P.E.R.C. NO. 95-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and- Docket No. CO-H-92-78

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the County of Essex violated the New Jersey Employer-Employee Relations Act when it discharged Hiram Ramos, a security guard, for requesting that a union representative be present during a meeting concerning his job duties. The Complaint was based on an unfair practice charge filed by the Communications Workers of America.

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In the Matter of

COUNTY OF ESSEX,

Respondent,

-and- Docket No. CO-H-92-78

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

Appearances:

For the Respondent, Stephen J. Edelstein, Essex County Counsel (Lucille LaCosta-Davino, Deputy County Counsel

For the Charging Party, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION AND ORDER

On September 16, 1991, the Communications Workers of America ("CWA"), a majority representative, filed an unfair practice charge against the County of Essex, a public employer. The charge alleges that the employer violated subsections 5.4(a)(1), (2) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it denied Hiram Ramos, a security guard, the right to CWA's representation at an April 11, 1991 meeting called to

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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. (5) Refusing...to process grievances presented by the majority representative."

discuss his job duties, when it discharged him immediately after that meeting, and when it refused to process a grievance contesting the denial and the discharge.

On December 27, 1991, a Complaint and Notice of Hearing issued. The employer filed an Answer admitting that it had denied Ramos union representation, but asserting that he was not entitled to representation since the meeting was not a disciplinary interview.

The hearing was scheduled for February 13 and 14, 1992. On February 10, however, Hearing Examiner Alan R. Howe cancelled these dates because CWA's representative had advised him that CWA would be retaining outside counsel. The Hearing Examiner's letter concluded that "[t]he setting of a new date will await advice to me as to who CWA has selected as its outside counsel for this case."

On April 30, 1992, the Hearing Examiner wrote a letter to CWA's representative asking her to please advise him whether counsel had been retained. Our files do not contain a response, although the Hearing Examiner's report states that CWA obtained several adjournments of the hearing.

In March 1993, CWA's attorney advised the Hearing Examiner that he would be representing CWA in this matter and that he was available for hearing on several dates in June 1993. The parties' attorneys and the Hearing Examiner agreed that the hearing would begin in July.

On July 14, 1993, the hearing began. The employer immediately moved to dismiss the case on the grounds that CWA had

abandoned its charge by not prosecuting it between February 1992 and March 1993; in the alternative, it asked that any back pay remedy be cut off as of the date of the originally scheduled hearing. The motion to dismiss was denied without prejudice.

At the conclusion of its case-in-chief, CWA moved to amend its charge to delete the alleged violations of subsections 5.4(a)(2) and (5) and to add an alleged violation of subsection 5.4(a)(3).[2/] This motion was granted. The employer then moved to dismiss the case on the grounds of insufficient evidence. That motion was denied.

At the end of the first day of hearing, the parties agreed to postpone the session scheduled for the next day until September 7, 1993 so that the employer could produce another witness. The hearing concluded on September 7. The parties filed post-hearing briefs.

On March 21, 1994, the Hearing Examiner issued his report. H.E. No. 94-19, 20 NJPER 165 (¶25077 1994). He concluded that Ramos was not entitled to union representation at the April 11 meeting because the meeting was not a disciplinary interview. He also concluded, however, that Ramos' two requests for representation were protected by the Act and that the employer violated subsection

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2/ This subsection prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

5.4(a)(1) and (3) when it discharged him in retaliation for making those requests. The Hearing Examiner recommended an order requiring the employer to reinstate Ramos and to pay him back pay plus interest from his discharge to February 13, 1992 and from July 14, 1993 to his reinstatement. The Hearing Examiner did not recommend back pay for the period in between those two dates because CWA had delayed the hearing.

On April 28, 1994, the employer filed exceptions. It asserts that: (1) the charge should have been dismissed given the delay in prosecuting it; (2) CWA should not have been permitted to amend its charge; (3) Ramos' requests for union representation were not protected by the Act; (4) Ramos was properly discharged for insubordination; and (5) the Hearing Examiner improperly excluded testimony from a CWA official concerning his alleged belief that Ramos had been insubordinate.

