P.E.R.C. NO. 84-132

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CI-83-16-43

ROGER CRESPY,

Charging Party.

DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-83-85-44

MYRON POLULAK & TEAMSTERS LOCAL 97 OF N.J.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a Hearing Examiner's recommendations, holds that the Dover Municipal Utilities Authority violated the New Jersey Employer-Employee Relations Act when it discharged two sewer maintenance employees. The Commission found that the employees were discharged for their protected activities on behalf of Teamsters Local No. 97 and not because of their job performance. The Commission further found that the Authority had illegally denied union representation to one of the employees during an investigatory interview. The Commission orders the Authority to reinstate the employees and to pay them back pay.

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Appearances:
For the Respondent, Paschon, Feurey & Kotzas, Esqs. (Stephen B. Kotzas, of Counsel; Bruce Rosetto, on the Brief)

For the Charging Parties, Goldberger & Finn, Esqs. (Howard A. Goldberger, of Counsel)

DECISION AND ORDER

On September 13 and November 1, 1982, respectively, Roger Crespy filed an unfair practice charge and an amended charge (Docket No. CI-83-16) against the Dover Municipal Utilities Authority ("Authority") with the Public Employment Relations Commission. Crespy, a sewer line maintenance employee, alleged that the Authority violated subsections 5.4(a)(1), (3), and (4)[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or (continued)

of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") when on July 23, 1982, it discharged him, allegedly in retaliation for his activities as a shop steward and negotiator for Teamsters Local #97 of New Jersey ("Local 97").

On October 5, 1982, Myron Polulak ("Polulak") and Local 97 filed an unfair practice charge (Docket No. CO-83-85) against the Authority. This charge alleged that the Authority violated subsections 5.4(a)(1), (3), and (4), when on July 23, 1982, it discharged Polulak, also a sewer line maintenance employee, allegedly because he sought and had been denied union representation during an investigatory interview and because he had filed grievances and supported Local 97.

On November 18, 1982, the Director of Unfair Practices issued an order consolidating the two charges and a Complaint and Notice of Hearing. The Authority submitted an Answer denying that it discharged Crespy and Polulak for their protected activity and asserting, to the contrary, that it discharged Crespy and Polulak for failure to perform their jobs properly on July 21 and 22, 1983; submission of fraudulent worksheets and misrepresentations concerning their work on those days, and their attitudes when questioned about their work on those days. Additionally, the Authority alleged that Polulak was not entitled to union representation during his interview on July 23, 1982.

1/ (Continued)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 (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this act."

On February 4,7,8, and 17, 1983, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses, presented exhibits, and waived oral argument. The record then closed, and the parties filed post-hearing briefs.

On April 18, 1983, the Hearing Examiner granted the Authority's motion to reopen the record to take evidence concerning Crespy's employment or unemployment since his discharge. On May 4, 1983, the Hearing Examiner conducted another hearing and then closed the record once again.

On May 13, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 83-40, 9 NJPER 315 (¶14143 1983) (copy attached). With respect to Crespy, he found that Crespy's protected activities as a shop steward and negotiator motivated the Authority's decision to discharge him and that the Authority would not have discharged him absent these activities; he thus concluded that Crespy's discharge violated subsections 5.4 (a)(1) and (3) of the Act. With respect to Polulak, he found that the Authority denied him union representation at an investigatory interview which he reasonably believed might result in disciplinary action and that he was terminated as a result of statements made during that interview; he thus concluded that Polulak's discharge violated subsection 5.4(a)(1) of the Act.[2/] As a remedy, the Hearing Examiner recommended an order requiring the Authority to reinstate Polulak and Crespy with full back pay,

2/ The Hearing Examiner recommended dismissal of the allegations of the Complaint alleging that Polulak's discharge violated subsection 5.4(a)(3) and that both discharges violated subsections 5.4(a)(4); he found insufficient evidence to support these allegations.

less interim earnings, together with interest of 12% per annum; to purge their personnel files of any references to their illegal discharges; and to post a notice of the violations found and the remedial actions ordered.

On May 26, 1983, the Authority filed exceptions. It asserts, in general, that it discharged Crespy because of his alleged poor work performance and misrepresentations rather than his union activities; that Polulak did not timely request union representation and was not entitled to such representation; and that the Hearing Examiner was biased and did not conduct a fair hearing.

On June 13, 1983, the Charging Parties filed a response supporting the recommended decision and relying upon their post-hearing briefs.

We have reviewed the record. We will set forth the pertinent facts, grouped in the following order:

(1) the structure and hierarchy of the Authority,

(2) the work history and disciplinary records of Crespy and Polulak;

(3) the history of union representation at the Authority;

(4) the evidence concerning Crespy's and Polulak's pro-union activity and their supervisors' anti-union animus;

(5) the instructions given Crespy and Polulak about their duties;

(6) the evidence concerning inspections of line maintenance work;

(7) the meetings and site visits occurring on July 23, 1982; and

(8) disciplinary incidents involving other employees.

The Authority has the responsibility of providing adequate sewerage service to residents of Dover Township. It has the following structure. There are five part-time Commissioners who attend meetings and determine the Authority's policy. A full-time Executive Director is in charge of the Authority's operations and reports directly to the Commissioners. Since October or November, 1982, John Broome has been Executive Director and from February 1982 to then Broome was Acting Executive Director. Broome has also been Director of Engineering since 1975 and has retained that title in addition to the Executive Director title. His predecessor was Robert Brune who was Executive Director during 1981 and the first two months of 1982. Brune's predecessor was Robert Conti. The Supervisor of Operations is the next position in the hierarchy.3/ Oliver McGuire is the Supervisor of Operations. He has responsibility for Authority operations concerning the maintenance and repair of the sewerage system. The General Superintendent is the next position in the hierarchy. Frederick Severs is the Superintendent. He oversees all field work and inspections and directly supervises the foremen and line maintenance personnel. Foreman is the next position in the hierarchy. Richard Lecuyer is a Maintenance Foreman. He oversees the maintenance and cleaning of sewer lines and the handling of sewer stoppages. Line maintenance employees under his supervision clean manholes, maintain the pumping stations, and build and maintain lateral pipes running from houses and businesses into the main sewer lines. Among the line maintenance employees Lecuyer supervised were Roger Crespy and Myron Polulak.

3/ Prior to 1981, there was a Deputy Director, but that position has been eliminated. Brune was Deputy Director from 1978-1981.

Roger Crespy worked for the Authority as a line maintenance employee from 1974 until his termination on July 23, 1982. In April 1978, Broome wrote then Executive Director Conti a memorandum concerning a promotion to inspector and salary raise for Crespy. Broome requested this personnel move because Crespy had shown himself capable and interested in the new position. Crespy has also been asked to help train new employees. On June 18, 1982, Crespy received a written warning from McGuire for alleged abuse of sick leave from 1979-1982.[4/] On an unspecified date, Crespy and two other employees all received one day suspensions for not reporting damage to an Authority vehicle driven by Michael Kajan. On October 24, 1978, Crespy was orally warned for reporting late to work seven times. Crespy had not been disciplined on any other occasions prior to his discharge and in particular had never been disciplined for poor work performance.[5/]

There is a dispute over how good or bad Crespy's job performance was before the events leading to his termination. Former Executive Director Brune testified that he was favorably impressed by Crespy and Polulak and that during the weekly staff meeting he held with McGuire and Broome during 1981 and early 1982 they never questioned Crespy's work performance. In January

4/ This warning was given on the same day Crespy filed a grievance concerning an unfounded allegation by Severs that Crespy abused sick leave one day. It will be further discussed when Crespy's protected activities are described.

5/ In its brief, the Authority alleges certain other incidents concerning Crespy's work record. For example, it alleges that Crespy had been warned for drinking on the job; for threatening another employee at a union election; and for filing a false request for overtime pay. There is no evidence to support these allegations. Crespy did, however, once return $8.00 he had received as a meal allowance and did once sit in a vehicle with a woman during working hours; no discipline ensued.

or February, 1982, Brune specifically asked Broome and McGuire whether there should be a reduction in force, and they responded that all employees were performing adequately.[6/] Broome testified that he believed Crespy had been the Authority's worst and most troublesome employee since 1978. Severs testified that Crespy's job performance was not very good and that in 1976 or 1977 he attempted to have him discharged, but then Executive Director Conti overruled him. McGuire and Broome both testified that when they discussed the possibility of a reduction in force with Brune, they initially recommended that Crespy be let go, if necessary, because of his work record and attitude.[7/]

Myron Polulak has worked for the Authority since July, 1975. He was hired as a line maintenance employee, but within a month was reclassified as a carpenter. Nevertheless, he continued to do any line maintenance assignments, such as raising manholes and cleaning stoppages, given him. In March, 1982, the Commissioners decided to eliminate certain positions, including carpenter, as part of a reorganization and reduction in force. As a result of a grievance he filed, Polulak was reclassified back to line maintenance work as a trainee. Prior to his termination, he had never been disciplined.

6/ Brune testified that Broome and McGuire did complain about Crespy at these staff meetings because of his union activities, calling him a troublemaker. This testimony will be further discussed when Crespy's protected activities are discussed.

7/ We disagree with the Hearing Examiner's finding of fact (#10) that Brune testified without contradiction that in January and February 1982 Broome and McGuire both stated that all employees were performing well. While we note this contradiction, we adopt the Hearing Examiner's evident decision to credit Brune's testimony, as will be seen, that Broome's and McGuire's disenchantment with Crespy stemmed from his union activities.

There is no dispute that Polulak's work performance prior to the events leading up to his discharge was acceptable and that his attendance record was good. Both Broome and Brune so testified.

There was a dispute concerning whether Polulak had an attitude problem following his 1982 reclassification. Lecuyer testified that Polulak was bitter following the reclassification; that Polulak would salute his superiors and click his heels as if they were gestapo; that he would ask to be excused to go to the bathroom; and that he would stand by the timeclock until the last second before punching in at 8:00 a.m. Lecuyer told Severs and Broome of this problem. On May 24, 1982, Lecuyer wrote a memorandum to Severs stating that while Polulak had a very poor attitude immediately after his reclassification, he was now showing improvement at times. This memorandum further stated that Polulak's attendance, ability, and work habits were fine and that he had made helpful job suggestions. Polulak was never warned about the perceived attitude problem or given a copy of Lecuyer's memorandum. He denied having a poor attitude or ever saluting his superiors or clicking his heels.

As a result of a representation election and ensuing certification issued on September 1, 1981, Local 97 is the current majority representative of all the Authority's non-supervisory full-time and regular part-time non-craft blue and white collar employees. Foremen and all higher ranks are excluded from the unit. Sometime prior to September 1981, another union -- Amalgamated 355 -- represented these employees for one year; this union was decertified after a foreman circulated a decertification petition

among unit employees. Polulak testified that he heard Broome tell the foreman to circulate the petition, but the foreman denied that Broome solicited his assistance. Another union represented Authority employees in 1976 or 1977.

The facts concerning Crespy's union activities and management's knowledge of and distaste for these activities follow. Crespy was active in the union in power in 1976 or 1977 and Broome knew of Crespy's activity. Crespy was also a shop steward for Amalgamated 355. Following the decertification of Amalgamated 355, non-supervisory employees looked for a replacement representative. Crespy helped choose Local 97 as a candidate, even though he did not initially contact that organization. Severs and Lecuyer attended Local 97's organizing meetings and Severs noted Crespy and Polulak in attendance.

After Local 97's election, Crespy became a shop steward and one of Local 97's three negotiators. Broome, McGuire, Severs, and Lecuyer all knew of these activities. At a weekly staff meeting following the election, Broome and McGuire stated, according to then Executive Director Brune, that "...there probably would not be any Union were it not for the particular efforts of Mr. Crespy" and that Crespy was a "troublemaker" who should be let go if anybody was to be terminated.[8/]

Negotiations between Local 97 and the Authority did not proceed smoothly. When the Authority's negotiators, two Commissioners, offered (from Crespy's perspective) "nothing", Crespy

8/ The Hearing Examiner credited Brune's testimony concerning these statements. So do we.

yelled at them and tempers flared. The Commissioners, unhappy with his attitude, told Crespy he was "off base". Negotiations broke down and on June 25, 1982, Local 97 filed a notice of impasse with this Commission requesting the appointment of a mediator.

Crespy filed and prosecuted several grievances as a Local 97 shop steward. All grievances are filed directly with the Executive Director. During the March, 1982 reorganization, Local 97 and he interceded to insure that any layoffs would follow seniority. Several employees, including Polulak, won their jobs back through seniority after grievances were filed. Crespy also filed a grievance on behalf of another employee with 18 years of seniority, but this grievance was later withdrawn when the employee decided to retire.

