OF SAYREVILLE

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission,

429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

(Continued)

on February 28, 1983, together with interest at the rate of 12% annum since that date.

WE WILL upon demand, negotiate in good faith with the PBA regarding disciplinary procedures in connection with the implementation of the accident review board.

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

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent,

-and-

Docket No. CO-83-335-25

PBA LOCAL NO. 98,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it transferred Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division of the Respondent's Police Department because of their submission of vouchers for overtime under the collective negotiations agreement rather than the taking of compensatory time off. The Hearing Examiner, applying the "causation test" in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984), found that the seeking of overtime payment was a "substantial" or a "motivating" factor in the Borough's decision to transfer the two employees from the Detective Bureau to the Uniformed Division and that the Borough offered no legitimate justification for its action. The Hearing Examiner found that the Borough violated Subsections 5.4(a)(1) and (5) of the Act when it failed to negotiate with the PBA disciplinary review procedures as mandated in Section 5.3 of the Act. This was in connection with the establishment by the Borough of an Accident Review and Safety Board.

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.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

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-and-

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PBA LOCAL NO. 98,

Charging Party.

Appearances:

For the Borough of Sayreville
Robert A. Blanda, Esq.

For the Charging Party
Weinberg & Manoff, Esqs.
(Yale Manoff, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 15, 1983 by PBA Local No. 98 (hereinafter the "Charging Party" or the "PBA") alleging the Borough of Sayreville (hereinafter the "Respondent" or the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent: (1) beginning in January 1983, unilaterally established an Accident Review Board for the purpose of conducting hearings to determine whether disciplinary action should be taken against members of the PBA who have been involved in automobile accidents and, since the inception of the Board, members of the PBA have been compelled to participate in hearings without the right of representation, notwithstanding the disciplinary nature of the proceedings; and (2) in February 1983 discriminatorily transferred Michael O'Hara and Douglas Olsen from the Detective Bureau to Patrolmen in the uniformed division of the Respondent's Police Department because of their

refusal to take compensatory time off in lieu of filing for overtime pay under the collective negotiations agreement, which request for overtime pay by O'Hara and Olsen was ultimately honored by the Respondent; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 28, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on February 13, 14 and 15, 1984 in Newark, New Jersey,^{2/} at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by April 5, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

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

A third component of the Unfair Practice Charge, pertaining to the assignment of Ronald Green to the Juvenile Aid Bureau, was withdrawn at the hearing.

- 2/ The delay in the commencement of the hearing in this matter was due to discovery initiated by the Charging Party involving the production of documents. There was some difficulty in satisfying certain of the Charging Party's requests. Ultimately, all requested documents were obtained.

FINDINGS OF FACT

1. The Borough of Sayreville is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. PBA Local No. 98 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. There are two collective negotiations agreements between the parties, one covering a unit of patrolmen and the other covering a unit of superior officers. The agreement covering patrolmen is effective during the term January 1, 1982 through December 31, 1984 (J-1). This agreement provides in Article VIII, Hours of Work and Compensation, Section C, that time and one-half shall be paid for all hours worked in excess of eight hours in any 24-hour period (J-1, p. 17).
4. There are 72 employees in the Borough's Police Department, of whom 50 are uniformed. The Adult Division of the Detective Bureau (non-uniformed) consists of a Captain, a Sergeant and four plainclothes patrolmen, two of whom were, until February 1983, Michael O'Hara and Douglas H. Olsen. O'Hara has been a patrolman for 16 years and was assigned to the Detective Bureau from May 8, 1978 until February 28, 1983 (CP-5 and CP-6). Olsen has been a patrolman for 17 years and was assigned to the Detective Bureau from 1970 until February 28, 1983 (CP-4 and CP-7). Unlike patrolmen in the Uniformed Division, who work on a three-shift basis, those in the Detective Bureau work Mondays to Fridays on two-shift basis with weekends off. Also, those patrolmen assigned to the Detective Bureau receive an annual stipend of \$250. It was stipulated that O'Hara and Olsen have received written commendations as detectives and that neither their job performance nor efficiency had anything to do with the involuntary transfers that are the subject of this proceeding.

