

P.E.R.C. NO.93-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CO-H-91-189

WAYNE TOWNSHIP PBA, LOCAL 136,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Wayne Township PBA, Local 136 against the Township of Wayne. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by transferring the PBA's president from the detective division to the patrol division in retaliation for his protected activity. In the absence of exceptions to the Hearing Examiner's recommendation that the Complaint be dismissed, the Commission concludes that the transfer was not motivated by the president's pursuing the PBA's objections to the Township's new retirement policy.

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Charging Party.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, attorneys
(M. Joan Foster, of counsel; Judith S. Miller, on the brief)

For the Charging Party, Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On January 28, 1991, Wayne Township PBA, Local 136 filed an unfair practice charge against the Township of Wayne. The PBA alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7),^{1/} by transferring PBA

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any

President Anthony J. Fraind from the detective division to the patrol division in retaliation for his protected activity. The transfer resulted in his losing a four percent pay differential. Specifically, the PBA alleges that Fraind was transferred in retaliation for continuing to pursue resolution of a retirement issue after the chief denied the relief the PBA had sought.

On May 10, 1991, a Complaint and Notice of Hearing issued. On May 24, 1991, the Township filed an Answer denying it had violated the Act and asserting that the decision to transfer Fraind was made prior to his involvement in the retirement issue. In addition, the Township asserted that the chief did not deny the PBA's retirement policy grievance but had instead recommended accommodating PBA members who had submitted retirement notices.

On December 19, 1991, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by February 24, 1992.

On May 13, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-31, 18 NJPER 293 (¶23125

1/ Footnote Continued from Previous Page

information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

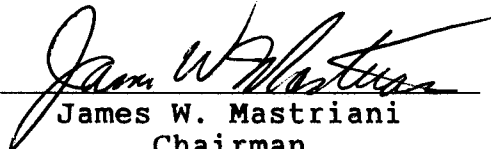
1992). Applying the standards of In re Bridgewater Tp., 95 N.J. 235 (1984), he found that the PBA had failed to establish that the Township was hostile towards Fraind's protected activity. The Hearing Examiner served his decision on the parties and informed them that exceptions were due May 27, 1992. Neither party filed exceptions or requested an extension of time.

We have reviewed the record and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 2-15). Based on those facts and in the absence of exceptions, we conclude that the transfer was not motivated by Fraind's pursuing the PBA's objections to the Township's new retirement policy.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Grandrimo was not present.

DATED: July 16, 1992
Trenton, New Jersey
ISSUED: July 17, 1992

H.E. NO. 92-31

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

In the Matter of
TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CO-H-91-189

WAYNE TOWNSHIP PBA, LOCAL 136

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Township of Wayne did not violate the New Jersey Employer-Employee Relations Act by transferring the PBA President from one division to another. The Hearing Examiner concluded that the transfer was not motivated by the exercise of protected activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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

In the Matter of

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(M. Joan Foster, of counsel; Judith S. Miller, on the brief)

For the Charging Party, Loccke & Correia, Attorneys
(Michael J. Rappa, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public
Employment Relations Commission (Commission) on January 28, 1991 by
Wayne Township PBA, Local 136 (PBA) alleging the Township of Wayne
(Township) violated subsections 5.4(a)(1), (2), (3), (4), (5), (6)
and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A.
34:13A et seq. (Act).^{1/} The PBA alleged the Township transferred

^{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. (2) Dominating or
interfering with the formation, existence or administration of
any employee organization. (3) Discriminating in regard to

PBA President, Anthony J. Fraind from the detective to the patrol division, because of his exercise of protected activity, resulting in a 4% loss of pay.

A Complaint and Notice of Hearing (C-1) was issued on May 10, 1991. The Township filed an Answer (C-2) on May 24, 1991 denying it violated the Act and asserting that the decision to transfer Fraind was made prior to his involvement in the pertinent protected activity.

A hearing was held on December 19, 1991 in Newark, New Jersey. The parties filed post-hearing briefs by February 24, 1992.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. Anthony Fraind was employed by the Township as a patrolman in December 1972. He worked as a patrolman in the patrol division for approximately 14 years, then was transferred to the detective division and assigned to the Youth Bureau. Pursuant to

1/ Footnote Continued From Previous Page

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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

Article 15 of the parties' 1989-1990 collective agreement (J-1), Fraind was entitled to a 4% differential for working in the Youth Bureau. He has been PBA president for over ten years. In January 1991 he was notified by Police Chief Donald Pavlak that he was being transferred back to the patrol division. The transfer was implemented that same month (T8-T9).