On June 18, 1982, Crespy filed another grievance on his own behalf. He alleged he had been humiliated when Superintendent Severs stated over the company radio and in front of his co-workers that Crespy, who had called in sick, was actually at the race track.[9/]

On July 21, 1982, at 1:00 p.m., Crespy filed a group grievance on behalf of all line maintenance personnel. The grievance stated that the line maintenance employees believed

9/ Severs admitted making this statement. The statement was unfounded. In fact, when Severs sent two employees to investigate his suspicion, they found Crespy at home sick. Crespy was thus not disciplined on this occasion. On the same day he filed his grievance, however, he received a written summary, signed by Broome, McGuire, and Severs, stating that his time records for 1979 through 1982 indicated that Crespy may have abused sick leave benefits by using all but 2 1/2 days of his available sick leave time in 1979, all available sick leave time in 1980 and 1981, and 3/4 of his available sick leave time for 1982.

that the foremen were unfairly receiving priority for overtime assignments which should have gone to line maintenance employees in order of seniority. As will be discussed in more detail, Lecuyer -- one of the foremen involved in the grievance -- commenced the manhole inspections in question within three hours of the filing of this grievance. The next day McGuire denied the grievance. Crespy then marked McGuire's response as unsatisfactory on the grievance form.

Sometime during the week before Crespy filed this last grievance, a line maintenance employee, Michael Kajan, overheard Broome telling Severs that Crespy "...was going to be in trouble" and "...it's going to be trouble with the union, because he was a shop steward." Kajan had also overheard Severs telling Lecuyer that there was going to be "trouble with the union."

In October, 1982, another line maintenance employee and shop steward, Allen Horner, met with Severs and discussed filing a grievance. Severs said: "Well, you seen what happened to Roger after he filed a grievance." After Horner said he did, Severs added: "He filed a grievance on Thursday, and he was dismissed on a Friday." Severs then grinned.

Polulak's union activities were more limited than Crespy's activities. As mentioned, Lecuyer and Severs attended a Local 97 meeting Polulak attended. Polulak believed that Severs and McGuire overheard him talking about his support for the union, but McGuire denied this testimony. When Polulak was told he might be laid off, he filed a grievance and attended a meeting of Commissioners where he complained about losing his carpentry job. Polulak signed the July 21, 1982 overtime grievance.

Line maintenance employees clean sewers and manholes along the eight inch main sewer lines in order to keep gases from building up in the line and to prevent stoppages. Waste materials enter the main sewer line by gravity from four inch lateral lines originating in houses and businesses and running downhill. A main sewer line generally slopes at a minimum pitch of .4 percent from the upper end of the system, a dead end manhole, to the lower end.

Sewer jets which generally operate under 1200 pounds of pressure at the nozzle are used to flush waste material in the main sewer lines.10/ The jet has a one inch hose of about 400 or 500 feet which is hooked up to a 1,000 gallon water tank and coiled on a drum on the maintenance truck. After one employee pulls a manpower cover, the hose is uncoiled and inserted into the manhole. Water is then flushed uphill so that any materials in the line that are loosened flow back down past the cleaned area. Such materials may include grease and solids like sand and gravel. The dead end manhole is flushed by running the jet hose through the next lower manhole and flushing water uphill to the dead end manhole. After each manhole has been flushed, handguns with about 50 pounds of pressure and a smaller hose may be used to remove any loose debris, dirt, or filth from the shelves within the manholes. Line maintenance personnel do not go down into manholes unless they have a methane gas detector.

10/If a main sewer line has a particularly great or heavy amount of waste, a larger hose may be used for sucking this material out. The larger hose is not used to suck out dead end manholes.

There was a dispute in the testimony about the instructions for cleaning manholes Polulak and Crespy received. Severs testified that he heard Lecuyer tell Crespy to flush every hole with the sewer jet and then clean every hole with a handgun. Severs testified this meeting occurred in Severs' office during the week before July 23, 1982; Severs did not recall if Polulak was there. Lecuyer did not corroborate Severs' version of the instructions. Instead, he testified that in April, 1982, he instructed "all the men" to clean every manhole with a gun. Lecuyer testified that Polulak was not present then and could not confirm that Crespy was. Lecuyer also testified that one morning during the week before July 23, he jumped up on the running board of Crespy's and Polulak's truck and told Crespy to make sure all manholes were washed down with a handgun. Polulak and Crespy denied receiving specific instructions to use a handgun on each manhole. Instead, they testified that they were repeatedly told that they did not have to use a handgun if the manholes were clean and there was no loose debris after flushing. Crespy added that when he received an assignment, he was generally told to "...do the area the best to your knowledge" because he was an experienced employee who knew what he was doing. The Hearing Examiner credited Crespy's and Polulak's testimony concerning the instructions. We accept his resolution of this credibility issue.

In February and March, 1982, the Authority underwent a reorganization following a change in its control from one

political group to another. The new Commissioners decided that certain positions were no longer necessary; as a result, there was a reduction in force of at least seven and maybe nine employees. Broome testified that the new Commissioners told him, either at a public meeting or in an executive session, that they had heard complaints that employees on field assignments were taking excessively long lunches and drinking on the job. Broome testified that he then relayed the complaints to McGuire and Lecuyer and instructed Lecuyer and all foremen to keep their employees in line. Lecuyer testified that this discussion occurred right after the reorganization, but was vague about the month and day.11/

Lecuyer testified that he inspected manholes infrequently and had not inspected any within the six months before July 21, 1982 or within the three or four months following the Authority's reorganization. The inspection six months before July 23, 1982 only covered 10-12 manholes. Prior to July 23, Severs never checked any manholes to see if they had been properly cleaned.

In the 1 1/2 - 2 week period before July 23, 1982, Crespy and Polulak were assigned to flush and clean the manholes and main sewer lines in an area known as Shelter Cove. This area had not been flushed since it was constructed and put into operation in 1971. Crespy, as the more senior employee, was in charge.

11/ At one point, Lecuyer testified he was told in April to assert more control; at another point, he testified he was told in June. When the Hearing Examiner discredited the testimony of Lecuyer and Severs concerning the instructions given Crespy and Polulak, he necessarily discredited any testimony that Crespy and Polulak had been warned that their work would be subject to greater scrutiny after the reorganization.

On July 21, 1982, Crespy and Polulak cleaned manholes and main sewer lines on the following streets, among others, in the Shelter Cove area: Bermuda, Barbados, Nassau, Jamaica, Tabago, and St. Thomas. After returning to the shop Crespy turned in the worksheet he had filled out.[12/] Lecuyer then went out that afternoon to see if the work had been done properly. He testified that he pulled eight to ten manholes and concluded that it had not.

On July 22, 1982, Crespy and Polulak cleaned manholes and main sewer lines on the following streets, among others, in the Shelter Cove area: Bermuda, Kingston, St John's, St. Thomas, and Culebra. They stopped work at 3:00 p.m. since Crespy, as his supervisors knew, had to return for a Local 97 meeting. When he returned, Crespy turned in his worksheet. Once again, Lecuyer immediately went out to inspect Crespy's and Polulak's work. This time he inspected 18-20 manholes. Lecuyer testified that there were three bad manholes, that he saw mildew in some manholes, and that there was not very much done in the other manholes. Lecuyer did not, however, dispute that the manholes had been flushed. When Lecuyer returned, he reported his findings to Severs and they agreed to inspect the manholes together the next morning.

About 9:00 a.m. on July 23, Lecuyer and Severs conducted another inspection. Severs testified that they pulled about ten manholes and that the manholes were filthy, some had

12/ Crespy filled out the worksheets for both July 21 and 22, 1982; Polulak did not help prepare these forms.

cobwebs, and some had not been previously pulled. They reported their findings to McGuire who in turn called in Broome. A decision was then made to question Polulak. He was called in from the Shelter Cove area where he had been working that morning with Crespy.

According to Broome, he had not decided to discharge or discipline Polulak before the meeting. Instead, he testified that the purpose of the meeting was to see if Polulak could explain why the area had not been properly cleaned. McGuire and Lecuyer also testified that the meeting with Polulak could result in a decision to discipline him. Severs testified that there was no decision to discipline Polulak before the meeting; that they wanted to hear Polulak's story first; and that Polulak was discharged afterwards as a result of misstatements he allegedly made during that meeting.

Polulak testified that when he was called into the meeting with Broome, McGuire, Severs, and Lecuyer, he believed that he might be asked to do some repair work. Instead, Broome told him he was there to discuss the work he had done the day before. After expressing some confusion about which streets and manholes were in question, Polulak told them that every Shelter Cove manhole listed on Crespy's worksheets had been properly cleaned, although not every manhole was cleaned with a handgun. Polulak was persistently asked about Crespy's work and whether he had regularly used the handgun; when Polulak refused to say that

Crespy had not used the handgun, his superiors became annoyed and accused him of lying. Polulak believed that his superiors wanted to fire Crespy and wanted Polulak's assistance towards that end. As the questioning proceeded, Polulak became worried about losing his job. About one third of the way through the hour long meeting, he asked for union representation. His request was ignored and the questioning and accusations continued. Polulak repeated his request for union representation but without success.[13/]

At the close of the meeting, Broome instructed Polulak to go back to the shop. Shortly thereafter, Lecuyer and Severs drove him to the Shelter Cove area. McGuire and Broome drove there separately.

13/ The Authority's witnesses offered different accounts of this meeting, but the Hearing Examiner credited Polulak's testimony. For example, Broome, McGuire, and Severs testified that Polulak did not ask for union representation until the very end of the meeting while Lecuyer testified that Polulak never asked for union representation. The Authority asks us to reverse the Hearing Examiner's credibility determinations on this issue since its witnesses outnumbered Polulak four to one. We decline to do so. The keys to a credibility determination are an assessment of the witnesses' demeanors and a review of their testimony for inconsistencies and implausibilities, not merely counting the number of witnesses for each side. We believe the Hearing Examiner properly discharged his role in making this credibility determination based on his assessment of the demeanor of the witnesses and of the conflicts in the testimony of the Authority's witnesses. We also note that finding the facts he did in finding no. 21, the Hearing Examiner necessarily rejected testimony from the Authority's witnesses that the questioning had not concerned Crespy's work and that Polulak had affirmed receiving instructions to use a handgun on every manhole. Finally, we note that McGuire testified that Polulak was only asked once whether he cleaned every hole with a handgun and that he responded negatively; no Authority witness testified to the contrary.

The two cars first stopped at a dead end manhole on St. John's street. According to Polulak, upon arriving at this manhole, he was accused of not cleaning it; he responded that this manhole had been flushed from the manhole below, but not handgunned because when he opened the manhole, spray started to come out and he was worried that any further water put into the manhole would run up a lateral pipe entering the manhole and damage the bathroom of a nearby house. Polulak further responded that the manhole was clean when they stopped working on it and did not need handgunning. According to the Authority's witnesses, Polulak stated that he stopped cleaning the St. John's manhole after opening it because he did not want to be hit by 2000 pounds of pressure. Broome took pictures of this manhole.

The two cars next went to a manhole at the intersection of Bermuda and Culebra. According to Polulak, he was again accused of not cleaning the manhole and he again responded that it was clean when they stopped work the day before. He acknowledged that there was a residue of black film at the time of the inspection. A neighbor who had observed Crespy and Polulak working at that manhole the day before asked what was going on. When told that the employees were being accused of not cleaning the manhole, the neighbor confirmed that Crespy and Polulak had worked on that hole for at least 1 1/2 hours. Broome again took pictures.

The witnesses differ as to whether and how many other manholes the five individuals visited collectively. Polulak

testified that he only visited the two manholes already discussed. Lecuyer initially confirmed this testimony, but later testified that they visited a third manhole at Bermuda Drive and Linda Drive. Severs and McGuire testified that they visited four manholes, the fourth being on Tabago Avenue, and McGuire added that Polulak admitted maybe not cleaning one of the manholes, although McGuire was not sure which one. Broome went to all four manholes and took pictures at each, but his testimony vacillated concerning whether Polulak accompanied him to each manhole.

The Authority introduced a color picture of each of four manholes into evidence. A description of each picture and a summary of the testimony concerning each manhole follow.

Exhibit R-5 is a picture Broome took of the manhole at Culebra and Bermuda Drive. The manhole is not clean. There is a substantial amount of grease in the picture, but no excrement.[14/] Polulak and Crespy testified that they worked for over an hour on July 22 cleaning a stoppage at this site; they used a rodder, a jet vacuum, and a handgun, and when they left, they testified, it was clean. Three neighbors confirmed that they were at this site for a substantial period of time that day. Nicholas Pomarico, who has 4 1/2 year's experience as a sewer jet operator, testified that marks on the side of the manhole indicated it had been sprayed with a handgun. Crespy corroborated this testimony and no one

14/ There is also some fresh white laundry soap; the Authority's witnesses did not express any concern about this soap.

contradicted it.[15/] Pomarico and Crespy also testified that the grease shown in R-5 could have accumulated overnight. Pomarico explained that when an area such as Shelter Cove has not been flushed in over ten years, flushing can loosen a great deal of grease built up from soaps, cooking oil, and other materials from the lateral lines. Crespy testified that the grease shown in R-5 was wet and therefore fresh and added that when a stoppage is broken up, as at this manhole, it is possible that the debris loosened, but not completely sucked up, will clog up the main line within one or two hours. Broome testified that the grease shown in R-5 could not have accumulated overnight because, he believed, the amount of grease (from 6" to 12") was too great for the few upstream lines to carry back down. Further, he testified that there were circles in the grease which showed that the jet vacuum had sucked up part, but not all of the grease.