5. On January 27, 1983 the Captain of the Detective Bureau, Joseph A. Kilcomons, informed Detective Sergeant Edward Wodarczyk that there was to be a

"stakeout" at a store known as the Sayreville Sportsman on Friday, Saturday and

WITNESS for the Charging Party and

testified that he told Olsen and O'Hara to work Saturday or Sunday "day for day," meaning each man would take a compensatory day off. Wodarczyk said that Olsen and O'Hara "agreed." However, on the following day, Friday January 28th, Olsen and O'Hara said that they wanted to be paid overtime rather than take compensatory time, at which time Wodarczyk ordered Olsen to work the Saturday and O'Hara to work the Sunday. Wodarczyk issued a memorandum to this effect, which also covered others in the Detective Bureau, and which indicated that the patrolmen so assigned would have their "Choice day off" (CP-1).

6. Olsen and O'Hara each worked as scheduled on the stakeout over the weekend of January 29 and January 30, 1983. On January 31st Olsen and O'Hara each submitted vouchers for the payment of overtime for the day worked on the stakeout (CP-2 and CP-3). O'Hara testified that he had a conversation with Wodarczyk after the stakeout and Wodarczyk stated that if O'Hara filed for overtime there was going to be "trouble" and he would probably be transferred back to uniform (1 Tr. 27, 28). O'Hara said that Kilcomons stated the same thing regarding a transfer (1 Tr. 29). Olsen testified that at some point in an around the weekend in question Wodarczyk stated to him that if an overtime voucher was submitted there probably would be transfer to the Uniformed Division (1 Tr. 77). Olsen also testified that Wodarczyk and Kilcomons said to him that it would be "in my best interest" to withdraw the overtime voucher (1 Tr. 78). Wodarczyk, as a witness for the Charging Party, testified that he never said that there was going to be "trouble" regarding the matter of overtime and denied discussing with others what would happen if Olsen and O'Hara refused to take compensatory time. During the week of January 31st the overtime vouchers of O'Hara and Olsen were rejected by the Borough. However, when Olsen and O'Hara resubmitted them the Borough paid the overtime in due course. Olsen testified that when the vouchers were resubmitted Wodarczyk and Kilcomons again told Olsen that it was probable that he would be transferred back to the Uniformed Division (1 Tr. 92, 93). O'Hara testified that at about the same time Kilcomons said that it looked very much like

there was going to be a transfer (1 Tr. 29). Captain Ronald Connors, who is in charge of the Uniformed Division, did not deny the testimony of O'Hara that he, Connors, stated to O'Hara that he was probably going to be transferred if he "continue(d) with the vouchers" (1 Tr. 30). Acting Lieutenant Edward J. Boyler, a Charging Party witness, testified that Kilcomons indicated to him that he, Kilcomons, had told O'Hara and Olsen that if they didn't take compensatory time "they would be gone, they would be transferred" (2 Tr. 13). Raymond Suchciki, the President of the PBA, testified that he heard both Wodarczyk and Kilcomons indicate that there would be a "problem" if the vouchers for overtime were not withdrawn.^{3/} Wodarczyk denied that he heard Kilcomons say there would be "trouble" or that Olsen and O'Hara would be transferred.

7. As previously found, the transfers of Olsen and O'Hara from the Detective Bureau to the Uniformed Division were made by the Chief of Police, Raymond N. Sweeney, effective February 28, 1983, as set forth in a memo to each individual dated February 14, 1983 (CP-4 and CP-5). Chief Sweeney has held the position for 21 years and is responsible, inter alia, for the making of assignments within the Department. The Chief testified that there is no rank of "Detective" and this is supported by the Department of Civil Service, which issued a clarifying letter to the Borough under date of January 26, 1983 (R-1). In this letter Civil Service states that in any Police Department operating under Civil Service there is no class, title or rank of "Detective" and that any incumbent so assigned does not obtain permanency in the assignment and may at any time be returned to his permanent class title. The Chief testified further that in his 21 years there had been twenty (20) or more transfers in and out of the Detective Bureau, most which were involuntary, and were made by the Chief. Within the past five years there have been five or six involuntary transfers out of the Bureau. The Chief testified that the reason for the transfers of Olsen and O'Hara was to "change personnel," which he thought was necessary.

^{3/} Kilcomons, as a witness for the Respondent, did not deny the statements attributed to him, supra.

