H.E. NO. 2006-2

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

In the Matter of

BOROUGH OF BLOOMINGDALE,

Respondent,

-and- Docket No. CO-2004-299

COMMUNICATIONS WORKERS OF
AMERICA AFL-CIO LOCAL 1030,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging a 5.4a(3) violation, namely that after an argument over a grievance, a supervisor falsely accused Charging Party's shop steward of taking a Borough lawn mower without permission and then terminated him. Charging Party asserted that the reasons advanced by the Borough for the termination were pretextual and that other similarly situated employees were not terminated. The Hearing Examiner found that Charging Party failed to satisfy the Bridgewater standards. In particular, she concluded that the decision-makers, the Mayor and Council, were not hostile to the shop stewards protected activities. The Hearing Examiner also concluded that the facts did not demonstrate that the shop steward was disparately treated from other employees because unlike these other employees, the shop steward had a disciplinary record including a recent major disciplinary action. Finally, the Hearing Examiner found no independent 5.4a(1) violation. She determined that the statements made by the supervisor during the grievance discussion were permissible under Black Horse Pike.

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

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Appearances:

For the Respondent, Struble, Ragno, Petrie, MacMahon & Cotroneo, P.C., attorneys (Joseph MacMahon, of counsel)

For the Charging Party, Weissman & Mintz, attorneys (James M. Cooney, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 25, 2004, the Communications Workers of America, AFL-CIO, Local 1032 (Charging Party or CWA) filed an unfair practice charge (C-1)[1/] against the Borough of Bloomingdale (Respondent or Borough). The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ "C" refers to Commission exhibits received into evidence at the hearing in this matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the hearing is referred to as "T".

34:13A-1 et seq., specifically, 5.4a(1) and (3)[2/] when the Borough terminated Assistant Shop Steward Raymond Bennett in retaliation for engaging in protected activities. Specifically, the charge alleges that Bennett and his supervisor, Joseph Luke, got into an argument over a grievance, and Luke falsely accused Bennett of stealing a Borough lawn mower. CWA contends that the termination arose out of Luke's union animus, and that the reasons advanced by the Borough for Bennett's termination were pretextual.

On October 19, 2004, a Complaint and Notice of Hearing issued (C-1). On December 15, 2004, the Borough filed its Answer (C-2), denying that it terminated Bennett in retaliation for the exercise of protected rights. It asserts a legitimate business justification for the termination.

A hearing was held on February 24, 2005. After several extension requests were granted to Charging Party, the parties filed post-hearing briefs by July 20, 2005. Based on the record in this matter, I make the following:

2/ These provisions 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."

FINDINGS OF FACT

1. The Borough of Bloomingdale is a public employer within the meaning of the Act. The Communications Workers of America AFL-CIO, Local 1032 is an employee representative within the meaning of the Act and represents a collective negotiations unit comprised of the Borough's blue collar employees in various titles, including mechanic, sanitation laborer, foreman, sanitation driver, road laborer, equipment operator and driver/laborer (R-3; T8-T9).

2. Raymond Bennett was hired by the Borough in June 1991 as a sanitation laborer in the Department of Public Works (DPW) (T18). His responsibilities included road work, garbage pick-up, recycling and lawn care (T19). At some point between 1995 and 1997, he transferred to the Borough's Water and Sewer Department as a water and sewer assistant where he remained for approximately four years until February 2001 (T19).[3/]

3. In February 2001 disciplinary charges stemming from allegations of an inappropriate relationship with another Borough employee were sustained against Bennett. As a result, the

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3/ Bennett testified that he transferred to the Water and Sewer Department in 1995 and left in 1999 (T19, T35). He also testified that he was transferred back to DPW in 2001 as a result of a disciplinary action against him when he was assigned to the Water and Sewer Department (T78-T79). I do not need to resolve this inconsistency. The start date in the Water and Sewer Department is immaterial. The fact that Bennett was disciplined in 2001 and the nature of that discipline is material and not disputed. [see fact no. 3]

Borough Administrator suspended Bennett without pay for five days, transferred him to DPW as an equipment operator, reduced his salary, required him to attend a conflict resolution/anger management seminar and prohibited him from any contact with the affected employee (T70, T73, T78-T79). The disciplinary report was placed in Bennett's personnel file, and he was cautioned that any future violations of Borough policy would result in further disciplinary action up to and including termination of employment (T79).