Exhibit R-6 is a picture Broome took of the manhole at Linda and Bermuda Drives. The manhole is not clean, but is not as dirty as R-5; there appear to be some small pieces of grease in the pipe. Crespy and Polulak testified that they flushed the manhole and used a handgun. Pomarico testified that marks on the side of the manhole indicated a handgun had been used, and both Pomarico and Crespy testified that the grease could have accumulated overnight. Crespy further testified that the grease was wet and therefore fresh. Broome testified that

15/ Broome testified that it was hard to say whether a handgun was used.

this manhole could have gotten into this condition overnight and could not say whether a handgun had been used.

Exhibit R-7 is a picture Broome took of a dead end manhole on St. John's Street.16/ The manhole is not clean; there are several pieces of excrement. There is no dispute that a handgun was not used on this dead end manhole. As already described, Polulak and Crespy testified that they did not use a handgun because the water pressure coming upstream from the sewer jet posed a danger of entering a lateral pipe and damaging a nearby residence and this water had already cleaned the shallow (only 2' deep) manhole. They testified that there was no excrement in the manhole when they closed it. Lecuyer and Severs testified, by contrast, that there was mildew in this manhole. Pomarico, Crespy, and Polulak all testified that the excrement shown in Exhibit R-7 could have accumulated overnight. Pomarico explained that the excrement could have come from a lateral pipe entering the manhole if a substantial amount of water (for example, if someone washed clothes) was generated in the lateral pipe and caused a stoppage to let go suddenly. He also stated that a back pitch in the lateral or main pipe might cause excrement to accumulate until a higher water level pushed it forward. Crespy testified that the water from the sewer jet which went up the lateral pipe could have loosened whatever solids were in the lateral pipe

16/ In its brief, the Authority asserts that there were two dead end manholes among the four manholes shown in R-5, R-6, R-7, and R-8. The testimony and the writing on back of each picture, however, establish that the only dead end manhole was at St. John's Street.

already. Polulak concurred with these explanations and added that the excrement could have been planted there. Broome testified, without elaboration, that this manhole could not have gotten into its messy condition overnight. He added that there were no emergency calls for St. John's Street on July 21, 22, or 23, 1982.

Exhibit R-8 is a picture Broome took of the manhole on Tabago Avenue. It is the second manhole from the end and is 4 to 4 1/2 feet deep. There is a white spot, a gray lump, and a black channel in the picture. According to Crespy's worksheet, this manhole was cleaned on the morning of July 21, not July 22. Broome testified that the white spot was the sun's reflection. Pomarico testified that the gray lump appeared to be two pieces of concrete while the black coloring in the channel was discoloration from sewage going down the channel over many years. Pomarico testified that the manhole was in fact clean and that the concrete pieces could have come from the closing of the manhole lid. Broome disagreed and testified, without elaboration, that it could not have gotten into that condition overnight. Broome did not testify concerning whether it could have gotten into that condition over a two day period starting the morning of July 21. Broome admitted he could not tell whether a handgun had been used. Crespy and Polulak testified that a handgun was used.

After returning from the visit to the manholes, Polulak was told to mop the shop floor. While mopping, he heard on the radio that Crespy had been summoned back to the shop. A second

meeting then ensued at about 3:00 p.m. in Broome's office; in attendance were Broome, McGuire, Severs, Lecuyer, Crespy, and Polulak.[17/] Broome and McGuire testified that upon entering the meeting, Polulak admitted that it was all his fault and Crespy and he were guilty; neither Severs nor Lecuyer corroborated this testimony, however, and Polulak denied it. The Hearing Examiner credited Polulak's denial and so do we. Broome conducted the questioning, starting with the statement that he had seen two dirty manholes and that Crespy and Polulak had not done their job properly and concentrating thereafter on Crespy's role. Broome questioned Crespy about whether he used a handgun on every hole and particularly asserted that the Bermuda and Culebra manhole was filthy. Crespy responded that every hole had been flushed and every hole, except the St. John's dead end manhole, had been handgunned. Crespy asked Broome to visit the job site with him and to inspect the grease sucked up in the jet vacuum; Broome denied both requests. Broome testified, with the general corroboration of McGuire, Severs, and Lecuyer, that at the end of

17/ Polulak and Crespy did not meet alone before the second meeting. On cross-examination, Polulak admitted that he had not attempted to contact either of Local 97's two shop stewards between the first meeting and the second meeting. Polulak testified that his fears of being discharged had subsided after the first meeting, but on redirect examination he testified that he was still afraid of losing his job at that time and he knew "something was coming about" but not what that something was. Polulak was not restrained or forbidden from contacting any stewards between the meetings, but he testified that he did not have access to a shop phone since employees were not allowed in that area of the shop. Broome countered by testifying that there were five phones in the bay area which employees were allowed to use.

the meeting Crespy said: "It was no big deal. They had cleaned all the manholes. So what if there was a couple that were dirty." Crespy denied making this statement, but the Hearing Examiner credited Broome. So do we.[18/] Broome concluded the meeting by saying that he had been "...kicking this around since 11:00 this morning..." and that Crespy and Polulak were both discharged. Broome testified that he made this decision because he believed Polulak and Crespy had lied about cleaning the manholes; because he disliked the attitude manifested by Crespy's "big deal" remark; and because the Commissioners had asked him generally to be tougher in supervising employees.

Michael Kajan testified that just after Crespy's and Polulak's discharge, Severs assigned him and another employee to check and clean manholes in the Shelter Cove area where Crespy and Polulak had worked. He checked over 100 manholes and the first day flushed about 15-20 manholes. Kajan testified that the manholes were clean and did not need flushing or handgunning. Severs testified that 11 truckloads of water were used to clean out these manholes on July 27 and 28 and he surmised, based on that amount, that the operator must have believed the lines were dirty.

The Authority has never fired any employee besides Crespy and Polulak for the stated reason of not thoroughly cleaning manholes. Allen Horner, a line maintenance employee for 14 years,

18/ We note that Crespy was not admitting that he completely failed to clean any manholes, but was stating instead that a couple of manholes might still have been dirty after cleaning.

testified that in late 1981 or early 1982, Lecuyer accused him of not cleaning a manhole at Jay Place properly, thus causing a stoppage at a house two weeks later. Lecuyer did not discipline Horner and instead merely told him to do a better job. Lecuyer did not deny this incident. He also admitted that he had never had occasion to report employees for not properly cleaning a manhole with a handgun.

There was evidence introduced to show that three employees had been involved in accidents with Authority vehicles, but had not been discharged. Six or seven years ago, Severs, while intoxicated, had an accident involving two other vehicles and his license was suspended; he was not disciplined in any way. Subsequently, the Authority adopted a policy requiring that all employees have a driver's license in order to retain their employment. Samuel Galloway then lost his license and did not tell the Authority until he was involved in a later accident; he was suspended for one week, but was not discharged because he had not signed the new Authority policy. John Risk, a foreman, has had two accidents (one in 1981) involving Authority vehicles, but has not been disciplined. Broome testified that these other employees were not more severely disciplined because they had not lied about the incidents.[19/]

19/ At the time of the hearing, Crespy had a valid New Jersey driver's license. Sometime in or about January, 1983, Crespy received a summons alleging that he had been driving while under the influence of liquor. Court proceedings on that summons had not occurred at the time of the hearings in this case.

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 434 (¶12193 1981), mot. for recon. den. P.E.R.C. No. 82-36, 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:

> ...[T]he 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 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.[20/] (Slip opinion at pp. 9-10).

20/ 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.

Applying the Bridgewater standards in the instant case, and based upon our review of the entire record, we find that Crespy and Polulak have proved by a preponderance of the evidence that Crespy's protected activity was a substantial and motivating factor in the decision to discharge them and that the Authority has not proved by a preponderance of the evidence that it would have discharged them absent this activity. It is clear, as we have always held, that union representatives will not be immunized against legitimate discipline for genuine offenses. See, e.g., In re Township of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351 (¶12156 1981), aff'd App. Div. No. A-4891-80T2 (6/21/82). However, we do not believe, based upon this record, that the employees would have received the penalty of discharge in the absence of their protected activities.

We first consider, under all the circumstances of this case, whether Crespy has met his burden of proving that his protected activity was a substantial and motivating factor in the decision to discharge him. We hold that he has. Crespy has specifically established, as the following review of the evidence shows, both direct evidence of anti-union motivation and indirect evidence of such motivation since he was engaged in protected activity; the Authority knew of this activity; and the Authority was hostile toward the exercise of his protected rights. Bridgewater; In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443 (¶11227 1980).

All Crespy's supervisors -- Broome, McGuire, Severs, and Lecuyer -- knew of his activities as shop steward and negotiator for Local 97. Following Local 97's election in August, 1982, Broome and McGuire specifically blamed the advent of the union on Crespy and told the then Executive Director that such a "troublemaker" should be let go. Crespy had conflicts with Commissioners during negotiations and when he filed a grievance challenging the Authority's reorganization. On June 18, 1982, Crespy filed another grievance against Superintendent Severs for the latter's unfounded accusation against the former; that same day, Broome, McGuire, and Severs responded with a memorandum warning Crespy about alleged sick leave abuse. On June 25, 1982, Local 97 filed a Notice of Impasse in negotiations. Sometime between July 15 and 20, Broome told Severs and Severs told Lecuyer that Crespy was "going to be in trouble" and there was going to be "trouble with the union" since Crespy was a shop steward; these statements indicate that Broome, Severs, and Lecuyer were planning to get rid of Crespy. On July 21, 1982, Crespy filed a grievance against the foremen, including Lecuyer; three hours later, Lecuyer initiated the manhole inspections leading to the discharges.[21/] McGuire denied the grievance the next day, and Crespy as shop steward marked this response unsatis-

21/ Although Lecuyer testified that the inspections in question were part of a program to tighten up employee supervision following the February and March reorganization, this testimony is not credible. There was no testimony of any inspections from the reorganization until July 21, 1982. We do not believe that Lecuyer decided to initiate inspections independent of Crespy's just-filed grievance and the previous discussions concerning the prospect of trouble with Local 97 and Crespy.

factory. Finally, just two months after the discharge, Severs, in an attempt to discourage the filing of a grievance, threatened another shop steward by pointing out that Crespy was dismissed the day after filing a grievance. Under all these circumstances, we believe that Crespy's superiors all knew and disliked Crespy's union activities; that they wished to fire him because of these activities and had decided upon that course of action before July 21, 1982; that they initiated the July 21 inspection (as well as the June 18 warning) in direct and immediate response to his filing of a grievance; and that they illegally used Crespy as an example to chill other union activists. Accordingly, we conclude that Crespy's union activities played a substantial and motivating role in the decision to discharge him.

We next consider whether the Authority has met its burden of proving by a preponderance of the evidence that it would have discharged Crespy even in the absence of his protected activity. We conclude, for the reasons set forth below, that the Authority has not met this burden.

Broome testified that he discharged Crespy because he believed Crespy lied about cleaning the manholes; because he disliked the attitude manifested by Crespy's "big deal" remark; and because the Commissioners had asked him generally to be tougher in supervising employees.[22/] Based on the foregoing

22/ In its brief, the Authority stresses that Crespy had a prior disciplinary record, but we agree with the Hearing Examiner that this record -- consisting formally of a one day suspension, an oral warning for being late, and a written (continued)

findings of fact and the Hearing Examiner's credibility determinations, we do not believe that Crespy would have been discharged for these reasons, absent his activity on behalf of Local 97. Instead, it appears to us that Crespy's union activity may have generated the inspections in the first place and that his superiors were planning to fire him for his union activities before the inspections. Further, we are not persuaded by a preponderance of the evidence that Broome believed in good faith that Crespy's alleged "lying" or poor attitude about the inspections warranted discharge. There is no dispute that Crespy and Polulak worked on each of the four manholes in question; the dispute is essentially over whether they did as thorough a job as they should have and whether a handgun was used when needed.[23/] Thus, it appears to us that Broome could not have believed that Crespy's worksheets were inaccurate, or that Crespy had lied in any absolute sense of having refused to acknowledge a complete failure to clean a manhole. Further, we are not persuaded by a preponderance of the evidence that Broome would have discharged Crespy, absent his union activity, based on a relative failure

22/ (continued)
warning for possible sick leave abuse -- was slight and essentially irrelevant to the discharge. The last warning appears to have been prompted by Crespy's filing of a meritorious grievance, and the Authority's reliance on other alleged incidents of discipline is unfounded in the record. The Authority did not rely on Crespy's prior disciplinary record at the hearing as a reason for his discharge, and it is disingenuous for it to argue now that it might not have discharged Crespy absent that record, especially since it simultaneously discharged another employee, Polulak, with no disciplinary record.