* * * *

8. On June 20, 1979 the Borough adopted an ordinance, which created an Accident Review and Safety Board (hereinafter the "Board") consisting of six members, three of whom were to be the Chief of Police, a superior officer with the rank of Lieutenant or above and the President of the PBA. The Board was granted certain powers, which include: the investigation of accidents involving borough employees and vehicles; the holding of hearings and meetings concerning the investigation of reported accidents where interested parties are given the opportunity to be heard before any determination is made as to whether an accident was preventable or non-preventable; and the making of written findings of fact and recommendations to the Governing Body for appropriate action within 40 days of the date of the accident. (See Stipulations, paragraph 1 and Exhibit "A").^{4/}

9. Prior to the adoption of the aforesaid ordinance, the PBA objected to its passage because the President of the PBA, as a member of the Board, might be required to recommend or mete out punishment. Assurances were made by the Borough that the purpose of the Board was to prevent accidents and not to fix fault or mete out punishment. (See Stipulations, paragraphs 2 and 3).

10. Under date of December 1, 1982 the Chief of Police directed his Deputy to recreate the Board so that it consisted of four members, three of whom being officers with the rank of Sergeant or higher and the President of the PBA. The directive to the Deputy also stated that the Board would determine the party at fault in an accident and make necessary recommendations to the Chief of Police as to whether or not disciplinary action should be taken "against the...officer." The PBA objected to the continued inclusion of the PBA President and the fixing of fault vis-a-vis disciplinary action (See Stipulations, paragraphs 4 and 5 and Exhibits "B" and "C").

^{4/} Counsel for the parties entered into certain post-hearing Stipulations covering the creation by the Borough of an Accident Review and Safety Board. Findings of Fact Nos. 8-11 are based upon these Stipulations.

11. On December 21, 1982 counsel for the Borough wrote to counsel for the PBA, citing City of Jersey City, 179 N.J. Super. 137 (App. Div. 1981) as authority for disciplining employees as a managerial prerogative of the Borough. Counsel for the PBA advised the Borough on December 23, 1982 that the PBA did not challenge the right of the Borough to mete out discipline, but, rather, the PBA challenged the procedures which the Borough was attempting to establish, citing the recent amendment to Section 5.3 of the Act by implication. (See Stipulations, paragraphs 6 and 7 and Exhibits "D" and "E").

THE ISSUES

1. Did the Respondent Borough violate Subsections(a)(1) and (3) of the Act when its Chief of Police involuntarily transferred Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division effective February 28, 1983?

2. Did the Respondent Borough violate Subsections(a)(1) and (5) of the Act when it unilaterally established and thereafter implemented an Accident Review and Safety Board without negotiations with the PBA?

DISCUSSION AND ANALYSIS

The Respondent Violated Subsections (a)(1) And (3) Of The Act When The Chief Of Police Transferred O'Hara And Olsen From The Detective Bureau To The Uniformed Division Effective February 28, 1983

The Charging Party alleges and has proven that the Respondent Borough was discriminatorily motivated by the action of its Chief of Police in transferring Olsen and O'Hara from the Detective Bureau to the Uniformed Division in the latter part of February 1983. The Hearing Examiner is persuaded that, notwithstanding the Chief's testimony that the transfers were merely to "change personnel," all of the surrounding circumstances, beginning with the weekend of the stakeout, indicate overwhelmingly that the reason for the transfer was the assertion by Olsen and O'Hara of their rights under the collective negotiations agreement. Thus, the Chief's stated

reason for the transfer was a mere pretext and a sham.

The Wright Line^{5/} analysis in "dual motive" cases was recently adopted by the New Jersey Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984).^{6/} First, by asserting a right to overtime under the agreement, Olsen and O'Hara were engaged in a protected activity under the Act: North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451, footnote 16, (1978), aff'd. App. Div. A-698-78 (1979). Further, the pursuit of this protected activity, wherein O'Hara and Olsen submitted a voucher for overtime, was a "substantial" or "motivating" factor in the Borough's decision to transfer them from the Detective Bureau to the Uniformed Division. The record is replete with statements by superior officers of the Borough's Police Department that there would be "trouble" and that Olsen and O'Hara would probably be transferred back to uniform if they filed for overtime (see Finding of Fact No. 6, supra). Only Sergeant Wodarczyk denied making the statement that there was going to be "trouble" regarding the matter of overtime. Even though Wodarczyk was called as a witness for the Charging Party, under which the Charging Party would normally be bound, the Hearing Examiner finds and concludes that there were so many witnesses for the Charging Party, who testified

^{5/} The National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) adopted the analytical test of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) in dual motive cases wherein the General Counsel (Charging Party) must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline (transfer); and once this is established, the employer has the burden of demonstrating that the same disciplinary action (transfer) would have taken place even in the absence of protected activity. The Wright Line-Mt. Healthy analysis was adopted by the Appellate Division in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981) and thereafter Wright Line was adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., ___ U.S. ___, 113 LRRM 2857 (1983).