4. In 2003 Bennett served on the CWA negotiations committee. The parties' collective negotiations agreement was settled in March 2003 and is effective from January 1, 2002 through December 31, 2005 (R-3; T23). Additionally, in 2003 Bennett acted as assistant shop steward for CWA. Roy Figaro was and is the chief shop steward (T94, T98). One of Bennett's responsibilities as assistant shop steward was to process grievances (T23-T24).

5. On Wednesday, July 9, 2003, Joe Rogers, a mechanic and co-worker of Bennett's, filed a grievance with DPW Superintendent Joseph Luke, Bennett's immediate supervisor (R-8; T22, T35, T143).[4/] The grievance asserted a violation of the seniority

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4/ Although there is no testimony as to the specific days of the weeks when these events occurred, the dates were confirmed by Bennett's and Luke's testimony as well as exhibits. The order of events is consistent with their

(continued...)

provisions of the parties' collective agreement (R-3; T35). Specifically, Rogers contended that he had more seniority than Bennett due to Bennett's break in service when he left DPW to work in the Water and Sewer Department (T35).

Luke responded to the step 1 grievance on the day it was filed. He sustained it and restored Rogers' seniority over Bennett (R-8; T133-T134).

6. On Friday, July 11, 2003, Bennett learned about the Rogers grievance when he noticed that his time card had been moved (T34). Time cards are arranged by seniority (T35). He spoke to Figaro about it and reviewed the parties' collective agreement over the weekend (T35). Bennett concluded that Luke made the correct decision in sustaining the grievance and adjusting Rogers' seniority, but confronted Luke after the weekend and accused him of favoring Rogers and not treating Bennett and others equally regarding other issues like tardiness (T35-T36, T133-T136). In response, Luke told Bennett he felt like he was walking on egg shells around Bennett (T37, T42). Bennett related that during this conversation, Luke got angry, swore and kicked a chair (T35-T37).

4/ (...continued)
testimony. Therefore, in order to set the time frame of events, I take administrative notice of the days of the week on which the Rogers grievance was filed, the Ferris lawn mower was taken by Bennett, and Bennett and Luke argued over the grievance.

Luke disputed Bennett's description of the conversation. He did not recall using profanity or Bennett accusing him of playing favorites, and he denied kicking a chair (T135-T136). He admitted, however, that both he and Bennett were upset and described Bennett as being "heated" (T135-T136).

I credit Bennett's version of the conversation. Luke handles only two or three grievances a year (T143), and his inability to remember the details of this particular incident which admittedly upset him convinces me that Bennett's description more accurately depicts the actual events.

7. On Thursday July 10, 2003, the day before Bennett learned about the Rogers grievance, Bennett took the Borough's Ferris 48-inch lawn mower in order to mow his girl friend's lawn (T24, T28, T33). The lawn mower was a back-up mower since the Borough had recently purchased a newer, more advanced model (T26, T132-T133). This was not the first time Bennett had taken Borough equipment or this particular lawn mower for his personal use (T24, T27, T29).[5/] In these other situations, however, Bennett got permission from Luke, either before or after-the-fact, to borrow the equipment (T27). On this occasion Bennett

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5/ Bennett testified that he was not the only employee to take the Ferris mower for personal use. Another DPW employee, a mechanic, also previously used the Ferris mower to mow his girlfriend's lawn (T89). The record is devoid of any details regarding whether this employee had permission to use the mower and/or when the mower was returned. Therefore, I draw no inferences from this testimony.

did not get permission from Luke before taking the lawn mower, because at 3:00 p.m. there was no one around to ask permission to take it (T29-T30, T132).