2. In February 1975 the Township Council passed an ordinance adopting the PBA's 1974 salary and benefit proposals. Detective William Culmane was on the PBA's negotiating committee that made the above proposals. Township Mayor Newton Miller participated in negotiations on the Township's behalf. After the ordinance was passed Miller filed a lawsuit challenging the ordinance. The PBA intervened in that litigation forcing Miller to present his case at a show cause hearing. Shortly thereafter, Miller had a conversation with Culmane and said: "You ought to be smiling now, Culmane." Culmane responded: "Yes, I am." The Mayor replied: "Well, you won the war but the battle 'isn't' over yet."

The lawsuit was dismissed in August 1975. Five days later then Chief of Police Daly requested Culmane's transfer to the patrol division. Culmane was notified the following day, and transferred in September 1975. As a result of the transfer, Culmane lost the differential that existed at that time.

In September 1975, the PBA filed a charge with the Commission over Culmane's transfer. The PBA alleged the transfer was discriminatorily motivated. The Township argued it was based

upon Culmane's unsatisfactory job performance. In September 1977 the Commission found the Township violated subsection 5.4(a)(3) and derivatively (a)(1) of the Act and ordered Culmane be offered reinstatement to the detective division, and paid the differential he would have received. Wayne Tp., P.E.R.C. No. 78-10, 3 NJPER 321 (1977).^{2/}

3. Newton Miller was again Township Mayor during the time period relevant here, late 1990 through early 1991. But Miller did not participate in, or say or do, anything to cause Chief Pavlak's decision to transfer Fraind. Miller was unaware of that decision until after the Chief notified Township Business Administrator, Stephen Cuccio, of Fraind's imminent transfer (T68, T87, T101). Miller questioned the timing of the transfer because the parties were about to begin negotiations for a new agreement. (T68, T86-T87, T101, T105-T106).^{3/}

2/ The Commission adopted the Hearing Examiner's findings reported in Wayne Tp., H.E. No. 77-20, 3 NJPER 188 (1977). The conversation between Miller and Culmane appears at 3 NJPER 188.

3/ Fraind testified that Mayor Miller made public remarks demonstrating an anti-PBA attitude and threatening to the PBA (T14-T15). Kenneth Kamper, the PBA's state delegate, also testified that Miller made threatening remarks about the PBA (T55-T56). I do not credit Fraind's or Kamper's testimony, however, to prove that Miller's alleged remarks violated the Act, or that Miller was responsible for Fraind's transfer, or that the alleged remarks, even if true, had any connection to Pavlak's decision to transfer Fraind. First, Miller was unaware of Fraind's transfer until notified by Cuccio (T68,

4. Donald Pavlak has been employed by the Township Police Department for thirty-four years, beginning employment in 1958. In November 1977 he was promoted to captain, in December 1989 he was notified he would become Acting Chief, and he became Acting Chief, then Chief, beginning in February 1990 (T88-T90). Between 1977 and 1989 he headed the Detective Bureau for five years (T89).

Sometime during his first twenty years of employment Pavlak served two years as PBA President, one year each as PBA secretary and treasurer, and five years as state delegate. He has not attended PBA meetings for over ten years (T101, T122).

5. Prior to December 1989 there were problems in the Township and the Police Department that lead to the arrest of Mayor Miller's predecessor and caused the removal of Pavlak's predecessor. As a result, when Pavlak was notified in December 1989

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T87). Second, while I am not deciding the witnesses' veracity, neither Fraind nor Kamper established when Miller made the alleged remarks. By not placing a time frame on those alleged remarks the PBA cannot rely on them to prove that anti-union animus was a motive in Pavlak's transfer decision. Fraind also claimed Miller made certain remarks after the PBA filed for interest arbitration, but still no time was set (T14-T15).

In addition, Pavlak's testimony that Miller disliked the way the PBA handled some matters, and was negative to binding arbitration (T126), did not contradict the evidence that Miller was not involved in the decision to transfer Fraind. The PBA did not include Miller's alleged remarks in its charge. It alleged that Pavlak's (not Miller's) actions violated the Act. It did not allege, nor does the evidence show, that anything Miller said or did violated the Act.

that he would become Acting Chief, he immediately began reorganizing the entire Department (T89-T90). That month he began drafting R-1, an outline of the Department's reorganization. He made his last entry on R-1 in April 1990 (T91-T92).