23/ For example, Broome knew, given a neighbor's statements during his inspection, that Crespy and Polulak had in fact spent a considerable amount of time on July 22 cleaning out the Bermuda and Culebra manhole, the one which, in the exhibits, appeared messiest.

to clean the manholes thoroughly. Of the four manholes specifically in question, only two -- the Bermuda and Culebra manhole and the St. John's Street dead end manhole --appear to have been of substantial concern.[24/] It is undisputed that the Shelter Cove area had not been flushed since 1971, and it appears possible, as some witnesses testified, that much grease and other materials in the main and lateral lines might have been dislodged as a result of the cleanings of these manholes. Further, there is no dispute that the manholes were flushed and that Crespy and Polulak spent over an hour cleaning the Bermuda and Culebra manhole. In addition, no employee had ever been discharged for failure to clean a manhole properly and one had not even been disciplined beyond an oral reprimand. Under all these circumstances, we are not persuaded that absent Crespy's union activity, Broome would have found these manholes so inexplicably dirty that he would have discharged Crespy outright. Compare ITT v. NLRB, 719 F.2d 851, 114 LRRM 2777 (6th Cir. 1983).

24 / At the second meeting, Broome started his questioning of Polulak by asserting he had seen two dirty manholes. In his testimony, Broome admitted that the manhole at Linda and Bermuda, which had small pieces of grease in the pipe, could have gotten into that condition overnight. The manhole on Tabago Avenue, cleaned on July 21, had only two pieces of concrete and Broome's testimony that this manhole could not have gotten into its condition overnight was conclusory and not responsive to the actual situation of a two day delay between cleaning and inspection. Finally, we do not consider Lecuyer's testimony about the condition of these manholes or other manholes during his visits to be credible given our findings concerning his animus against Crespy and the Hearing Examiner's credibility determinations.

We next consider whether the Authority violated subsections 5.4(a)(1) and (3) when it discharged Polulak on July 23, 1982. We conclude it did for two independent reasons: (1) it discharged Polulak as part of its decision to fire Crespy for his union activities, and (2) it denied Polulak the union representation to which he was entitled and then relied on his alleged misstatements during that interview to terminate him.

The Hearing Examiner concluded that there was insufficient evidence to conclude that Polulak was discharged because of his own union activities. With this observation we agree. Nevertheless, the Hearing Examiner also stated (p. 22) that Polulak was an innocent bystander who was hurt when the Authority took aim at Crespy. With this statement we agree and believe it suffices, under all the circumstances of this case, to establish a violation of subsections 5.4(a)(1) and (3). We will not repeat the evidence establishing that the Authority's supervisors wanted to fire Crespy for his union activities and initiated the inspections as a result of his (and Polulak's) July 21 grievance. Obviously Crespy could not have been discharged for unsatisfactory work performance unless his work partner was also discharged. When Polulak was interviewed, he was persistently asked to incriminate Crespy -- the target of the investigation -- but refused to do so, thus annoying his questioners. Under all these circumstances, we believe the Authority was substantially motivated to discharge Polulak because of Crespy's protected activities.

We also do not believe that the Authority has proved by a preponderance of the evidence that it would have discharged Polulak absent its illegal desire to eliminate Crespy and his protected activities from the workplace. Broome testified that Polulak was fired because of his alleged misstatements that the manholes in question had all been cleaned.[26/] Again, however, the dispute was over whether the manholes had been properly cleaned, not whether they had been cleaned at all, and no employee had ever been discharged or disciplined beyond an oral reprimand for failure to clean a manhole completely. Further, we do not see the dramatic misstatements that Broome allegedly detected. Polulak admitted that a handgun was not used on every manhole (.e.g., the St. John's dead end manhole) and attempted to explain why a handgun had not been used. Further, Broome knew that Polulak and Crespy had spent a substantial period of time cleaning the Bermuda and Culebra manhole and that the entire Shelter Cove area had not been flushed since 1971. Under all these circumstances, we do not believe that Broome, absent a desire to discharge Crespy for his union activities, would have found these manholes so inexplicably dirty that he would have discharged Polulak outright. See, Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409, 424 (1970); Associated Milk Producers, 259 NLRB 1033

26/ The Authority, of course, does not and cannot assert that Polulak was fired based on his disciplinary record since it was unblemished. Further, Polulak did not prepare the July 21 and 22 worksheets or make any "big deal" comments; thus not all the same factors applicable to Crespy's case apply to Polulak's case.

(No. 131), 109 LRRM 1072 (1982); Howard Johnson Co., 209 NLRB 1122 (No. 1773), 86 LRRM 1148 (1974); Goshen-Litho, Inc., 196 NLRB 977 (No. 139), 80 LRRM 1829 (1972); V.E. Anderson Manufacturing Co., 184 NLRB 50, 74 LRRM 1642 (1970); All-Tronics Inc., 175 NLRB 44 (No. 110) 71 LRRM 1621 (1969; Developing Labor Law, p. 189 (2d Ed., 1983).

We next consider whether the Authority violated subsection 5.4(a)(1) when it discharged Polulak following an interview in which his requests for union representation were denied. We hold it did.

In re East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979) ("East Brunswick"), aff'd in part, rev'd in part, App. Div. Docket No. A-280-79 (6/18/80), we held that an employer interfered with the exercise of rights protected by the Act and therefore violated subsection 5.4 (a)(1) when it denied an employee's request for union representation at an interview which the employee could reasonably believe might result in discipline. We relied upon NLRB v. Weingarten Inc., 420 U.S. 251, 88 LRRM 2689 (1975) ("Weingarten"),[27/] where the U.S. Supreme Court endorsed an identical rule of law, and Red Bank Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978), where the N.J. Supreme Court held that section 5.3 of the Act guarantees employees

27/ Our Supreme Court has held that it is appropriate to look to private sector caselaw in unfair practice cases. See Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Ed. Sec'ys, 78 N.J. 1 9 (1978); Bridgewater. We believe this guidance is particularly appropriate here, where the United States Supreme Court has persuasively articulated the need for the Weingarten rule. See also Dupont v. NLRB, __ F.2d __, 115 LRRM 2153 (3rd Cir. 1983) ("Dupont"). Among the reasons identified for such a rule are: (1) the union's interest in safeguarding the interests of the entire unit by exercising vigilance over the fairness and uniformity of the employer's disciplinary practices; (2) the need to assure other workers that they, too, can obtain such aid and (continued)

the right to have grievances presented by the majority representative. Since East Brunswick, the Commission has applied the Weingarten rule in cases where the facts indicate an objectively reasonable belief that an investigatory interview may result in discipline, and has declined to apply that rule in cases where the facts do not indicate such an objectively reasonable belief. In re Camden Co. Vo-Tech. School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); In re County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981); In re Twp. of East Brunswick, P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982); In re Stony Brook Sewerage Authority, P.E.R.C. No. 83-138, 9 NJPER 280 (¶14129 1983). See also, R. Jacobs, Employee Rights To Representation, N.J. Lawyer, pp. 53-56 (May 1984); R. Jacobs, Weingarten Rights In the Public Sector, N.J. Law Journal, p. 1 (Dec. 9, 1982). The reasonableness of an employee's belief is measured by objective standards, under all the circumstances of each case. Weingarten, 420 U.S. at 257, n. 5; Alfred M. Lewis Inc. v. NLRB, 587 F.2d 403, 99 LRRM 2841 (9th Cir. 1978); ILGWU v. Quality Mfg. Co., et al., 195 NLRB 195, 76 LRRM 1269 (1972); Lennox Industries, Inc., 637 F.2d 340, 106 LRRM 2607, 2611 (5th Cir. 1981); DuPont.[28]

27/ (continued)
protection if and when they need it; and (3) assisting a fearful and inarticulate employee to relate accurately the incident being investigated. DuPont, 115 LRRM at p. 2156. This last reason is of special force in the instant case since Polulak was fearful, inarticulate, and confused during the first meeting.

28/ Weingarten rights do not attach where a meeting is called solely to inform an employee of an already made disciplinary determination. Baton Rouge Waterworks , 246 NLRB 995, 103 LRRM 1056, 1058 (1979). We also note that on May 14, 1984, the Third Circuit Court of Appeals, after rehearing, vacated the original decision in DuPont. The employer and the NLRB requested rehearing of the original decision's extension of Weingarten rights to a non-unionized workplace. That issue, of course, is not present here and we intimate no opinion concerning it. We cite the original decision in DuPont merely for its exposition of the reasons and concerns underlying the Weingarten rule.

Once the employee makes the request for representation, the employer has three options: (1) granting the employee's request for union representation; (2) discontinuing the interview; or (3) offering the employee a choice of continuing the interview unrepresented or having no interview. Weingarten, 88 LRRM at 2691, Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188 (1972). There is no waiver of rights unless the requesting employee voluntarily agrees to remain unrepresented after being presented with these options or is otherwise made aware of the choices. Pacific Tel. and Tel. Co. v. NLRB, 711 F.2d 134, 113 LRRM 3529, 3530-3531 (9th Cir. 1983).

In the instant case, the facts establishing a violation of the Weingarten rule are clear beyond cavil. The Authority's own witnesses all agreed that the purpose of the meeting with Polulak alone on July 23 was to investigate whether discipline against Polulak was warranted and that no pre-meeting decision to discipline Polulak had been made. The Hearing Examiner found, and so do we, that Polulak requested union representation one-third of the way through the long morning meeting; that he repeated this request, that his requests were ignored; and that the questioning continued for approximately 40 or more minutes. Under all these circumstances, we find that there was a reasonable basis for believing that disciplinary action might result from the first meeting and that therefore the Authority had an obligation, which it violated, to either grant Polulak's request for union representation; immediately stop questioning him; or offer him the choice of continuing the interview unrepresented or having no interview.[29/]

29/ The Authority errs in relying on Polulak's testimony about his subjective beliefs concerning the likelihood of discharge before (Continued)

We next consider whether the Authority's violation of Weingarten justifies an order reinstating Polulak to his job, and awarding him back pay independent of the Authority's subsection 5.4(a)(3) violation already justifying that remedy. We conclude that it does.

The Hearing Examiner correctly articulated the test the National Labor Relations Board set forth in Kraft Food, Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980) for determining whether a Weingarten violation justifies a reinstatement and back pay order:

> Initially, we determine whether the General Counsel has made a prima facie showing that a make-whole remedy such as reinstatement, backpay, and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.
>
> In the face of a such a showing, the burden shifts to the respondent. Thus, in order to negate the prima facie showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remedy will not be ordered. Instead, we will provide our traditional cease-and-desist order in remedy of the 8(a)(1) violation.

See also, The Developing Labor Law, pp. 155-156 (2nd Ed. 1983).

In the instant case, we are satisfied, regardless of who has the

29/ (Continued)
and after the first meeting. Polulak's pre-meeting belief that he might be requested to do some repair work quickly became irrelevant when the hostile trend of questioning concerning his and Crespy's work was established and was thus replaced with an objectively reasonable belief during the meeting that discharge or lesser discipline was a reasonable possibility. That his fear of discharge may have subsided somewhat between the first and second meetings is irrelevant to a determination that he was entitled, upon request, to union representation at the first meeting.

burden of showing what remedy is appropriate, that Polulak must be reinstated and given back pay because the Weingarten violation directly led to his discharge.[30/]

Broome and the other Authority witnesses testified that Polulak was discharged because he was allegedly "untruthful" concerning whether the manholes had been completely cleaned.[31/] According to the Authority's witnesses, the allegedly "untruthful" statements occurred during the first meeting when Polulak's requests for union representation were denied.[32/] We do not perceive the same degree in untruthfulness in Polulak's statements then as the Authority's witnesses claimed they did since no manhole was completely unflushed; since Polulak did not claim that every manhole was additionally cleaned by a handgun; and since the relative degree of cleanliness was really the issue. Permitting union representation of Polulak, whom Broome conceded was confused about the streets and manholes in question, might well have helped to sort out some of the questions his supervisors had. DuPont. Because the Authority, by its own account, directly fired Polulak for statements made at an investigatory interview at which he was denied union representation, we agree with the Hearing Examiner that reinstatement and back pay are warranted

30/ Here, we are accepting at face value the testimony of the Authority's witnesses that Polulak's statements during the first interview led to his discharge and are assuming that the independently illegal reason -- retaliation against Crespy's protected activities -- for Polulak's discharge does not exist.

31/ We discount Broome's testimony that a tougher policy on supervising employees since the reorganization contributed to Polulak's discharge and certainly do not believe that this explanation alone would have resulted in the discharge of an employee whose work was good and who had no prior disciplinary record.

32/ The Authority's witnesses testified that Polulak made certain admissions when visiting the work site and that he confessed his guilt at the outset of the second meeting. We have not credited this testimony, but it does make clear that the

(Continued)

remedies for the Weingarten violation. See In re Office of the Bergen County Prosecutor, P.E.R.C. No. 83-130, 9 NJPER 264 (¶14121 1983).

We consider last the Authority's contention that the Hearing Examiner was biased and did not conduct a fair hearing. This contention is meritless.