According to Bennett, he intended to return the lawn mower on Monday or Tuesday after the weekend (T29-T30, T89). Bennett, however, never communicated that intention to Luke or anyone else in the Borough by getting authorization before or after-the-fact to borrow it nor did he return the mower (T47, T50-T53, T56, T65). Although it was common practice for DPW employees to borrow equipment for personal use, it was with permission, and the equipment was always returned (T25, T27, T95-T96, T126-T127).[6/]

Bennett's stated reasons for not returning the mower or getting Luke's authorization after-the-fact to use it are as follows: (1) the weather was inclement; (2) he had a falling out with his girl friend, left the mower at her house and was avoiding her; and (3) he was also avoiding Luke after their confrontation over the Rogers grievance (T30-T31, T49-T50, T55, T89).[7/]

6/ Figaro confirmed that he has borrowed Borough equipment but always with permission (T95).

7/ Bennett also testified that he did not return the lawn mower, because he was on vacation (T31). I do not credit this reason. Vacation records reveal that Bennett was not on vacation during the operative period between the time he took the mower and Luke received a phone call from Bennett's

(continued...)

8. On July 15, 2003, Luke learned the Ferris lawn mower was missing because he needed it for a job (T117). Luke asked Bennett if he had the mower or knew where it was (T37, T118, T133). Bennett lied to Luke and denied having the lawn mower. Bennett's professed reasons for lying to Luke are because Luke caught him off-guard at the end of his coffee break when he had other things on his mind, including his girl friend, and he did not want to get into another discussion with Luke about the Rogers grievance and was avoiding him (T37-T38, T49-T50, T53-T55, T118).

Also, Bennett never notified anyone else in the Borough that he had the lawn mower, because he and Figaro liked to handle problems in-house (T51-T52). Bennett especially did not want to go outside the Department and shed light on the common practice in DPW of borrowing Borough equipment for personal use, because the Borough's policy manual forbids such a practice even though Luke and previous supervisors permitted it (T25, T51).[8/]

7/ (...continued)
girl friend that she had the lawn mower and sent someone to retrieve it (R-6; T81-T83 T112-T113).

8/ On May 11, 2003 Bennett signed for and acknowledged receipt of the Borough's Personnel Policy Manual adopted by the governing body in 2002 (R-1, R-2; T59-T60). Section 3.12, paragraph A, entitled "Use of Borough Equipment and Supplies", states:

> Borough equipment and supplies assigned to employees are the responsibility of those

(continued...)

For all of these reasons, between July 15, 2003, when Luke first asked Bennett about the missing mower, and July 28, 2003, when Bennett's girl friend telephoned Luke to inform him she had it, Bennett did not return the lawn mower, did not tell anyone that he had it and lied to Luke when asked about the mower (T53-T56, T65).

9. On July 28, 2003, after Bennett learned that his girl friend had telephoned Luke to tell him that the mower was left at her house by Bennett, he called Luke (Bennett had begun his vacation that day) and offered to return the mower, but was told that Luke had already arranged for it to be retrieved (R-6; T32-T33, T38-T39, T42, T47-T49, T118-T119, T124, T129-T131).[9/]

At this point Bennett knew he was in trouble, because he was wrong to take the lawn mower without permission and to lie to Luke about having it, but hoped that Luke would take care of the problem in-house. Even though Bennett had lied to Luke, he felt Luke should have known that he intended to return the mower because Luke knew his character (T53-T54, T62, T68).

8/ (...continued)
> employees and are only to be used while performing officially authorized work-related duties and functions. Unauthorized use or removal of Borough equipment and/or supplies shall be cause for disciplinary action, including termination of employment (R-2).

9/ Bennett and his girlfriend had broken up shortly before she telephoned Luke (T32).

10. Sometime after Bennett returned from vacation on August 11, 2003, at the start of his shift (7:00 a.m.), two policemen handed Bennett a letter from Luke notifying him that he was charged with conduct unbecoming a public employee and that a hearing was scheduled for August 26, 2003 in Luke's office (R-5, R-6, R-7; T41). Specifically, Bennett was charged with taking a Borough lawn mower without permission on or about July 12, 2003[10/] and denying that he had the mower after being asked specifically on July 15, 2003 by Luke if he had the mower. The charge also set out that the lawn mower was retrieved only after Bennett's ex-girlfriend telephoned Luke that she had the mower and stated that her boyfriend was Raymond Bennett (R-7).