On June 8, 1994, CWA responded to the exceptions. It asserts that: (1) the employer was not prejudiced by the delay in beginning the hearing; (2) the employer was not prejudiced by permitting CWA to amend its charge; (3) Ramos' requests for union representation were protected by the Act; and (4) Ramos was discharged for requesting representation rather than for insubordination.

We have reviewed the record. Accepting the Hearing Examiner's credibility determinations, we find these facts.

The County is a Civil Service jurisdiction. Its Department of Citizen Services has five divisions, including the Division of Welfare (2T5). That Division has several units, including a field office unit containing five field offices. Each field office is headed by a manager and an assistant manager (2T6).

In November 1988, the County provisionally appointed Hiram G. Ramos as a security guard (1T12; 1T90). Ramos worked at a Newark field office. His supervisor was the assistant field office manager (1T44-1T45). Before August 1990, his supervisor was Marion Jackson; subsequently his supervisor was Joan Ellison (1T48; CP-1).

Ramos was evaluated every six months. He always received ratings of "outstanding" (1T20). On January 25, 1991, he received an evaluation for the first and second halves of the 1990 calendar year. He received the highest number of points possible and was rated "outstanding." Ellison signed the second half rating (CP-1).

On April 5, 1991, Ellison wrote Ramos a memorandum entitled Job Performance (R-1; 1T52). The memorandum recounted four incidents.

The first incident occurred on March 21, 1991. According to the memorandum, Ramos refused the request of the head clerk and Ellison to take a postage meter to the post office unless he was given gas money; he was told that he was being insubordinate and he responded that he was not concerned and Ellison could do what she had to do.

The second incident occurred on March 27, 1991. According to the memorandum, staff members complained that Ramos was not in the parking lot when they left work and at other times; Ramos responded that he reported to the lot at 10:30 or 11:00 a.m. and only left the lot for lunch.

The third incident took place on April 2, 1991. According to the memorandum, Ramos had been instructed the week before to take the mail pouch to the ninth floor as close to 10 a.m. as possible each day; when Ellison's secretary reminded him to do so on April 2, he responded "I didn't know that you were my supervisor now" and he did not pick up or take the mail pouch until 11 a.m.

The fourth incident occurred on April 3, 1991. According to the memorandum, the field manager told Ramos that he was not wearing the correct patches on his uniform; and Ramos had been told twice before that he must wear the correct patches, but had responded that he did not have the money to sew the patches on his shirt.

The memorandum added that on April 3, 1991, Ellison informed Ramos about his poor work attitude and his tendency to resist supervision and to ignore rules and regulations he did not like. He was reminded that he had an obligation to abide by such rules and regulations and that he was a temporary employee whose work performance would be taken into consideration in determining whether to give him a permanent appointment.

A copy of the memorandum was placed in Ramos' personnel folder (R-1; 1T52-1T54). Other copies were sent to the Director of Personnel, George Clements, the field office manager, and another assistant field office manager.

On the morning of April 11, 1991, Ellison summoned Ramos and Peter Pacillo, another security guard, to her office (1T12-1T13). Disciplinary action was not discussed or contemplated (1T15; 1T21; 1T47; 1T75-1T76). The meeting was triggered by Ramos' recent resistance to performing clerical tasks which he believed were unrelated to his security duties. Ellison thought that she should review her expectations and the security guards' duties since she had not done so before (1T46-1T48). Ramos asked for union representation to help clarify his job duties (1T13). Ellison denied this request because the meeting was not disciplinary and she did not believe that representation was necessary (1T12; 1T46). The Hearing Examiner credited Ramos' testimony that Ramos' request angered Ellison, as reflected by the tone of her voice (1T13). We accept that credibility determination.