Pavlak's intent in drafting R-1 was to professionalize the Department by placing people in the areas where they had the most talent and ability (T94). R-1 is an organizational chart showing the para-military hierarchy in the Department with the Chief at the top; the captains in charge of the different divisions; the lieutenants, then sergeants, assigned to particular shifts; and then the patrol officers or detectives.

Pavlak wrote R-1 himself, but had input from Captains Suhaka and LeFevre. Suhaka was assigned as captain of patrol and traffic, and LeFevre, who was in the patrol division, was transferred to the detective division as chief of--or captain of--detectives (T93, T108-T109). R-1 contains approximately twenty personnel changes, including the transfer of several employees out of the detective division (T94-T95). In addition to Fraind, Pavlak transferred Detective Cunniffe, Detective Kunchen, Sgt. Buwalda, and Sgt. Liebchen from the detective division back to the patrol division, and announced the transfer of Lt. Loutheed from the detective division, but he quickly retired (T96-T97). Pavlak intended to transfer Detective Neurouter out of the detective division, too, but he granted Neurouter's request to be allowed to retire as a detective within a short time (T98). Fraind, Cunniffe

and Liebchen all lost their differential by being transferred (T139-T140).

The transfers were too disruptive to do all at once. They began in early 1990 and continued throughout the year, but most transfers occurred early in the year. Pavlak started the transfers with the highest ranks and worked down to patrol officers and detectives (T95). Pavlak transferred Sgt. Liebchen because he was not an effective supervisor; Det. Cunniffe because he was lazy and needed constant motivation; and intended to transfer Det. Neurouter because he was "burned out" (T106-T107). Pavlak transferred Fraind out of the Youth Bureau (and detective division) because he possessed a cavalier attitude, and Pavlak did not believe that Fraind's ability to work with juveniles was in the best interests of the Department (T99).^{4/}

^{4/} Pavlak testified that he knows the strengths and weaknesses of every officer/detective in the Department. Pavlak never directly supervised Fraind, never gave him a negative evaluation, and never formally observed him interacting with juveniles at the Youth Bureau (T123-T124). But he had read his reports, and based upon his overall observation and input from others, concluded that Fraind had a cavalier attitude (T123-T124). There was no evidence challenging that conclusion. Having observed Pavlak's demeanor and attitude while testifying I found him to be a credible witness. He delivered his testimony in a straight-forward manner. He strongly and effectively rejected the notion that Fraind's PBA activity may have played a part in his decision, and proudly explained his own PBA involvement (T101).

Fraind testified that shortly after Pavlak became Chief in February 1990, the PBA's office and parking spot were taken

Fraind's transfer was not implemented until 1991 due to a series of events arising during the latter half of 1990. Pavlak first implemented the transfers for captains, lieutenants and sergeants. It was late spring, 1990, before he was ready to make changes for patrolmen and detectives. At that point he, and Capt. LeFevre, felt that with Det. Neurouter soon retiring and creating an opening at the Youth Bureau, it would place a hardship on the Bureau to transfer Fraind out, and assign someone new to the Bureau during the busy summer season. Pavlak intended to make the change at summer's end. But then Det. Green of the Bureau was hospitalized

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away, a police car Fraind drove was assigned to someone else, and the state delegate and vice-president were not allowed to be on the same shift (T16-T17). Fraind also alleged he was denied certain vacation or holiday requests, but gave no time frame for that allegation (T17-T18, T45).

He alleged there was a good possibility that the "administration" was "dictating" action the Department should take against him, but offered no evidence to support his contention within the statute of limitations period, relying only on Mayor Miller's involvement in the 1975 Culmane incident (T48-T49).

The incidents Fraind testified about were not included in this charge, were not fully and fairly litigated, and may not have occurred within the statute of limitations period in this case. Nevertheless, Pavlak responded to that testimony and said he was unaware Fraind had been denied a holiday request, that Capt. Suhaka (not Pavlak) handled the reorganizing of parking spaces, and that he (Pavlak) had to remove one car from the Youth Bureau which was needed elsewhere (T109-T113). I credit Pavlak's testimony on these issues and do not infer that animus played a role in those matters, or that those allegations played any role in Pavlak's decision to transfer Fraind.

until the fall and only returned on a part-time basis. December, soon approaching, is a busy month for the Bureau and was considered a bad time for Bureau changes. Under those circumstances, Pavlak again concluded it was the wrong time to implement Fraind's transfer, but resolved to implement it after the first of the year (T100). Fraind was notified of the transfer on January 2, 1991 when he was given CP-1, a formal notice of personnel change. His transfer became effective on January 14, 1991.