The letter further advised Bennett that at the conclusion of the hearing on August 26, 2003 Luke would make a written determination as to the truth of the charges and that if the charges were found to be true, Luke could impose punishment consisting of a warning, oral or written reprimand or suspension not to exceed five (5) working days. Finally, the letter advised that if the severity of the offense warranted greater punishment than Luke was authorized to impose, he would submit the charges to the Mayor and Borough Council for action (R-7). Bennett was also suspended with pay (T41-T42).

10/ In a subsequent factual finding it was determined that the lawn mower was actually taken on July 10, 2003 (CP-1).

11. About a week later, when Luke returned from his vacation, Bennett sat down with Luke and discussed the lawn mower incident. He told Luke that he (Bennett) was wrong and apologized (T39-T40, T61, T63-T64). Bennett explained to Luke that whatever punishment Luke administered he would support because Bennett knew that there were occasions in the past where the Mayor and Council found out about borrowed equipment and disciplined the employees (T39-T40, T42, T60).

Bennett, however, never considered that he would be terminated, because, in his experience, discipline for such acts ranged from no discipline to suspension, but never termination (T40). For instance, Bennett recalled one incident where during working hours and without authorization, two sanitation workers took a garbage truck to another community to collect garbage from a private business. A supervisor from the community notified Luke about the incident (T90, T97, T125). Luke referred the matter to the Borough Administrator for possible disciplinary action (T40, T125). Figaro represented the employees before the Mayor and Council. They had no prior disciplinary record (T96, T126). The employees apologized for their actions and received a letter of reprimand which was placed in their personnel files (T92, T97).[11/]

11/ Bennett testified that the employees were not disciplined, but Figaro testified that he represented the employees and (continued...)

In another incident, a parent of a DPW employee had a collapsed waterway on his property. On a Saturday, Luke, Bennett and other DPW employees, with the authorization of a councilman, used Borough equipment to clear the waterway (T91, T139). There was no discipline issued to Luke or the employees involved in this incident (T92).

Finally, Figaro noted that employees regularly work on their personal vehicles in the Borough's garage during work hours and with the knowledge of Luke with no resulting discipline (T99-T100).

Neither Bennett nor Figaro, however, knew of any circumstance where Borough equipment was borrowed for personal use without permission and not returned (T57, T63, T101-T102, T104-T106).

12. Luke described his relationship with Bennett before this incident as decent and, therefore, viewed this incident as unusual for Bennett (T121, T125, T138). For instance, Luke recalled that on one previous occasion when Luke noticed a mower was missing and asked Bennett about it, Bennett admitted he had the mower and was sent to retrieve it. There was no resultant discipline (T139).

11/ (...continued)
that they received a letter of reprimand (T92, T97). I credit Figaro's testimony since he was directly involved in the incident and there is no evidence on the record that Bennett participated in the representation of the employees.

Here, however, Luke concluded that Bennett's unusual behavior in lying to him on July 15 about the missing mower combined with his failure to bring it back demonstrated that Bennett had no intention of returning the lawn mower (T121-T123, T138, T141-T142). Indeed, Luke felt this was a police matter, but despite being instructed by the Borough Administrator to report the incident to the police, no formal charges were filed and it was handled solely as a disciplinary matter (T137).

Therefore, because of the serious nature of the lawn mower incident and the potential consequences, Luke referred the matter to the Borough Administrator and Mayor and Council. In particular, Luke concluded that due to his limited authority to suspend and his personal relationship with Bennett, he could not handle it in-house (R-7; T117, T127).[12/]

Once the matter was transferred to the governing body, Luke considered the matter to be out of his hands. Luke, however, did not believe Bennett would be terminated nor did he recommend termination or any other form of discipline when he transferred the matter (T117, T125, T128). Luke himself had never

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12/ The record is unclear as to Luke's ability to suspend employees. He testified that he had no authority to suspend but I infer from R-7 that he had the authority to suspend but not for longer than five days. In any event, this fact is immaterial because it is undisputed that Luke referred the matter to the Borough Administrator because, under the circumstances, he felt the matter might warrant discipline beyond his authority to administer (T117)

disciplined an employee for taking Borough equipment for personal use, but he had no experience dealing with this particular situation, namely where an employee took equipment for personal use without permission and not returned it (T140-T141).