The meeting continued. Ellison explained what Ramos' duties were (1T13-1T14) and, according to Ellison, Ramos responded that he was not going to do clerical duties (1T46-1T47; 1T77). Ramos renewed his request for union representation and Ellison repeated her belief that union representation was unnecessary (1T13-1T14). Ellison asked her secretary to find out if any union representatives were available; the secretary made some calls and determined that none were (1T78-1T80; 1T106).

Ellison had hoped that the meeting would produce an agreed-upon schedule for performing such duties as covering the parking lot and picking up the mail. This goal was not accomplished because of the disagreement over job duties. She could not settle that dispute because the personnel department had not yet given her a job description for security guards, as she had requested before the meeting. Ellison ended the meeting (1T14; 1T47).

Ramos returned to his post (1T14). Later that day, Ellison summoned him and told him to report to James Petrone in the personnel department (1T14; 1T62-1T63). Petrone told Ramos that his services were no longer required and to turn in his badge and radio (1T15). A letter terminating Ramos was sent later that week (1T89).

Ellison testified that immediately after the meeting ended, she went to the personnel department to obtain a copy of the job description (1T47; 1T55). She testified that she did not intend or seek to have Ramos disciplined or discharged (1T82-1T83), nor did she tell anyone what had just happened at the meeting (1T56-1T57). Instead, when she arrived at the personnel department, the Director of Personnel informed her that it had already been decided to discharge Ramos based on her April 5 memorandum (R-1), unspecified other incidents, and Ramos' provisional status (1T56; 1T87). The Hearing Examiner rejected this testimony as illogical (H.E. at 7) and instead inferred that Ellison had sought Ramos' discharge because his requests for union representation had angered her. Ellison signed the standard form requesting formal disciplinary action, in this case termination (R-2; 1T59-1T60; 1T84).

The Hearing Examiner found that Ellison's testimony did not "ring true." He cited two reasons.

First, the employer's normal procedure in disciplinary actions is for an employee's immediate supervisor to initiate the process by filling out the standard form for recommending discipline (CP-3; 1T64-1T66). According to the president of the CWA local representing County employees, he had been involved in hundreds of disciplinary cases and he was not aware of any instance where a supervisor did not have input into a decision to discharge an employee, provisional or permanent (2T25-2T26). The Hearing Examiner thus believed it unlikely that the Director of Personnel had decided to discharge Ramos without first receiving a recommendation from Ellison or consulting her.

Second, the County has a progressive discipline policy applicable to "all Division employees" (CP-2). According to CWA's local president, this policy applies to both provisional and permanent employees (2T18-2T19) and it has been applied in all instances within his experience where a provisional employee was terminated (1T30-1T31).[3/] The policy states that progressive

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3/ The Hearing Examiner credited this testimony. Ellison testified that the general procedure is to follow some form of progressive discipline (1T73), but later added that the policy was "not necessarily" the same for provisional employees as for permanent employees and that Ramos had not been treated differently from other provisional employees (1T93). The Director of the Department of Citizen Services added that provisional employees are generally terminated instead of suspended (2T9).

discipline requires communication between supervisors and employees about workplace expectations and rules and a mutual understanding about job duties and performance standards. Although in some instances the severity of a violation may justify immediate suspension or discharge, progressive discipline normally requires that discipline be administered in progressive steps -- counseling, oral warnings, written reprimands, minor suspensions, and major suspensions. Ramos had never been disciplined before his discharge (1T16). The Hearing Examiner thus believed it unlikely that the April 5 memorandum by itself led to a summary dismissal.