6. Fraind's name appears on the organizational chart (R-1) in two places. It appears beneath the Youth Bureau listing and says: "Fraind - Patrol." That was placed on R-1 in December 1989 (T116). It also appears at the bottom of R-1, under the date April 16. Fraind's name appears in a grouping as follows:

"OUT - Cunniffe - Fraind -
Bogert"^{5/}

That information was placed on R-1 by Pavlak on April 16, 1990, and meant that Pavlak was intending to move those people out of their then current assignments (T114).

Cunniffe, like Fraind, was a detective but he was assigned to the Bureau responsible for the criminal investigation of adults. Like Fraind's name, Cunniffe's name first appears beneath his bureau's listing and says: "Cunniffe - Patrol." Cunniffe was, in fact, transferred back to the patrol division (T96). After

^{5/} Fraind's name was circled.

evaluating Bogert's performance Pavlak decided not to change his assignment, and his name appears in the organizational chart under the patrol/traffic bureau (T115).

Fraind's name was circled at the bottom of R-1 because his transfer was put on hold due to Neurouter's planned retirement. Pavlak intended to transfer patrolmen Dox into the Youth Bureau to replace Fraind. The top of R-1 shows Dox's name already in the Bureau, but at the bottom of R-1 there is a listing for the Youth Bureau with Dox's name circled. His name was circled because his transfer was put on hold while Fraind's transfer was on hold (T114).

7. As PBA president, Fraind was involved in processing grievances. During the two-year period prior to the hearing, the PBA filed six grievances. None of them were settled, every one was submitted to grievance arbitration (T13). Those grievances included a grievance over increments for two detectives, and a uniform grievance for the same two employees transferred from the detective bureau to patrol (T12). The parties' collective agreement, J-1, was expiring on December 31, 1990. Fraind was included in negotiations for a new agreement which began in late 1990. No agreement was reached and the PBA subsequently filed for interest arbitration (T12).^{6/}

8. Sometime between September and October 1990, during a shift change, Fraind was involved in an impromptu discussion with

^{6/} The PBA did not establish when it filed for interest arbitration.

other employees. From this discussion Fraind developed the belief that Chief Pavlak, Capt. LeFevre, and Sgt. Vieldhouse were laying the groundwork to remove him from the Youth Bureau. But Fraind did not remember who participated in that discussion or what was said (T31-T32, T35-T37).^{1/}

On or about November 15, 1990 the Township hired Stephen Cuccio as business administrator. Shortly after being employed, perhaps sometime early in December, Cuccio issued a directive to Pavlak to discontinue a previously existing retirement benefit for police employees (T61). The previous policy apparently credited police employees with certain vacation and holiday time towards retirement even though some of that time had not been formally "earned." Cuccio intended to allow employees to use only the time they actually earned (T62).

The same day, or morning after, the directive was issued Pavlak spoke to Cuccio and argued vigorously against implementing the retirement directive. Pavlak told Cuccio that the benefit had existed for many years and explained that three employees who had recently filed their retirement papers and were relying on their

^{1/} Fraind's testimony regarding this impromptu discussion was so vague, uncertain and unsupported that I do not credit it to support the PBA's allegation that Fraind was transferred because of his exercise of protected activity. In fact, even if Fraind's "belief" was accurate, it would only confirm what Pavlak (and LeFevre) had decided back in December 1989 and April 1990, to remove Fraind from the Detective Bureau. But Pavlak made that decision based upon Fraind's work attitude and performance, not his exercise of protected activity.

vacation and holiday time, would be adversely affected by the directive. Pavlak requested from Cuccio that the directive not be applied to those three employees. Cuccio, however, rejected Pavlak's request (T63-T64, T76-T77, T83, T102).

Shortly after that meeting with Cuccio, Pavlak spoke to Mayor Miller about the retirement directive and argued that it should not apply to anyone who had already begun their terminal leave. Later in December, Pavlak discussed the same issue together with Cuccio and Miller and again argued that the directive should not apply to the three employees who had applied for retirement (T104).