Luke did not make the decision to terminate. That decision was made ultimately by the Mayor and Council (CP-1; T128-T129, T138).

13. On August 13, 2003, Bennett received a Notice of Pending Charge/Rice Notice from Borough Administrator Steven Ward notifying Bennett of the charges pending against him (CP-1). Specifically, Bennett was charged with "conduct unbecoming a public employee, violation of the personnel policy manual, theft of public property and other sufficient causes." (CP-1).

14. On September 30, 2003 Bennett attended an executive session of the governing body (CP-1; T143-T144). The Mayor and Council considered the charges against Bennett and the relevant facts. Based on these facts and Bennett's admissions that he removed the mower without permission or authorization and did not tell the truth about the mower when asked, Bennett was found guilty by the Mayor and Council of conduct unbecoming a public employee and notified by letter dated October 17, 2003 of their findings (CP-1).

The Mayor and Council also found that Bennett violated Section 3.12A of the Borough's Personnel Manual which prohibits

unauthorized use or removal of Borough equipment. The governing body further found that although Borough equipment had been borrowed by other employees, they had done so with permission and authorization from the appropriate supervisor. Unlike these employees, Bennett acknowledged that he did not ask for permission to remove the mower nor was he authorized to do so (CP-1).

For the enumerated reasons and considering Bennett's prior major disciplinary action, the Mayor and Council voted to terminate Bennett (CP-1). He was verbally notified at the September 30, 2003 Executive Session and in writing on October 17, 2003 of the Council's decision to terminate him (CP-1; T20, T46).

15. Later in October 2003 Bennett was hired by O'Connell Sports. He received an hourly wage of fifteen (15) dollars and worked a forty (40) hour week. Currently his hourly salary rate is seventeen (17) dollars. However, he receives no benefits (T85-T87).

ANALYSIS

Public employees and their majority representatives have a statutory right to negotiate terms and conditions of employment, to reduce the negotiated agreement to writing and to enforce it through negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of those rights violates the Act.

N.J.S.A. 34:13A-5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the Charging Party has proven, 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 unlawful motives 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 proven, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Here, Charging Party contends that Assistant Shop Steward Bennett was fired because his supervisor, Luke, was hostile to Bennett's union activity. Specifically, it asserts that Luke and Bennett got into an argument over a grievance filed by Bennett's co-worker, Joe Rogers. Although Bennett conceded that Luke's decision in granting the grievance was correct under the terms of the parties' collective agreement, Bennett accused Luke of favoring Rogers over other DPW employees which led to a heated discussion between the two. As a result of Luke's hostility toward Bennett arising from that argument, Charging Party contends the Borough used the lawn mower incident as a pretext for terminating Bennett - a punishment which far exceeded the crime Bennett was accused of perpetrating. In essence, Bennett admits that he borrowed a Borough lawn mower for personal use without permission, did not return it and lied to Luke when asked directly about the lawn mower, but contends that borrowing Borough equipment for personal use is a common practice and that other employees have received little or no punishment for the same offense.

The Borough denies that it was hostile to Bennett's union activities and counters that although borrowing Borough equipment for personal use is a common practice, it is done with the permission of the appropriate supervisor and the equipment is returned. Bennett neither got permission before or after the

fact for taking the lawn mower nor did he return it. Additionally, he lied to Luke when asked about the lawn mower. The Borough asserts that Bennett admitted to his actions. His termination was warranted because of these actions and his prior disciplinary record (Bennett had been suspended and demoted two years previously). The Borough contends, therefore, that union animus was not the motivating factor behind the termination and that it had a legitimate business justification for its actions.