The Authority asserts that the Hearing Examiner should have granted its request to recuse himself from the case. This request was made during the cross-examination of Severs on the third day of hearing and followed the Hearing Examiner's overruling of several objections the Authority's attorney had interposed to this cross-examination. The Hearing Examiner denied this request and arranged for an immediate appeal of that decision to the Chairman by telephone. It was then agreed that the Hearing Examiner would continue to conduct the hearing and the Authority's attorney could place on the record additional statements he believed necessary, if the Authority lost the case, to preserve his contention for the Commission's review. We have reviewed the record completely and find that the Hearing Examiner's rulings with respect to this particular cross-examination and with respect to all other evidentiary questions were fair and accurate.[33/]

32/ (Continued) focus of concern about alleged untruthfulness was on Polulak's statements during the first meeting.

33/ Here is an example of the questions which Severs was asked on cross-examination and to which the Authority's attorney unsuccessfully objected:

> Q. Now, then, the purpose of the meeting was to determine whether or not he should be disciplined, the first meeting?
> MR. KOTZAS: You are putting words in his mouth.
> MR. GOLDBERGER: Of course I am.
> THE HEARER: Overruled. It's Cross-examination.
> MR. KOTZAS: Objection, for the record.

This question and the ones which followed were obviously within the proper scope of cross-examination which allows for a wide latitude of hard questioning.

The Authority also asserts that the Hearing Examiner's findings of fact were skewed and ignored the testimony of Authority witnesses. The Hearing Examiner's findings of fact were supported by substantial evidence and specific credibility determinations. Crediting one witness over another does not mean the latter's testimony has been ignored; instead, it has been considered and found not worthy of belief or weight. The Hearing Examiner drew some credibility determinations in favor of the Charging Parties' witnesses and against the Authority's witnesses and some credibility determinations (for example, Crespy's "big deal" comment) vice-versa. We reiterate our adoption of his credibility determinations.

The Authority also contends that the Hearing Examiner erred in failing to give more weight to Polulak's testimony concerning his fear of discipline after the first meeting and to Crespy's prior disciplinary record. We agree with the Hearing Examiner's weighing and discussion of this evidence for the reasons we have already stated. Supra at 16-17, 29-30, 36-37.

Finally, we consider the Authority's argument that the Hearing Examiner erred in failing to admit certain evidence to impeach Crespy after the hearing had been reopened. This argument is meritless.

At the hearing, the following interchange occurred on cross-examination of Crespy:

> Q. Mr. Crespy, are you currently employed?
> A. No, I'm not.
>
> Q. Have you been unemployed continuously since you were discharged from the Dover MUA?
> A. Yes, I am.

After the first closing of the hearing, the Authority wrote the Hearing Examiner a letter dated April 6, 1983 which stated that it had been advised of the results of an investigation by the Department of Labor, Division of Unemployment finding that Crespy had been collecting unemployment while self-employed with a taxi company from September 2, 1982 through March 1, 1983. Claiming that Crespy may have committed perjury at the hearing, the Authority asked the Hearing Examiner to conduct his own investigation and to take judicial notice of the Department of Labor's records. The Charging Parties' attorney filed a letter dated April 7, 1983 opposing any off-the-record investigation or any post-hearing consideration of arguments based on allegations outside the record; in addition, the attorney asserted that the alleged findings were not inconsistent with Crespy's testimony since he was self-employed rather than employed in the hire of someone else and he was not asked if he was self-employed. On April 8, 1983, the Hearing Examiner wrote the parties that he would not conduct an investigation or take official notice of any records.

In a letter dated April 13, the Authority then asked that the record be reopened so it would have an opportunity to introduce newly discovered evidence concerning Crespy's employment. In a letter dated April 15, the Charging Parties opposed this request. On April 18, the Hearing Examiner reopened the record and scheduled a hearing for May 4.

On April 20, the Authority requested a subpoena duces tecum for the Division of Unemployment Compensation employee who

allegedly investigated Crespy. On April 26, the Hearing Examiner issued the subpoena duces tecum.

On May 4, the hearing reopened. The investigator did not attend nor did he submit any documents. The Authority's attorney stated that the investigator's superior had informed him the day before that the subpoena would not be complied with since it was departmental policy to treat investigation-related documents as confidential and private unless the subject of the investigation authorized the release or a court ordered production. After stating that he had no other witnesses to produce, the Authority's attorney asked the Hearing Examiner to enforce the subpoena and attempted to introduce two documents, entitled Claimant's Benefit Payment and Employment Record and purportedly from the investigation file, into evidence. The Hearing Examiner responded that he had no personal authority to enforce the subpoena, but that there was a mechanism for attempted enforcement through the agency. He also declined to admit or mark for identification the unauthenticated documents. He then closed the record. In his recommended decision, the Hearing Examiner stated that he had not considered the post-February 17, 1983 efforts to impeach Crespy by matters not of record.

The Hearing Examiner quite properly decided not to conduct his own investigation, not to take judicial notice of the alleged Division of Unemployment Compensation records, and not to allow the introduction of the unauthenticated records.[34/] Neither

34/ He also properly advised the Authority's attorney that the agency had a mechanism by which it could seek to have its (continued)

the Hearing Examiner nor this Commission is licensed to conduct off-the-record proceedings; evidence must be introduced in an orderly manner subject to the protections of due process. Brotherhood of R.R. Trainmen v. Palmer, 47 N.J. 482 (1966); In re Parlow, 192 N.J. Super. 247 (App. Div. 1983). Further, we do not believe it would be proper to take judicial notice of other agencies' raw investigative files as opposed to technical or scientific facts or matters of indisputable and common knowledge. N.J.S.A. 52:14B-10. See also Phillips v. Erie Lackawanna R.R. Co., 107 N.J. Super. 590 (App. Div. 1969), certif. den. 55 N.J. 444 (1970); Flanders v. William Paterson College, 163 N.J. Super. 225 (App. Div. 1978); cf. NLRB v. Sears-Roebuck Co., 421 U.S. 132, 89 LRRM 2001 (1975); Charlotte Mecklenberg Hospital Authority v. Perry, 571 F.2d 195 (4th Cir. 1978).[35/] Moreover, we agree with the Hearing Examiner that the Authority, despite having the record reopened on its motion, did not diligently act to obtain the evidence it wished to submit. Thus, the Authority did not earlier ascertain whether enforcement proceedings would be necessary and did not timely apply to have the subpoena enforced; the Authority did not call the man for whom Crespy allegedly worked, despite knowing the man's name and address for a month before the

34/ (continued) subpoena enforced, but the Authority never took advantage of this mechanism. N.J.A.C. 19:15-1.3. The Authority has made no attempt to argue that enforcement proceedings would have been successful, despite the asserted departmental policy on the confidential nature of the records.

35/ The Authority's reliance on Hintenberger v. City of Garfield, 49 N.J. Super. 175 (Law Div. 1958), aff'd 52 N.J. Super. 526 (App. Div. 1958) is misplaced since that case involved judicial notice of court records of fully litigated and concluded proceedings rather than raw investigatory administrative materials.

reopened hearing; and the Authority did not even attempt to recall Crespy to confront him with its allegations. Under all these circumstances, we hold that the Hearing Examiner acted well within his discretion in ruling on these evidentiary questions.

ORDER

The Public Employment Relations Commission orders that the Dover Municipal Utilities Authority:

I. Cease and desist from:

A. Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by denying employees such as Myron Polulak union representation at investigatory interviews which they could reasonably believe might result in disciplinary determinations, and by discharging employees such as Myron Polulak and Roger Crespy for engaging in protected activities on behalf of Teamsters Local 97 of New Jersey;

B. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by discharging Myron Polulak and Roger Crespy for engaging in protected activities on behalf of Local 97.

II. Take the following affirmative action:

A. Forthwith offer Myron Polulak and Roger Crespy reinstatement to the position of line maintenance employee or any substantially equivalent position;[37/]

37/ If, however, Crespy does not now have a valid driver's license and is thus disqualified under the Authority's policy from working, the Authority may apply to have this portion of the order concerning Crespy rescinded.

B. Make Myron Polulak and Roger Crespy whole for lost wages, less interim earnings,[38/] with interest at the rate of 12% per annum from July 23, 1982;

C. Expunge from the personnel files of Myron Polulak and Roger Crespy any reference to their discharges on July 23, 1982;

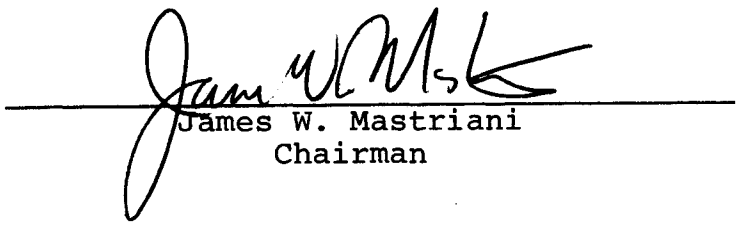
D. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative,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

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

38/ If the existence or amount of interim earnings is in dispute, compliance proceedings may be initiated before the Commission to resolve any questions.

The Public Employment Relations Commission dismisses those portions of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(4).

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

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 employees in the exercise of rights guaranteed to them by the Act, particularly by denying employees such as Myron Polulak union representation at investigatory interviews which they could reasonably believe might result in disciplinary determinations, and by discharging employees such as Myron Polulak and Roger Crespy for engaging in protected activities on behalf of Teamsters Local 97 of New Jersey.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by discharging Myron Polulak and Roger Crespy for engaging in protected activities on behalf of Local 97.

WE WILL forthwith offer Myron Polulak and Roger Crespy reinstatement to the position of line maintenance employee or any substantially equivalent position.

WE WILL make Myron Polulak and Roger Crespy whole for lost wages, less interim earnings, with interest at the rate of 12% per annum from July 23, 1982.

WE WILL expunge from the personnel files of Myron Polulak and Roger Crespy any reference to their discharges on July 23, 1982.

DOVER MUNICIPAL UTILITIES AUTHORITY
(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.

H. E. No. 83-40

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

In the Matter of

DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CI-83-16-43

ROGER CRESPY,

Charging Party.

DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CO-83-85-44

MYRON POLULAK & TEAMSTERS LOCAL 97 OF N.J.

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Authority independently violated Subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act when it discharged Myron Polulak as a result of what transpired at an unlawful investigatory interview in violation of Polulak's Weingarten rights. The Hearing Examiner further recommends that the Commission find that the Respondent Authority violated Subsections 5.4(a)(1) and (3) of the Act when it discharged Roger Crespy in retaliation for the exercise by him of activities protected under the Act as a shop steward for Local 97. By way of remedy, the Hearing Examiner recommends that both Polulak and Crespy be reinstated with back pay with interest at the rate of 12% per annum and that any reference to their discharges in their personnel files be removed.

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.

H. E. No. 83-40

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

In the Matters of

DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CI-83-16-43

ROGER CRESPY,

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DOVER MUNICIPAL UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CO-83-85-44

MYRON POLULAK & TEAMSTERS LOCAL NO. 97 OF N.J.

Charging Parties.

Appearances:

For the Respondent
Paschon, Feurey & Kotzas, Esqs.
(Stephen B. Kotzas, Esq.)

For the Charging Parties
Goldberger, Siegel & Finn, Esqs.
(Howard A. Goldberger, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 13, 1982, and amended on November 1, 1982, by Roger Crespy in Docket No. CI-83-16-43, and a second Unfair Practice Charge was filed on October 5, 1982 by Myron Polulak and Teamsters Local No. 97 of N.J. in Docket No. CO-83-85-44 (hereinafter the "Charging Parties," "Crespy," "Polulak" or "Local 97") alleging that the Dover Municipal Utilities Authority (hereinafter the "Respondent" or the "Authority") 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 on July 23, 1982 unlawfully denied Polulak's request for union representation at a disciplinary interview and, further, discharged Polulak on that date as a result of the exercise by Polulak of protected activities, including the filing of grievances; and that the Respondent on July 23, 1982, discharged Crespy, a shop steward for Local 97, as a result of Crespy's having engaged in protected activities, inter alia, the filing of a grievance on July 21, 1982; further, both Crespy and Polulak alleged disparate treatment in that other employees' infractions have not led to terminations; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 18, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on February 4, 7, 8, 17 and May 4, 1983[1a/] in Newark, New Jersey, 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 May 4, 1983.

Unfair Practice Charges, as amended, 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.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

1a/ The final hearing on May 4th resulted from Respondent's Motion to Reopen the Record to introduce new evidence as to Crespy. Respondent unsuccessfully sought to subpoena records of the Department of Labor, Division of Unemployment Insurance. No additional witnesses having appeared, the Hearing Examiner closed the record, notwithstanding Respondent's objection to both the closing of the record and the Hearing Examiner's refusal to mark for identification two unauthenticated documents.

FINDINGS OF FACT

1. The Dover Municipal Utilities Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Teamsters Local No. 97 of N.J. is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Roger Crespy and Myron Polulak are public employees within the meaning of the Act, as amended, and are subject to its provisions.