^{6/} In Bridgewater the Court, in adopting the Wright Line analysis in dual motive cases, also approved East Orange Public Library. The Court was in agreement with both the Mt. Healthy analysis of the United States Supreme Court and its later decision adopting Wright Line in Transportation Mgt. Corp.

to the contrary, that the Hearing Examiner finds that the Charging Party has proven by a preponderance of the evidence that protected activity was a substantial or a motivating factor in the Chief's decision to transfer Olsen and O'Hara to the Uniformed Division.

The Charging Party having established a prima facie case under Wright Line-Mt Healthy, it remained for the Borough to demonstrate that the transfer of Olsen and O'Hara would have taken place even in the absence of their protected activity of asserting a right under the agreement. Unfortunately for the Borough, it did not begin to meet its burden of showing that the transfers would have taken place even in the absence of the submission by O'Hara and Olsen of vouchers for overtime. As noted above, it was the Chief of Police who made the decision to transfer. No other witness for the Respondent offered any reason for the transfer other than the Chief, whose testimony was that the transfers were made to "change personnel," a change which he thought was "necessary." Plainly, there had to be more to the Chief's decision to transfer than necessity for change. The reliance on the letter from Civil Service (R-1) that there is no such title as "Detective" is makeweight. It is noted that on the average there has been only one involuntary transfer out of the Detective Bureau per year in 21 years. The only inference that the Hearing Examiner can draw from the Respondent's evidence is that the Chief was miffed or piqued with O'Hara and Olsen for having the audacity to assert a right to overtime compensation under the agreement rather than take compensatory time as had been suggested by Wodarczyk and other superior officers, including Kilcomons.

For the foregoing reasons, the Hearing Examiner finds and concludes that the Respondent Board violated Subsection(a)(3), and derivatively Subsection(a)(1), of the Act by the action of the Chief of Police herein.

The Respondent Did Not Violate The Act When It Unilaterally Established An Accident Review And Safety Board Without Negotiations But, To The Extent That The Respondent Has Refused To Negotiate "Disciplinary Review Procedures" Under Section 5:3 Of The Act, then the Respondent Has Violated Subsections(a)(1) And (5) Of The Act.

The Commission long ago held that a public employer may establish an Internal Investigation Unit, which is analogous to the instant Accident Review and Safety Board, without collective negotiations as to the decision to establish: City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975). Since that decision there have been many cases decided by the New Jersey Supreme Court, which underline and reinforce the authority of a public employer to make decisions involving managerial prerogatives as to its method of operation and the discharge of its public function: See for example, the three-part analysis on negotiability set forth in IFPTE, Local 195 v. State of New Jersey, 88 N.J. 393, 403, 404 (1982).

In City of Trenton, supra, the employer created an Internal Investigation Unit in its Police Department to investigate alleged breaches of conduct by police employees. The unit was authorized, inter alia, to investigate referrals from the Mayor and the Director of Public Safety and allegations of criminal offenses, gross misconduct or neglect of duty. The Commission said: "We do not view...the decision to utilize a particular method of (investigation)... as constituting a term or condition of employment of its employees. As such, the employer's decision is not a required subject for collective negotiations..." (1 NJPER at 59).

The Hearing Examiner finds and concludes that the establishment of the Accident Review and Safety Board by the Borough is directly analogous to the establishment by the City of Trenton of its Internal Investigation Unit. Thus, the Borough herein was under no obligation to negotiate the decision to establish the Board.

* * * *

However, to the extent that the Board has undertaken to recommend to the

Chief of Police as to whether or not disciplinary action should be taken against an individual officer or officers, the Borough, upon demand, is obligated to negotiate disciplinary review procedures in accordance with the July 30, 1982 amendment to Section 5.3 of the Act.