James Zalkind is the Director of the Department of Citizen Services (2T5). He testified that on April 11, he received a call from either the assistant field office manager, Ellison, or the Director of the Welfare Division, then Judith Goldstein. The caller told him that Ramos had "walked out" of the meeting and recommended that Ramos be discharged (2T7). Zalkind concurred with this recommendation, but based his concurrence solely on the incidents described in the April 5 memorandum, not upon Ramos having allegedly walked out of the meeting (2T7-2T8).[4/] Zalkind's testimony conflicts with Ellison's testimony since Ellison testified that she had not reported the events of the meeting to anyone, but Zalkind could not have learned about the meeting without such a report (1T56-1T57). Zalkind also testified that the April 11 meeting may

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4/ Ellison ended the meeting (1T14; 1T47). No competent evidence suggests that Ramos walked out.

have been "an attempt to remediate or moderate the potential dismissal of Mr. Ramos" and that the meeting had been called because Ramos "had a right to understand what his job duties were clearly" (2T8).

A grievance was filed contesting Ramos' discharge. That grievance was denied by the field office manager. The denial stated that Ramos was a provisional employee who was discharged for repeatedly failing to follow his supervisor's instructions and that the matter was not grievable (R-1; 1T97-1T98).

The County asserts that the Hearing Examiner should have dismissed the charge because CWA failed to prosecute it between February 1992 and March 1993. We hold that the Hearing Examiner did not abuse his discretion in declining to do so.

The ultimate sanction of dismissal should not be invoked unless no lesser sanction would erase any prejudice suffered by the non-delinquent party or unless there is a pattern of willful non-compliance with administrative directives and rules. See, e.g., Johnson v. Mountainside Hosp. Respiratory Disease Assocs., 199 N.J. Super. 114 (App. Div. 1985); New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 87-158, 13 NJPER 583 (¶18215 1987), recon. den., P.E.R.C. No. 88-47, 13 NJPER 846 (¶18325 1987). The respondent has not shown that the delay prejudiced its defense. The prejudice the County suffered by virtue of its back pay liability continuing to accrue during the delay was cured by the proposed remedial order excluding the period of delay from any back pay calculations. Nor

did CWA's delay constitute a pattern of non-compliance with administrative directives and rules rather than an instance of neglect, albeit a continuing, serious and unexplained instance of neglect. Our Hearing Examiner should not have postponed the hearing indefinitely to permit CWA to seek legal representation, but should instead have fixed a new date for the hearing in the near future and required CWA to show cause for any further postponement. Failure to appear on the day of hearing or to show cause for a further postponement would then have warranted more severe sanctions. Under all these circumstances, we decline to dismiss the Complaint because of a delay in starting the hearing.

The County asserts that the Hearing Examiner should not have permitted CWA to amend its charge to allege that Ramos' discharge violated 5.4(a)(3). We hold that the Hearing Examiner properly allowed this amendment.

The original charge did not expressly allege a violation of the statutory right to request union representation during a disciplinary interview and was not limited to that theory. Instead, the charge notified the employer that CWA was contesting Ramos' discharge and alleged that the employer had violated subsection 5.4(a)(1) by interfering with Ramos' rights under the Act. Understanding that Ramos' discharge was contested, the employer asked that the Hearing Examiner limit its back pay liability given the delay in starting the hearing, a request that was honored. The amendment added a new subsection, 5.4(a)(3), but the legal test for

considering an alleged violation of subsection 5.4(a)(3) merges with the legal test for considering an alleged violation of subsection 5.4(a)(1) in this instance. See In re Bridgewater Tp., 95 N.J. 235 (1984). In any event, the second day of hearing was postponed so that the employer could produce additional witnesses; it thus had an opportunity to respond to any aspect of the amendment that may have surprised it. Under all these circumstances, we conclude that the amendment was properly allowed.

We next consider whether the employer violated subsections 5.4(a)(1) and (3) when it discharged Ramos. Bridgewater sets forth the standards for analyzing that question.

No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive

cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The first question is whether Ramos' requests for union representation during the April 11 meeting were protected by the Act. We hold that they were.