4. Crespy was hired by the Authority in 1974 as a Line Maintenanceman and continued in that job classification until he was terminated on July 23, 1982. Polulak was hired on July 7, 1975 as a Line Maintenanceman but, shortly thereafter, was reclassified as a Carpenter. 2/

5. The record is clear that Crespy openly engaged in protected activities, of which supervision was aware, as follows: He was shop steward for Amalgamated Union 355 during the approximate one year of its incumbency in 1980 and 1981; Local 97 became the collective negotiations representative in or around August 1981 and Crespy was appointed shop steward in September 1981 and continued in that capacity until his termination in July 1982; Crespy was one of three employees designated by Local 97 to be its negotiation representatives and, in that capacity, Crespy attended all collective negotiations meetings between Local 97 and the Authority; in the collective negotiations meetings with the Authority, Crespy testified without contradiction that he voiced his opinion on the Authority's negotiations offers in strong terms and he also so testified that the Authority's Commissioners did not like his attitude, considering him "off base;" as recently as June and July 1982 Crespy filed two grievances, i.e., on June 18, 1982 against Severs regarding alleged improper sick leave (CP-2) and on July 21, 1982 regarding overtime given to foremen (CP-1).

2/ In March 1982 the Authority decided to RIF certain employees, among them Polulak. Polulak testified credibly that he filed a grievance, claiming that he should be retained based on his seniority. As a result, Polulak was reclassified back to Line Maintenanceman as a trainee under Frederick H. Severs, the General Superintendent of the Authority.

6. Robert Brune, the Deputy Director of the Authority from 1978 to 1981 and Executive Director until February 1982, testified without contradiction that John W. Broome, the Executive Director of the Authority since October 1982 and previously the Director of Engineering, and Oliver J. McGuire, the Supervisor of Operations, stated at a weekly administrative meeting of the Authority that Crespy was a "troublemaker" (1 Tr. 32). Also, Brune testified without contradiction that at one or more of the said administrative meetings of the Authority Broome and McGuire stated that "...there probably would not be any Union were it not for the particular efforts of Mr. Crespy" (1 Tr. 32, 33). Brune also testified without contradiction that at one or more of the said administrative meetings of the Authority Broome and McGuire expressed the view that "...if there was anybody that should go, the preference would be for Mr. Crespy" (1 Tr. 34).

7. Michael Kajan, who was employed as a Line Maintenanceman by the Authority from 1979 until his discharge on July 28, 1982, testified without contradiction that between July 15 and July 20, 1982 he overheard Broome and Severs conversing by the bathroom and, after mentioning Crespy's name, Broome said "...It's going to be trouble with the union, because he was a Shop Steward..." (2 Tr. 41).

8. Allen Horner, a Line Maintenanceman for the Authority for fourteen years and the shop steward for Local 97 since July 1982, testified without contradiction that in October 1982 he had a discussion with Severs regarding the filing of a grievance where Severs stated "Well, you seen what happened to Roger after he filed a grievance" (2 Tr. 26). After Horner indicated that he did, Severs said "He filed a grievance on a Thursday, and he was dismissed on a Friday" (2 Tr. 26, 27). With that, Severs "Just grinned, more or less" (2 Tr. 27).

9. On June 18, 1982, the date that Crespy filed a grievance (CP-2, supra), Crespy was issued his first written warning by McGuire for abuse of sick time during the years 1979 through 1982 (R-3).[3/] This warning was approved by Broome

3/ The only other evidence of discipline as to Crespy was an oral warning on October 24, 1978 for having been late seven times on unspecified dates and a one-day suspension for not reporting damage to an Authority vehicle driven by Michael Kajan.

and Severs, in addition to McGuire. The warning memo indicates that in 1979 Crespy had used all of his sick time except for two and one-half days; that in 1980 he had used all sick time by September; that in 1981 he had used all sick time by November; and that in 1982 he had used nine days in less than six months time. Employees receive twelve sick days and three personal days per year.

10. Broome testified that Crespy was the Authority's worst and most troublesome employee and that this opinion of Crespy dated back four years. Severs testified that Crespy's job performance was "not very good." Severs stated that he had once recommended that Crespy be discharged but that he was overruled by the then Executive Director, Robert D. Conti. A countervailing opinion of Crespy and Polulak, too, was given by former Executive Director Brune, who testified that he was "favorably impressed" with both Crespy and Polulak. Also, Broome on April 5, 1978 had written a memo to Executive Director Conti regarding the promotion of Crespy on January 16, 1978, which stated, inter alia, that Crespy had shown himself "capable and interested in this new position" and recommended an increase in Crespy's rate of pay (CP-4). Finally, Brune testified without contradiction that in January and February 1982, when the question of a RIF was being discussed, both Broome and McGuire stated to him that all employees were performing well.

11. The engaging in protected activities by Polulak is much more limited than that of Crespy. The activities consisted of Polulak's having attended and spoken at union meetings of Local 97, having filed a grievance in March 1982 in connection with proposed RIF plus his having signed the grievance, which Crespy filed on July 21, 1982 (CP-1, supra)

12. With respect to Polulak's job performance and disciplinary history: Brune was favorably impressed by his job performance; Broome and McGuire in January or February 1982 said, according to Brune, that all employees were performing well; Broome testified that Polulak had an extremely bad attitude after he was reclassified in March 1982; and no evidence of prior discipline was elicited.

13. In the period prior the the discharge of Crespy and Polulak on July 23, 1982

their supervisor was Richard Lecuyer, the Line Maintenance Foreman.

14. Job duties of a Line Maintenanceman are essentially to clean sewers and manholes, the access to the sewers being through manholes on the street surface. The manholes are situated at points along the main sewer lines. The main sewer lines are cleaned with a high-powered suction jet vacuum, which sucks up waste material. A high velocity hand gun is used to clean the shelves within the manholes by flushing them with water from a tank truck.

15. Crespy, as a Line Maintenanceman, had been cleaning sewers and manholes for a least two to three years immediately prior to his discharge on July 23, 1982. Crespy credibly denied that he had been instructed by foreman Lecuyer to use the hand gun on every manhole without regard to whether or not it was already clean.[4/] Crespy testified without contradiction that when he received an assignment from his foreman he was told to "...do the area the best to your knowledge," explaining that because he was an experienced employee it was assumed that he knew what he was doing (1 Tr. 63).

16. In the week immediately preceding July 22, 1982 Crespy and Polulak had been working together in cleaning an area of Dover Township known as Shelter Cove. Crespy as the senior and more experienced employee was in charge.

17. On July 22, 1982 Crespy and Polulak worked on cleaning sewers and manholes on the following streets in the Shelter Cove area: Bermuda, Kingston, St. Johns, St. Thomas and Culebra (see work sheet completed by Crespy: R-1). Crespy returned to the "shop" at about 3:30 p.m. for a union meeting, having left the job site with Polulak at about 3:00 p.m.[5/]

18. Lecuyer testified that at about 3:30 p.m. on July 21 and July 22, 1982 he pulled a number of manholes in the area in which Crespy and Polulak had been

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4/ Polulak also testified credibly that Lecuyer had told him to use his "discretion" as to whether or not a hand gun was needed on any given manhole. Crespy and Polulak are credited in this regard based on their demeanor and the fact their version of what instructions Lecuyer gave to them appears more probable: see also Lecuyer's and Severs' inconsistent testimony (cf. 3A Tr. 52, 53 v. 63, 81).

5/ Polulak during the day had been opening manholes and using the hand gun where needed. Polulak acknowledged that he did not clean the last manhole on St. Johns that day.

working and discovered that some manholes had not been pulled, that three were "bad" and that not much had been done on the others. On July 22, after pulling 18 to 20 manholes, Lecuyer reported his findings to Severs. The next day, July 23, Severs and Lecuyer went to the job site and pulled 10 manholes and then reported back to McGuire that all of the manholes were "dirty." Severs acknowledged on cross-examination that he had never previously checked the work of Crespy and Polulak (3A Tr. 31, 32). Lecuyer acknowledged on cross-examination that the first time that he had ever found manholes dirty was in July 1982 and that his last prior check of the work of any Line Maintenanceman was six months earlier when he pulled 10 to 12 manholes (3A Tr. 83, 85). Finally, Severs acknowledged on cross-examination that in the year prior to July 1982 he had never gone out to any job site to see if manholes were improperly cleaned (3A Tr. 50).

19. On July 23, 1982 Crespy and Polulak drove to Bermuda Drive in the Shelter Cove area where they had been working and at some point between 9:30 and 10:00 a.m. they received a radio message from Lecuyer to "Go and hit the bad spots in town" (1 Tr. 71). After that they responded to an emergency at 242 Clinton Avenue. At 11:00 a.m. an employee, John Risk, intercepted Crespy and Polulak and directed Polulak to accompany him back to the "shop." Kajan, who was with Risk, commenced working with Crespy.

20. Prior to the arrival of Polulak at the "shop" Severs and Lecuyer had reported to McGuire on their investigation of manholes, stating that they were "dirty," supra. Severs, Lecuyer and McGuire then went to Broome to report on the manholes.

21. Shortly after Polulak arrived at the "shop" he was requested to go to Broome's office where McGuire, Lecuyer and Severs were also present. Broome informed Polulak that he was there in reference "...to the work that was done yesterday" (2 Tr. 74). Polulak proceeded to describe what work had been done and "they" insisted that he was not telling the truth (2 Tr. 74, 75). He was questioned as to whether

Crespy was using the hand gun on manholes. Polulak insisted that the hand gun was used. Polulak testified that he became scared and said "I was afraid of my job, and I asked for union representation" (2 Tr. 75). Polulak testified that this request was ignored and that questions continued. He again asked for union representation, a request which was again ignored. Broome testified that this meeting lasted about one hour. Polulak testified that his first request for union representation came about one-third of the way through the meeting. Severs, McGuire and Broome each testified that Polulak's request for union representation came near the end of the meeting and that their response was to visit the job site. Lecuyer testified that Polulak never asked for union representation. Based upon the demeanor of the witnesses and conflicting testimony of the witnesses for the Respondent, the Hearing Examiner credits Polulak's testimony that his first request for union representation was made at a point about one-third through the meeting. The Hearing Examiner finds as a fact that each of the two requests by Polulak for union representation was ignored by the supervisors present. The Hearing Examiner further finds as a fact that Polulak was in reasonable apprehension of discipline at the time his first request for union representation was made. This is confirmed by the testimony of Severs on cross-examination that he had decided to recommend discipline when Polulak said the manholes were clean (3A Tr. 38, 46-48).[6/]

22. After the foregoing meeting was concluded, Polulak was told to go to the "shop" and, shortly thereafter, he was taken in a station wagon to the Shelter Cove area. The first stop was the last manhole on St. Johns. Those present were Broome, McGuire, Severs, Lecuyer and Polulak. Broome had a camera and commenced taking pictures from atop the open manhole. Next the group proceeded to Bermuda Drive

6/ The Hearing Examiner does not find probative to a violation by the Authority of the Act as to Polulak, Polulak's testimony on cross-examination in connection with why he did not attempt to contact either of the shop stewards between the morning and afternoon meetings on July 23, 1982. Polulak's testimony that he did not think that he was being "terminated" or "fired" occurred after the conclusion of the morning meeting in Broome's office where Polulak twice requested union representation. Compare 2 Tr. 75 with 2 Tr. 140, 144.

where Broome said that the manhole had never been cleaned. Polulak acknowledged that there was a residue of black film. The number of manholes visited is disputed. Polulak said that only two were visited (St. Johns and Culebra) while Broome testified that four manholes were visited, at which he took photographs. Four photographs were received in evidence.[7/]

23. After the group had completed the visit to the manholes, Polulak was taken back to the "shop" and told to mop the floor. Shortly thereafter, he heard on the radio that Crespy had been summoned back to the "shop." When Crespy arrived at about 3:00 p.m. he and Polulak were summoned to Broome's office where McGuire, Severs and Lecuyer were also present. Crespy testified that Broome told him that "...we didn't do our job that day, that he went out and he saw two manholes that were dirty..." (1 Tr. 74). There then ensued a discussion over whether or not the hand gun had been used in the manholes with Broome stating that "...one manhole in particular, 776 Bermuda Drive... was filthy" (1 Tr. 74). Crespy asked Broome to come out to the job site and to look at the grease sucked up by the jet vac. Broome refused Crespy's request. The Hearing Examiner credits Polulak's denial that he made a statement during this meeting to the effect that it was all his fault, notwithstanding the testimony of McGuire to the contrary. The Hearing Examiner has previously credited Polulak over McGuire in connection with Polulak's request for union representation, supra. Broome testified that near the end of the meeting Crespy said "So a couple of manholes were dirty, so what's the big deal" (3B Tr. 58).[8/] Broome concluded the meeting with the statement that he had been "...kicking this around since 11:00 this morning..." and "both of you are terminated" (1 Tr. 74). When asked for the reasons for the discharge of Crespy and Polulak, Broome testified that the "major" reason was because of the "untruthfulness" of Crespy and Polulak and Crespy's attitude as indicated by the "big deal" remark, supra (3B Tr. 59)

7/ The photographs are of the manholes at Bermuda and Culebra (R-5), Linda and Bermuda (R-6), St. Johns dead end (R-7) and Tabago (R-8).

8/ Crespy denied making such a statement but the four Authority witnesses present at the meeting corroborated each other in their testimony that Crespy did make the statement. The Hearing Examiner does not credit Crespy's denial given the overwhelming corroboration by the Authority's witnesses.