As to Luke, Charging Party has established that Bennett was engaged in a protected activity when Luke and he argued over the Rogers grievance and Luke's alleged favoritism towards some employees regarding terms and conditions of employment. Even assuming, however, that Charging Party demonstrated Luke was hostile to Bennett regarding the allegation of favoritism, Luke took no adverse personnel action against Bennett. The Mayor and Council were the decision-makers. There is no direct or circumstantial evidence that Luke's alleged hostility was transferred to the Mayor and Council, thus, tainting the decision-making process or that the decision-makers in this matter were separately hostile to Bennett's union activities. Tp. Of Teaneck, P.E.R.C. No. 2000-45, 26 NJPER 48 (¶31018 1999); Village of Ridgewood, P.E.R.C. No. 99-114, 25 NJPER 341 (¶30147 1999); UMDNJ, P.E.R.C. No. 98-127, 24 NJPER 227 (¶29107 1998). Accordingly, I find that the Charging Party has not established

the requisite hostility element by the Respondent under the Bridgewater test.

Specifically, although Luke conducted the initial investigation before referring the matter to the Mayor and Council for action, Bennett acknowledged that the facts gathered by Luke and considered by the governing body were accurate. Additionally, Luke's decision to transfer Bennett's situation to the governing body for action (not to handle it in-house) is consistent with how he handled another similar situation - e.g. where employees took Borough equipment without authorization to a neighboring community to collect garbage from a private business. Also, Luke made no recommendation to the governing body regarding Bennett's discipline. He considered the matter to be out of his hands once he transferred it to them for possible action. Contrast Ezell v. Potter, __ F.3d__, 95 FEP Cases 689 (7th Cir. 2005)(supervisor's discriminatory motive in proposing discharge imputed to decision-maker who relied on recommendation in deciding to terminate employee).[13/]

Timing is an important factor in determining whether or not hostility or union animus may be inferred. Tp. Of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999); Essex Cty.

13/ The Commission is often guided by NLRB and other federal precedent in interpreting our own Act. Lullo v. International Association of Firefighters, 55 N.J. 409 (1970).

Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16, 18 (¶17005 1985). I find no hostility or animus based on the timing of the argument which ensued from the Rogers grievance and the disciplinary action which led to Bennett's termination. Since there is no evidence that the decision-makers were aware of the Bennett/Luke argument, the fact that Bennett was terminated two months after that argument fails to support an inference of hostility.

Moreover, only where the personnel action is unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business does that inference arise. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). Here, Bennett knew that he was in trouble once his girlfriend telephoned Luke about the mower and anticipated some adverse personnel action because he had violated policy regarding use of Borough equipment. Bennett acknowledged to Luke that he was wrong and would accept punishment. Bennett knew or should have known once the matter was referred to the governing body for action that termination was a possibility because he was cautioned by the Mayor and Council following his 2001 major disciplinary action that any further transgression might result in discipline up to and including termination.

Other than Luke's alleged hostility to Bennett over the accusation of favoritism which I have determined is not imputed to the decision-makers, there is no independent evidence of hostility to Bennett's exercise of protected activity attributable to the Mayor and Council. Although Bennett was a member of the CWA negotiations team during the most recent collective negotiations, no facts establish that the negotiations were acrimonious or difficult. Also, there is no evidence of hostility to Bennett in his role as assistant shop steward because few grievances were filed in DPW, and no facts were presented to demonstrate that those grievances created a hostile relationship between Bennett, the CWA or the Mayor and Council. Prior to his termination, the only adverse personnel action taken against Bennett by the governing body is the 2001 major discipline which arose not out of Bennett's protected activity, but out of an inappropriate relationship with another Borough employee. This action resulted in Bennett's suspension, demotion and reduction in salary.

Finally, Charging Party suggests that I infer hostility from the severity of Bennett's punishment because the discipline meted out by the governing body - termination - was more severe than for other employees charged with misuse of Borough equipment. Disparate treatment of similarly situated employees can be evidence of union animus. Old Bridge Tp. Bd. of Ed., P.E.R.C.