Although there is no pertinent decision, to which the Hearing Examiner can refer, as authority for the foregoing proposition pertaining directly to discipline, he can refer to the 1982 decision of the New Jersey Supreme Court in Bethlehem Township Education Association v. Bethlehem Township Board of Education, 91 N.J. 38 where it was held that evaluation procedures are mandatorily negotiable whereas evaluation criteria are not. The 1982 amendment to Section 5.3 contains an express proviso that: "Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance." This is no more than a reflection of what the Supreme Court held in Bethlehem, supra.

The Charging Party raises the issue of representation before the Board when an employee is required to appear. Weingarten^{7/} is the law of this state in the public sector^{8/} and there should be no problem between the parties in applying it to matters that have come before the Board. The post-hearing Stipulations do not contain any facts upon which the Hearing Examiner can make a finding of a violation of Weingarten by the Borough in this case. The Charging Party's letter memorandum of April 4, 1984 appears to contain some alleged facts regarding individual discipline, which are not contained in the Stipulations, nor were litigated in this proceeding. Therefore, they will be disregarded.

One final matter which pertains to disciplinary procedure is whether or not the Borough can, on its own initiative, require that the PBA President, or his

^{7/} NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

^{8/} East Brunswick Board of Education v. East Brunswick Education Association, P.E.R.C. No. 80-31, 5 NJPER 398 (1979), aff'd. in part, rev'd. in part App. Div. Docket No. A-280-79 (1980).

designee, be a member of the Board. It appears to the Hearing Examiner that this is a negotiable item and, in the absence of agreement by the PBA, the Borough would illegally intervene in the internal affairs of the PBA if it unilaterally succeeded in placing the PBA President on the Board. The reason for this is that it would place the President in a serious conflict with the members of the unit that he represents, who might be the subject of disciplinary proceedings before the Board.

Accordingly, the Hearing Examiner finds and concludes that the Borough has violated Subsections(a)(1) and (5) of the Act by its failure to have negotiated with the Charging Party over disciplinary review procedures attendant to the implementation of the Accident Review and Safety Board.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when its Chief of Police involuntarily transferred Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division effective February 28, 1983.
2. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, after properly establishing an Accident Review and Safety Board, it failed to negotiate disciplinary review procedures with the PBA attendant to the implementation of the Board.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from transferring employees such as Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division because they applied for overtime payment under

the agreement, or by refusing to negotiate with the PBA regarding disciplinary review procedures in the course of implementing an Accident Review and Safety Board.

2. 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 the Act, particularly, by refraining from transferring employees such as Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division because they applied for overtime payment under the agreement.

3. Upon demand, refusing to negotiate in good faith with the PBA regarding disciplinary review procedures in connection with the implementation of the Accident Review and Safety Board.

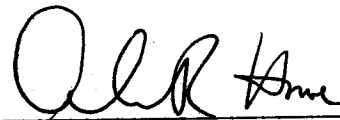
B. That the Respondent Borough take the following affirmative action:

1. Forthwith rescind the involuntary transfers of Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division and reinstate them to their former positions in the Detective Bureau. Further, forthwith make payment to O'Hara and Olsen of their \$250 annual stipend, calculated from the date of the involuntary transfers on February 28, 1983 together with interest at the rate of 12% annum since that date.

2. Upon demand, negotiate in good faith with the PBA regarding disciplinary review procedures in connection with the implementation of the Accident Review and Safety Board.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Borough to insure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Borough has taken to comply herewith.



Alan R. Howe
Hearing Examiner

Dated: April 10, 1984
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from transferring employees such as Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division because they applied for overtime payment under the agreement, or by refusing to negotiate with the PBA regarding disciplinary review procedures in the course of implementing an Accident Review and Safety Board.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise or the rights guaranteed to them by the Act, particularly, by refraining from transferring employees such as Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division because they applied for overtime payment under the agreement.

WE WILL, upon demand, negotiate in good faith with the PBA regarding disciplinary review procedures in connection with the implementation of the Accident Review and Safety Board.

WE WILL forthwith rescind the involuntary transfers of Michael O'Hara and Douglas H. Olsen from the Detective Bureau to the Uniformed Division and reinstate them to their former positions in the Detective Bureau. Further, we will forthwith make payment to O'Hara and Olsen of their \$250 annual stipend, calculated from the date of the involuntary transfers on February 28, 1983 together with interest at the rate of 12% annum since that date.

BOROUGH OF SAYREVILLE

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with
Chairman, Public Employment Relations Commission,
P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780