24. With respect to the four photographs taken by Broome on July 23, 1982 (see footnote 7, supra) Broome testified that all photographs disclosed dirty manholes. Broome acknowledged that the manhole depicted in R-6 could have gotten into that condition overnight. However, he was clear that the other three manholes depicted in R-5, R-7 and R-8 could not have gotten into that condition overnight. Further, Broome testified that he could not tell if a hand gun had been used on any of the four manholes.[9a/]

25. Nicholas A. Pomarico, who has had four and one-half years of experience as a Sewer Jet Operator, cleaning sewer main lines and laterals, testified regarding the four photographs taken by Broome, supra. He testified that, in his opinion, the residue shown in R-5, R-6 and R-7 could have accumulated overnight. He testified further that R-8 appeared to depict a clean manhole.

26. Horner, a Line Maintenanceman for fourteen years, supra, testified without contradiction that Lecuyer, in either late 1981 or early 1982, told him to do a better job and did not discipline him when Horner failed to clean properly a manhole on Jay Street.[9b/] Horner said that thereafter he used a hand gun.

27. Kajan, a Line Maintenanceman from 1979 to July 28, 1982, supra, testified without contradiction that after Crespy and Polulak were discharged he was sent out to check and clean manholes in the Shelter Cove area. He said that he checked over 100 manholes and that the first day he flushed 15 to 20 manholes, all of which were clean and without residue.

28. Evidence of disparate treatment in the disciplining of employees establishes:

a. Severs: It is not disputed that about six or seven years ago Severs had an accident involving two other vehicles when he was driving under the influence, as a result of which his drivers license was suspended. Thereafter the Authority

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9a/ It is noted that Broome acknowledged that the Shelter Cove area had not been flushed since the area was constructed in 1971 (3B Tr. 48, 4 Tr. 38).

9b/ Lecuyer acknowledged on cross-examination that he had never had occasion to report employees for not cleaning manholes properly with a hand gun nor had he had any complaints of non-use (3A Tr. 82, 84).

changed its policy to require that all employees have a drivers license in order to continue in employment. According to Broome, this policy change occurred in 1975. Severs was never disciplined as a result of the incident.

b. John Risk: Risk is a foreman, who has in recent years been involved in at least two accidents. No discipline was ever imposed. Crespy testified without contradiction that within the year prior to his termination Risk had had an accident involving an Authority trailer and Broome testified without contradiction that sometime in 1981 Risk had had an accident involving a back hoe.

c. Samuel Galloway: Within the year prior to Crespy's discharge Galloway lost his drivers license and did not report it to the Authority. Thereafter, he was involved in a minor accident and could not produce his drivers license. Galloway initially received a two-week suspension, which was reduced to one week. Broome testified that the reason Galloway was not terminated was that he did not sign the Authority policy, which, as indicated above, was adopted in 1975.

* * * *

NOTE: In the crediting of the testimony of Crespy in this proceeding, supra, the Hearing Examiner relies solely on matters developed on the record at hearings on February 4, 7, 8 and 17, 1983. No weight or consideration whatever has been given to post-February 17th efforts of the Respondent to impeach Crespy's credibility by matters not of record.

THE ISSUES

1. Did the Respondent violate Myron Polulak's Weingarten[10/] rights when it ignored Polulak's request for union representation at the morning meeting on July 23, 1982, and did the Respondent violate Subsections(a)(1) and (3) of the Act[11/] by discharging Polulak thereafter on the same date?

2. Did the Respondent violate Subsections(a)(1) and (3) of the Act[11/] when it discharged Roger Crespy on July 23, 1982?

10/ NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

11/ There was no evidence adduced by the Charging Parties that the Respondent violated Subsection(a)(4) of the Act as to Polulak or Crespy. The Hearing Examiner will recommend dismissal of the (a)(4) allegation.

DISCUSSION AND ANALYSIS

The Respondent Violated Polulak's Weingarten Rights When It Ignored Polulak's Request For Union Representation At The Morning Meeting On July 23, 1982 And Thereby Independently Violated Subsection (a)(1) Of The Act When It Discharged Polulak Thereafter On The Same Date

As the Respondent points out, an employee is entitled to have a union representative present "...at any interview in which the employee reasonably believes that disciplinary action might result..." subject to the limitation that Weingarten rights arise only "...in situations where the employee specifically requests representation..."

The Commission had adopted Weingarten, supra, specifically in the following cases: East Brunswick Board of Education, P.E.R.C. 80-31, 5 NJPER 398 (1979), aff'd. in part, rev'd. in part, App. Div. Docket No. A-280-79 (1980); Camden County Vocational Technical School, P.E.R.C. No. 82-16, 7 NJPER 466 (1981); and County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (1981). The Appellate Division in East Brunswick, supra, reversed the Commission on the facts as to whether or not a Weingarten violation had occurred, but affirmed the Commission in adopting Weingarten as precedent from the Federal sector. Thus, the holding of the United States Supreme Court in Weingarten, and subsequent decisions of the NLRB are applicable to cases arising before the Commission.

The Hearing Examiner finds and concludes that the Respondent violated Polulak's Weingarten rights on July 23, 1982. Further, the Hearing Examiner finds and concludes that the discharge of Polulak on that date was based upon information obtained from Polulak at the morning and afternoon meetings. Broome testified that the "major" item in his decision to discharge Polulak was his "untruthfulness,"[12/] which necessarily was manifested at the two meetings on July 23, 1982.

12/ See Finding of Fact No. 23, supra.

The Hearing Examiner has previously found as a fact that Polulak first requested union representation about one-third of the way through the morning meeting on July 23, 1982, which was ignored, and that at the time of the request he was in reasonable apprehension of discipline (see Finding of Fact No. 21, supra). Polulak made a second request at the morning meeting, but did not renew his request for union representation at the afternoon meeting. The same administrators and supervisors were present at each meeting.

In Lennox Industries, Inc. v. NLRB, 637 F.2d 340, 106 LRRM 2607 (5th Cir. 1981) the Court enforced an order of the NLRB and held, inter alia, that where an employee requests union representation at an investigatory interview, and is in reasonable apprehension of discipline, he need not renew or repeat the request at a subsequent meeting as long as at least one supervisor was present at both meetings. The Court said:

> "...As long as one or more company officials are aware of the employee's desire and request for the presence of a union representative, a single request will suffice for the multiple subjects of a single meeting, or for multiple meetings which are part of a 'single, interrelated episode,' as here..." (106 LRRM at 2611) (Emphasis supplied).

The Hearing Examiner has previously noted that he does not find probative to a violation by the Authority of the Act, Polulak's testimony as to why he did not attempt to contact either shop steward between the morning and afternoon meetings, i.e., he did not think that he was being "terminated" or "fired" after the conclusion of the morning meeting (footnote 6, supra). Polulak's Weingarten violation occurred during the morning meeting when the Authority's administrators and supervisors twice ignored Polulak's request for union representation when he was in reasonable apprehension of discipline. The mere fact that he emerged from the morning meeting without being terminated did not obligate him to seek union representation between the morning meeting and the eventual afternoon meeting.

The violation of Weingarten occurs when, during an investigatory interview, an employee requests union representation when he is in reasonable apprehension

Of discipline. Clearly, a Weingarten violation occurred at the morning meeting. Since, under Lennox Industries, supra, there was no need to request union representation at a subsequent meeting, the Respondent Authority violated Polulak's Weingarten rights at the afternoon meeting as well. It is no answer to the issue of union representation to suggest, as does the Respondent, that the presence of Crespy, a shop steward, at the afternoon meeting satisfied Weingarten. Crespy's status in the afternoon meeting was that of an employee under investigation and he, too, was in reasonable apprehension of discipline. Plainly, Crespy's representation of Polulak was not of the type contemplated by the United States Supreme Court in Weingarten.

In Weingarten and in Lennox Industries, supra, the alleged violation of the National Labor Relations Act was of Section 8(a)(1), which, by its term, is directly analagous to Subsection(a)(1) of our Act. The usual remedy for an "(a)(1)" violation of either Act is the posting of a cease-and-desist notice. In the instant case there is involved the discharge of Polulak in alleged violation of Subsections(a)(1) and (3) of the Act. There is also involved the issue of whether or not a "make whole" remedy is warranted and, if so, under which Subsection.

Subsequent to the United States Supreme Court decision in Weingarten the NLRB has had occasion to order "make whole" remedies where a suspension or discharge has occurred following a violation of Weingarten rights. The NLRB in Kraft Foods, Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980) had occasion to delineate the test for determining whether a "make whole" remedy should be ordered in a case involving only an alleged violation of Section 8(a)(1). The Board set forth the following analysis:

> "...Initially, we determine whether the General Counsel (Charging Party) has made a prima facie showing that a make-whole remedy such as reinstatement, backpay and expungement of all disciplinary records is warranted. The General Counsel can make this showing by proving that the respondent conducted an investigatory interview in violation of Weingarten and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview.

> "In the face of such a showing, the burden shifts to the respondent. Thus, in order to negate the prima facie showing of the appropriateness of a make-whole remedy, the respondent must demonstrate that its decision to discipline the employee in question was not based on information obtained at the unlawful interview. Where the respondent meets its burden, a make-whole remdey will not be ordered..." (105 LRRM at 1233).

In Kraft Foods, on the merits, the NLRB found a Weingarten violation but ordered only the traditional cease-and-desist remedy for the Section 8(a)(1) violation. It declined to order a "make whole" remedy because the employer met its burden by negating a prima facie showing for the necessity of such a remedy "...by demonstrating that its decision to discipline... was not based on any information it obtained at the unlawful interview..." (105 LRRM at 1234). The facts in that case were that the employee in question was involved in a fight and that the fight was witnessed by several employees, who were interviewed prior to the unlawful interview of the subject employee and, thus, "...the information obtained... played no part in Respondent's decision to discipline..." (105 LRRM at 1234).

However, the NLRB ordered appropriately a "make whole" remedy in U.S. Postal Service, 256 NLRB No. 12, 107 LRRM 1172 (1981) where, after finding a Weingarten violation of Section 8(a)(1) of the NLRA, the Board concluded that the suspension, which was imposed by the employer, resulted from the employee's conduct at the unlawful investigatory interview. The Board said:

> "...The appropriate remedy here is to make Durkin whole for lost wages resulting from his unlawful suspension and to expunge from his records the suspension letter as well as related documents..." (107 LRRM at 1176).

Finally, the NLRB in Montgomery Ward & Co., Inc., 254 NLRB No. 102, 106 LRRM 1148 (1981) ordered the unusual remedy of backpay only to the date of hearing, without reinstatement, where the employer failed to establish that its decision to discipline was based solely on information obtained at an interview with a co-employee, which was independent of the unlawful interview with the terminated employee.

A Commission Hearing Examiner in Bergen County Prosecutor's Office,

H.E. No. 83-20, 9 NJPER 83 (1982) found a Weingarten violation where the employee was subsequently discharged. No reinstatement or backpay was ordered since the employee declined reinstatement and no demand was made for backpay.[12a/]

Turning now to the instant case, it will be recalled that Broome's testimony was clear and direct that the "major item" in his decision to discharge Polulak was his "untruthfulness," which necessarily occurred at the morning and afternoon meetings on July 23, 1982 when Polulak sought to explain away the condition of the manholes and failed to acknowledge any dereliction of duty. Thus, according to Broome, it follows that Polulak would not have been discharged, but for his "untruthfulness." The "untruthfulness" having been elicited only at the two meetings on July 23rd, the Hearing Examiner finds and concludes that the Respondent has independently violated Subsection(a)(1) of the Act and will be ordered hereinafter to make Polulak whole: U.S. Postal Service, supra.[13/]

The Respondent Violated Subsections(a)(1) And (3) Of The Act When It Discharged Roger Crespy On July 23, 1982

In order for the Charging Parties to prevail as to Crespy, they must prove by a preponderance of the evidence that the action of the Respondent in discharging Crespy was "discriminatory" and was motivated, in whole or in part, by anti-union animus: Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71, 72 (1977); City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modif., 82 N.J. 1 (1980); and Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45, 46 (1980).

Further, it appearing to the Hearing Examiner that this is a case of "dual motive," the Charging Parties must meet the "causation test" enunciated by the National Labor Relations Board in the case of Wright Line, Inc., 251 NLRB No. 150,

12a/ Affirmed by the Commission: P.E.R.C. No. 83-130, 9 NJPER _____ (1983).

13/ There having been insufficient proof of a violation of Subsection(a)(3) of the Act as to Polulak, the Hearing Examiner will recommend dismissal of this allegation: East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981).

105 LRRM 1169 (1980).[14/] In Wright Line, the NLRB adopted the analysis of the United States Supreme Court in Mt. Healthy City School District Bd. Ed. v. Doyle, 429 U.S. 274 (1977), which involved the following requisites in assessing the legality of employer conduct: (1) 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; and (2) once this is established, the employer has the burden of demonstrating that the same disciplinary action would have taken place even in the absence of protected activity.