On or about December 27th or 28th, 1990, PBA State delegate, Ken Kamper, spoke to Pavlak about the retirement directive, he wanted to know the Chief's position on the issue. But Kamper did not say what, if anything, the Chief said, and Kamper told the Chief that the PBA was going to file a grievance over the matter (T54).^{8/} Early on December 31, 1990, Fraind heard Pavlak talking to employee John Potosnak, one of the three employees affected by the retirement directive. Pavlak said he had gone to the "administration" and fought to have the three employees exempt

^{8/} Throughout the hearing witnesses referred to the retirement issue as the "retirement grievance." But the retirement grievance was not actually filed until late January or early February 1991. Kamper told Pavlak in late December that the PBA would file a grievance over that issue, and Cuccio explained it was filed approximately a month later (T54, T67). I credit Cuccio's testimony.

from the directive, but the administration had rejected it (T18-T20). Just after that encounter, Pavlak again spoke to Kamper about the retirement directive and told him that he had supported the three retiring employees and felt that they should not be subject to the directive (T103).

Later in the day on December 31, Fraind, Kamper, and Officer Reardon met with Cuccio and discussed the retirement directive (T21). Kamper explained the prior policy and discussed the three people who were in their terminal leave. Cuccio explained that he did not mean to hurt anyone by issuing the retirement directive (T22, T66). He told the employees he would consider not applying the directive to those three employees, but the decision would be issued from the Chief's office (T66).

Later that day, around 3:45 p.m., Cuccio called Fraind back to his office to again discuss the retirement directive. Cuccio asked Fraind why certain employee(s) were going around the building saying the PBA got the retirement directive issue resolved when the parties had agreed it would come through channels (T26). Fraind agreed to have the Mayor join the meeting and he (Fraind) explained to Cuccio and Miller that he was unaware of what other employees had done. Cuccio decided that the retirement directive would not apply to the three employees, but that his policy change would remain in effect. Miller agreed, but indicated the notice should go through the Chief's office. Sometime after the retirement grievance was

filed in February 1991, Cuccio withdrew the retirement directive (T23, T27, T66-T67, T77).^{9/}

9. On or about January 2, 1991 Cuccio received a memo from Pavlak indicating that Fraind was being transferred to patrol. That was Cuccio's first knowledge of the transfer (T71). Cuccio immediately asked Mayor Miller if he was aware of the transfer, but Miller said, "no." Cuccio and the Mayor discussed the matter. The Mayor believed the timing of the transfer was inappropriate because the Township and PBA were entering negotiations for a new collective agreement. The Mayor did not want the transfer to be misconstrued as being related to negotiations. They agreed that Cuccio would speak to Pavlak (T67-T68, T86-T87).

Late that day Cuccio spoke to Pavlak about Fraind's transfer. He told Pavlak it was the wrong time to implement the

^{9/} Fraind testified that during the December 31 meeting Cuccio said he was not aware that three people had filed for retirement. Fraind also testified that Cuccio told him that Pavlak had not discussed the retirement directive with him (T22). Fraind alleged Cuccio contradicted what Pavlak had told him. I do not credit Fraind's testimony to show that Cuccio and Pavlak did not discuss the retirement directive prior to December 31. Both Cuccio and Pavlak testified that they discussed the retirement directive and the three affected employees in early December, and that Pavlak asked Cuccio not to apply the directive to those employees (T62-T64, T102). I credit their testimony to show that they did discuss it and that Cuccio was aware of it on December 31. Cuccio explained that Fraind and Kamper misunderstood him. He was aware that three employees were affected by the retirement directive, but he was not aware of the personal problems affecting those employees until Fraind and Kamper explained them. The Chief had only not explained the personal problems affecting those three employees (T78, T83-T84). I credit Cuccio's explanation and find that neither he nor Pavlak misled the PBA.

transfer and asked him to withdraw it because it might be misconstrued as bad faith by the Township. Pavlak told Cuccio that the transfer had been coming for a long time, well before Cuccio arrived, and he (Pavlak) felt it was the most opportune time for implementation. Pavlak asked Cuccio to support his decision (T68-T69, T73-T76).

Pavlak subsequently spoke to Mayor Miller about Fraind's transfer. Miller expressed his concern that Pavlak would implement the transfer while the parties were entering negotiations. But Pavlak explained he had a time schedule to meet and he was determined to implement the transfer (T105-T106). Pavlak explained that he had postponed Fraind's transfer twice, but now had five probationary police officers who finished the academy in December 1990 who were coming on staff and he had to complete his scheduling assignments (T120).