No. 87-2, 12 NJPER 599, 600 (¶17224 1986). That inference is not warranted here. The facts do not demonstrate disparate treatment since Charging Party has not established that, in the examples it presented, other employees were similarly situated to Bennett.

Specifically, although the two employees who took a Borough garbage truck without authorization to collect garbage in a neighboring community only received a written reprimand, these employees, unlike Bennett, had no prior disciplinary record. Bennett's 2001 major disciplinary action was considered by the Mayor and Council in their decision to terminate his employment. Also, unlike Bennett, the two employees returned the borrowed equipment.

Similarly, in another incident, Luke was not charged or disciplined when he used Borough equipment to clear the waterway of a private residence with the assistance of other DPW employees, including Bennett. The employees assisting him were also not charged and/or disciplined. This incident, however, differs in significant ways from the lawn mower incident involving Bennett. Luke as a supervisor is not a unit employee. Luke obtained prior authorization from a councilman for his actions, and, presumably, the employees assisting Luke were authorized by Luke to do so. Also, all borrowed equipment was returned.

Finally, although no disciplinary action was taken against employees who worked on their personal vehicles during working hours, this situation is distinguishable from Bennett's situation because the employees' activities were carried out with Luke's knowledge and presumable, therefore, his permission. Also, the activity did not entail removing Borough equipment to a private residence, lying to a supervisor about doing so and not returning it.

Thus, these incidents do not support an inference of hostility based on disparate treatment. See Village of Ridgewood (where employee had been warned after third multi-day suspension that any future transgression would warrant termination. The fact that, unlike other employees, he was terminated for unauthorized presence in the Village's fleet services garage did not establish a nexus between the employee's status as a union representative and his termination.)

Based on the foregoing, I find that the Borough was not hostile to Bennett's union activity and did not treat Bennett disparately. Rather, Bennett was terminated because of the lawn mower incident as well as his prior disciplinary record. The Mayor and Council would have terminated him absent any protected activity.[14/]

14/ Moreover, having found no violation of 5.4a(3), I do not second guess the nature of the discipline and concomitant (continued...)

Finally, there is no independent 5.4(a)(1) violation established on the record before me. An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The Charging Party need not prove an illegal motive. Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3rd ed. 1992). However, an employer may express opinions about unions so long as the statements are not coercive. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). The cases must balance the employer's right to free speech with the employees' rights to be free from coercion, restraint or interference in the exercise of protected activities. County of Mercer and PBA Local #167, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985). The Commission considers the total context of the situation and evaluates the issue from the standpoint of employees over whom the employer has a measure of

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14/ (...continued)
penalty meted out by the Respondent.

economic power. Id. See also NLRB v. E.I. DuPont de Nemours, 926 F.2d 538, 118 LRRM 2014, 2016 (6th Cir. 1984).

Specifically, Luke's reaction to Bennett's allegations of favoritism, - swearing and kicking a chair - is protected under Black Horse Pike. Bennett as assistant shop steward and Luke were meeting as equals and engaged in a heated face-to-face exchange regarding a grievance. Luke's reaction can not be characterized as out of proportion to the circumstance. Also, Luke's comment that he felt like he was walking on egg shells around Bennett grew out of Bennett's suggestion that Luke was not treating the employees equally in all situations. Luke's statement was neither threatening nor coercive and had no tendency to interfere with Bennett's rights as an employee. It was within the permissible sphere of criticism and discussion permitted by Black Horse Pike. Contrast Orange Bd. of Ed. (where principal called a faculty meeting at which he criticized union leaders for engaging in a protest rally, and failed to discuss any legitimate concerns he had over their conduct) and Fairview (where employer eliminated or modified certain benefits in reaction to a representation petition).

CONCLUSIONS OF LAW

Respondent did not violate N.J.S.A. 34:13A-5.4a(1) and (3) by terminating Raymond Bennett.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

Wendy L. Young
Hearing Examiner

DATED: Trenton, New Jersey
July 29, 2005

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by August 11, 2005.