Based on the Haddonfield line of cases, supra, and the Wright Line-Mt. Healthy analysis, supra, the Hearing Examiner finds and concludes that the Charging Parties have demonstrated by a preponderance of the evidence that the Respondent by its agents violated Subsection(a)(3), and derivatively Subsection(a)(1), of the Act when it discharged Roger Crespy on July 23, 1982.

Crespy had been an employee of the Authority since 1974 and had worked in only one job classification, Line Maintenanceman, since his date of hire. Crespy's history of discipline is slight over the period of his employment from 1974 to July 23, 1982, namely, he was given an oral warning on October 24, 1978 for lateness, a one-day suspension for not reporting damage to an Authority vehicle (date unspecified) and a written warning on June 18, 1982 for abuse of sick time over four-year period from 1979 through 1982 (see Finding of Fact No. 9 and footnote 3, supra).

In support of his conclusion that the Respondent violated Subsection(a)(3) of the Act by the conduct of its agents herein, the Hearing Examiner first notes that the Charging Parties have established preliminarily that Crespy was engaged in protected activities as a shop steward since 1980 and that the Respondent expressly or impliedly knew that Crespy was so engaged: Haddonfield, supra (3 NJPER at 72).

14/ The Appellate Division adopted the Wright Line analysis in "dual motive" cases in East Orange Public Library v. Taliaferro, supra (footnote 13), which the Commission has followed in cases beginning with Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669 (1981) and, more recently, Dover Board of Education, P.E.R.C. No. 83-69, 9 NJPER 26 (1982).

A detailed statement of the findings of the Hearing Examiner as to Crespy's protected activities is set forth in Finding of Fact No. 5, supra, and will only be briefly recited again here. As noted above, Crespy has been a shop steward for two unions since 1980, he served on the Local 97 negotiations committee since in or around November 1981 and spoke in such strong terms that the Authority's Commissioners did not like his attitude, considering him "off base," and as recently as June and July 1982 he filed two grievances, one against Severs on June 18th and one on July 21st regarding overtime given to foremen. The Hearing Examiner has found as a fact that Crespy openly engaged in the foregoing protected activities and that the Authority's supervision was aware of these activities.

Further, the Hearing Examiner concludes that the Authority's supervision, particularly, Broome, McGuire and Severs, manifested anti-union animus toward Crespy within the meaning of City of Hackensack and Cape May City Board of Education, supra. The Hearing Examiner bases this conclusion on Findings of Fact Nos. 6-10, supra. Briefly, as testified to without contradiction by Brune, the former Executive Director of the Authority, Broome and McGuire said that Crespy was a "troublemaker," that "...there probably would not be any Union were it not for the particular efforts of Mr. Crespy," and that "...if there was anybody that should go, the preference would be for Mr. Crespy." Kajan, a co-employee of Crespy, testified without contradiction that sometime between July 15 and between July 20, 1982 he overheard Broome say "...Its going to be trouble with the union, because he was a Shop Steward..." Horner, a co-employee of Crespy and the shop steward for Local 97 since July 1982, testified without contradiction that in October 1982 he discussed with Severs the filing of a grievance and Severs stated: "Well, you seen what happened to Roger after he filed a grievance" and then said: "He filed a grievance on a Thursday, and he was dismissed on a Friday." Further, on the day that Crespy first filed a written grievance on June 18, 1982 he was issued his first written warning for abuse of sick time over a four-year period

beginning in 1979. It is noted that the grievance was filed against Severs and that the warning was approved by Broome, Severs and McGuire. Although Broome testified that Crespy was the Authority's worst and most troublesome employee, former Executive Director Brune testified that he was "favorably impressed" with Crespy and that both Broome and McGuire had stated to Brune in January and February 1982 that all employees were performing well. Also, it is noted that Broome on April 5, 1978 stated in a memo that Crespy had shown himself "capable and interested" in a new position and recommended an increase in Crespy's rate of pay.

Now moving to the Wright Line-Mt. Healthy analysis, the Hearing Examiner is clear in his conclusion that the Charging Parties have established a prima facie showing that the protected activities engaged in by Crespy, supra, were a "substantial" or a "motivating" factor in his having been terminated on July 23, 1982. The causal nexus between Crespy having engaged in extensive protected activities since 1980 and the Authority's decision to discharge Crespy on July 23, 1982 appears plain to the Hearing Examiner. As noted above, Crespy's prior disciplinary history was slight and timing of the discipline on June 18 and July 23, 1982 is suspect since it coincided to the day in the first instance, and to two days in the second instance, with each grievance involving the Authority's supervision. The June 18th grievance was filed directly against Severs and the July 21st grievance complained about overtime given to foremen of the Authority.

Obviously, the timing of discipline in the relationship to these grievances would not, in and of itself, be sufficient to establish a causal nexus between the exercise of protected activities by Crespy and his termination on July 23, 1982. However, if one reflects on the evidence of anti-union animus, as set forth above, the Authority's motiviation vis-a-vis Crespy becomes abundantly clear. The characterization of Crespy as a "troublemaker" coupled with the other statements of Broome and McGuire, which were made in the presence of Brune, supra, indicate clearly that the activities of Crespy were a "substantial" or a "motivating factor"

in the Authority's decision to discharge Crespy on July 23, 1982. The testimony of Kajan, supra, indicates to the Hearing Examiner that Broome was predisposed to take disciplinary action against Crespy as much as one week before the date of actual termination on July 23, 1982. Also, the statement by Severs to Horner in October 1982 was clearly intended to chill the shop steward activities of Horner and supplies post-discharge evidence that Crespy was disciplined "...after he filed a grievance." Thus, as stated above, the Charging Parties have clearly established a prima facie showing that the engaging by Crespy in protected activities was a "substantial" or a "motivating" factor in his termination on July 23, 1983.

The Hearing Examiner finds and concludes that the Respondent Authority has failed to meet the burden of demonstrating that Crespy would have been discharged on July 23, 1982 even in the absence of the exercise by him of protected activities as shop steward since 1980. It is first noted that Broome testified that the "major" reason for the termination of Crespy was his "untruthfulness" at the afternoon meeting on July 23rd and his attitude, as indicated by Crespy's remark, "So a couple of manholes were dirty, so what's the big deal" (see Finding of Fact No. 23, supra). Thus, the Authority did not elect to base its discharge of Crespy on dereliction of duty, i.e., poor job performance on July 22 and July 23, 1983 in the cleaning of the Shelter Cove area.

However, even if the basis of the discharge of Crespy had been dereliction of duty, i.e., poor job performance, the Authority's evidence, as rebutted by the Charging Parties' evidence, is not persuasive and does not satisfy the Hearing Examiner that the Authority has met the burden of demonstrating that Crespy would have been discharged even in the absence of his protected activities. Not only was there no proof that any employee had ever been discharged for failing to clean manholes and sewers properly, but it is undisputed that Lecuyer, in either late 1981 or early 1982, told Horner to do a better job and did not discipline him when Horner failed to clean properly a manhole on Jay Street (see Finding of Fact No. 26, supra).

Additionally, there is a serious question, considering the evidence adduced by the parties, as to whether the manholes in the Shelter Cove were dirty on July 23, 1982, as claimed by the Authority. To rebut the Authority's contention that the manholes were dirty, the Charging Parties produced Pomarico, a Sewer Jet Operator, who testified that three of the four photographs taken by Broome depicted manholes, the residue of which could have accumulated overnight, and that one photograph appeared to depict a clean manhole (see Finding of Fact No. 25, supra). Also, Kajan testified for the Charging Parties, without contradiction, that after Crespy and Polulak were discharged he was sent to check and clean the manholes in the Shelter Cove area. He said that he checked over 100 manholes and that the first day he flushed 15 to 20 manholes, all of which were clean and without residue (see Finding of Fact No. 27, supra).

Thus, Broome's testimony that all of the photographs disclosed dirty manholes does not stand unrebutted. Even Broome acknowledged that one manhole, as depicted in R-6 could have gotten into that condition overnight. Broome also stated that he could not tell if a hand gun had been used on any of the four manholes depicted in Exhibits R-5 through R-8 (see Finding of Fact No. 24, supra). It is noteworthy that Broome also acknowledged that the Shelter Cove area had not been flushed since the area was constructed in 1971. It stands to reason that much residue could have accumulated over the course of 11 years prior to Crespy and Polulak appearing in the area to clean the manholes and sewers a week prior to the discharges.

As previously found, the testimony of the witnesses for the parties falls short of conclusively establishing that the Line Maintenancemen are instructed to use a handgun in every manhole without regard to whether or not it is clean (see Finding of Fact No. 15, including footnote 4, supra). Crespy credibly denied that he had been so instructed and Polulak credibly testified that Lecuyer had told him to use his "discretion." Horner testified that he used a handgun only after having been told to do a better job by Lecuyer in either late

1981 or early 1982, following his failure to clean properly a manhole on Jay Street, supra.

Thus, the Authority's proofs establish that no one was ever disciplined, prior to Crespy and Polulak, for failure to clean manholes or sewers properly. It is also noted that Lecuyer acknowledged that the first time he had ever found manholes dirty was in 1982 and that his last prior check of the work of any Line Maintenanceman was six months earlier. Severs acknowledged that in the year prior to July 1982 he had never gone out to any job sites to see if manholes were cleaned properly. (See Finding of Fact No. 18, supra). One might ask why, suddenly, the Authority's supervisors decided to investigate the cleanliness of manholes on July 22 and July 23, 1982, but for Crespy having filed his second grievance against the Authority's foremen on July 21, 1982. Polulak, who by chance was working with Crespy, is thus cast in the role of an innocent bystander when the Authority's true target was Crespy. Polulak's status as a discriminatee in this proceeding has been treated above and will not be considered further in connection with the analysis of Crespy's termination.

Although the Hearing Examiner does not place great weight on the Charging Parties' evidence of disparate treatment in the disciplining of employees (see Finding of Fact No. 28, supra), it is noted that the Authority does tend to handle the disciplining of its supervisors more leniently than other employees, i.e., Severs and Risk. The Hearing Examiner does not give much weight to Broome's testimony that the reason that Galloway was given a one-week suspension was that Galloway had not signed the Authority's policy on the loss of a drivers license.

In conclusion, the Hearing Examiner finds that the Authority's supervisors were discriminatorily motivated by anti-union animus against Crespy and terminated him in retaliation for the exercise by Crespy of activities protected by the Act: Haddonfield, City of Hackensack and Cape May City of Board of Education, supra. Further, the Charging Parties have fully met the causation test set forth in Wright

Line - Mt. Healthy, supra, and the Authority has failed to meet the burden of demonstrating that Crespy would have been terminated even in the absence of his exercise of protected activities.

Based on all the foregoing, the Hearing Examiner finds and concludes that the Respondent Authority has violated Subsection (a)(3), and derivatively Subsection (a) (1), of the Act by its conduct herein. Accordingly, an appropriate remedy will be recommended hereinafter as to Roger Crespy.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Authority independently violated N.J.S.A. 34:13A-5.4(a)(1) when it discharged Myron Polulak on July 23, 1982, following two meetings with him on that date, where his Weingarten rights were violated.

2. The Respondent Authority violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when it discharged Roger Crespy on July 23, 1982 on account of the exercise by him of protected activities as a shop steward, the Respondent having failed to demonstrate that he would have been discharged even in the absence of protected activities.

3. The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(3) as to Myron Polulak.

4. The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(4) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Authority 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 (1) violating the Weingarten rights of employees such as Myron Polulak and thereafter terminating Polulak, and (2) by discharging Roger Crespy for engaging in protected activities

on behalf of Local 97.

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 discharging Roger Crespy for engaging in protected activities on behalf of Local 97.

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

1. Forthwith offer Myron Polulak and Roger Crespy reinstatement to the position of Line Maintenanceman, or any substantially equivalent position, and make each of them whole for lost wages, less interim earnings, with interest at the rate of 12% per annum 15/ from July 23, 1982 and, further, expunge from their personnel files any reference to their discharges on July 23, 1982.

2. 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 Authority to insure that such notices are not altered, defaced or covered by other materials.

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

C. That the allegations that the Respondent Authority violated Section 5.4 (a)(4) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: May 13, 1983
Trenton, New Jersey

15/ See Salem Co. Bd. for Vocational Ed. v. McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239 (1979), aff'd. in part, rev'd. in part and remanded App. Div. Docket No. A-3417-78 (1980) and Borough of Teterboro, P.E.R.C. No. 83-137, 9 NJPER ___ (1983).

APPENDIX "A"

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 (1) violating the Weingarten rights of employees such as Myron Polulak and thereafter terminating Polulak, and (2) by discharging Roger Crespy for engaging in protected activities on behalf of Local 97.

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, discharging Roger Crespy for engaging in protected activities on behalf of Local 97.

WE WILL forthwith offer Myron Polulak and Roger Crespy reinstatement to the position of Line Maintenanceman, or any substantially equivalent position, and make each of them whole for lost wages, less interim earnings, with interest at the rate of 12% per annum from July 23, 1982 and, further we will remove from their personnel files any reference to their discharges on July 23, 1982.

DOVER MUNICIPAL UTILITIES AUTHORITY
(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