In the afternoon of January 2, 1991, Pavlak served Fraind with CP-1 and notified him of his transfer to patrol. The transfer became effective January 14, 1991 (T9, T29).^{10/}

^{10/} Fraind testified that Pavlak transferred him as a negative reaction to Fraind's and Kamper's meeting with Cuccio over the retirement grievance (T36). Fraind believed that Pavlak was upset because Cuccio had not agreed to excuse the three retirees from the retirement directive when he asked, but granted it when Fraind and Kamper asked (T38, T40-T41). Cuccio did not believe he damaged Pavlak's credibility by denying Pavlak's request to excuse the three retirees from the retirement directive and later granting Fraind's request on

ANALYSIS

Despite alleging a violation of subsections 5.4(a)(1) through (a)(7) of the Act, the PBA did not present evidence that this case involved issues arising under subsections (a)(2), (4), (5), (6) and (7) of the Act. Those elements of the charge are dismissed. This case is limited to an (a)(3) and derivative (a)(1) allegation charging that Fraind was transferred from the Youth Bureau to the Patrol Division because of his exercise of protected activity. In that regard I find that the Township did not violate the Act. Fraind was transferred based upon legitimate business concerns rather than because of protected activity.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the Supreme Court established the test used in determining whether an employer's actions violate subsection (a)(3) of the Act; motive is a necessary element. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the

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the same issue (T79). Pavlak, himself, was delighted the retirement directive was withdrawn (T105, T126). I credit Cuccio and Pavlak and find that Fraind's above transfer theory was unsupported by the evidence. The evidence shows that Fraind had been selected for transfer long before the retirement directive issue arose and Pavlak's transfer decision was not in reaction to the PBA's December 31 meeting with Cuccio.

employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246. If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242.

The PBA obviously established that Fraind exercised protected activity and that the Township (including Miller, Cuccio and Pavlak) was aware of that activity. But the PBA failed to establish that the Township was hostile toward the exercise of that activity.

In its post-hearing brief the PBA raised several issues to support its claim of hostility or animus. It argued that: Pavlak transferred Fraind in retaliation for the PBA obtaining Cuccio's promise not to apply the retirement directive to the three retiring employees; Pavlak disregarded Cuccio's (and Miller's) request to avoid the transfer because the parties were about to enter negotiations for a new agreement; Pavlak's determination that Fraind had a "cavalier attitude" was unjustified; Pavlak was responsible for the PBA losing its office and access to a police car; Miller made threatening remarks toward PBA activity in 1975, and more recently made hostile remarks towards the PBA.

Those arguments lack merit. Neither Miller, Cuccio, nor the retirement directive and subsequent grievance had anything to do with Fraind's transfer. I credited Pavlak's testimony that he

decided to transfer Fraind in December 1989 and again in April 1990 because of Fraind's work attitude; that Miller was not involved; and that Pavlak could not implement the transfer until January 1991. While the PBA attempted to discredit Pavlak's testimony by relying upon how the retirement directive was handled and because of the timing of the transfer, it presented no evidence contradicting Pavlak's explanation of R-1, and that he originally decided to transfer Fraind in December 1989. The events that arose after R-1 was completed were insufficient to overcome Pavlak's explanation of that document and why he could not implement Fraind's transfer until January 1991.

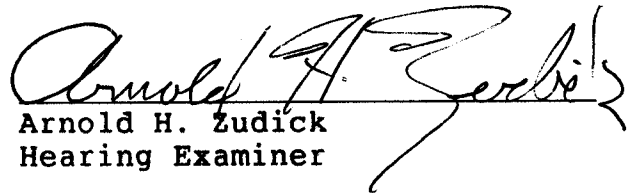
Pavlak, in fact, supported the PBA's position on the retirement directive and argued for the directive's removal. He was not obligated to avoid the transfer even though Cuccio and Miller expressed concern about imminently entering negotiations with the PBA. While I do not find that the December 31 retirement directive discussion among Cuccio, Miller and the PBA officials upset Pavlak, even if it did, and even despite Cuccio's and Miller's concern, I find that Fraind's transfer would have occurred in early January 1991 in any event, based on Pavlak's credited explanation for why the transfer was not implemented earlier.

Finally, the PBA cannot rely on the 1975 Wayne Tp. facts or decision to prove a violation here. Neither Pavlak nor Miller made any inappropriate remarks to or about Fraind, Miller was not involved in the transfer decision, and Pavlak made the decision well before Fraind engaged in the pertinent protected activity.

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

RECOMMENDATION

I recommend the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: May 13, 1992
Trenton, New Jersey