The April 11 interview was not aimed at investigating whether to discipline Ramos so the Weingarten rule did not entitle Ramos to union representation at that meeting. See, e.g., Monmouth Cty. Probation Dept., P.E.R.C. No. 91-121, 17 NJPER 348 (¶22157 1991). Nevertheless, the fact that an employee does not have a right to demand representation at a meeting does not mean that the employee can be discharged for requesting representation. Employees may have an interest in not having to perform duties outside their job description, an interest that may be addressed by their majority representative in contract proposals and grievances. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977). Ellison called the meeting to clarify the duties of security guards in light of Ramos' apparent belief that these duties did not encompass the clerical tasks that he had recently been asked to perform. The

employer's progressive discipline policy states that employees need to understand their supervisor's expectations and their job duties. Zalkind and Ellison believed that Ramos was entitled to know what was expected of him and Ellison believed that it was necessary to know whether the new duties conformed with the job description she had unsuccessfully tried to obtain from the personnel department. It was thus reasonable for Ramos to request union assistance in clarifying the reach of his job duties. He did so politely. Under all these circumstances, we conclude that Ramos could not be discharged for requesting union assistance to clarify an employment condition of central importance to him.

Ellison was angered by Ramos' requests for union representation.[5/] We next consider whether that hostility was a motivating factor in Ramos' discharge. We agree with the Hearing Examiner that it was.

Before the April 11 meeting, Ellison did not intend to recommend that Ramos be discharged or disciplined. Immediately after that meeting, Ellison went to the personnel department. She completed a form recommending that Ramos be discharged. Shortly afterwards Ramos was summoned to her office and directed to report to the personnel department where he was discharged. These

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5/ We have accepted the Hearing Examiner's credibility determination on this point. That Ellison asked her secretary to ascertain if a union representative was available does not necessarily mean that Ellison was not hostile to Ramos for making the requests.

circumstances, especially the fact that Ramos was discharged almost immediately after requesting representation, warrant an inference that Ellison carried her anger out of the meeting and up to the personnel department, where she sought and received Ramos' immediate termination. Bridgewater.

Ellison testified that she did not tell anyone about what happened at the meeting; she was left out of the loop about the decision to discharge Ramos; and her written request for Ramos' termination was simply a retroactive ratification of a decision already made by others. The Hearing Examiner rejected that testimony. So do we. Zalkind himself contradicted Ellison when he testified that either Ellison or Goldstein called him after the meeting, reported that Ramos had "walked out," and recommended that he be discharged. Since Ellison was the only management representative at the meeting, she obviously reported the meeting and at least some aspect of Ramos' alleged insubordination at that meeting to Zalkind or to Goldstein who passed it on to Zalkind.6/ Further, it would have been unprecedented for the personnel department to have decided to terminate an employee without first receiving a written recommendation from the immediate supervisor or consulting her -- it is thus unlikely that Ellison filled out the form recommending termination after the decision to terminate Ramos had already been made by others. In addition, it would have been

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6/ It is doubtful that Ellison reported that Ramos "walked out" of the meeting since there is no evidence that he did.

unusual for this employer to have departed from the progressive discipline policy applicable to all Division employees to discharge Ramos without any prior discipline, especially since both Ellison and Zalkind believed that Ramos had a right to be clearly informed about his duties and his supervisor's expectations; the progressive discipline policy itself stressed the importance of supervisors communicating duties and expectations to the employees they supervise; and the April 11 meeting was called for that purpose. These circumstances, especially the testimonial contradictions and the departures from normal personnel policies, support the Hearing Examiner's inference that Ellison sought Ramos' termination for requesting representation. Bridgewater.

Having found that Ellison's hostility towards Ramos' protected activity played a substantial role in his discharge, we next consider whether the employer proved that it would have discharged Ramos absent that hostility. See Newark Housing Auth., P.E.R.C. No. 93-10, 18 NJPER 432, 437 (¶23195 1992). We conclude that the employer has not carried this burden of proof.

On April 5, 1991, Ellison wrote a memorandum specifying several incidents of Ramos' alleged refusal to comply with directives. Since a copy was sent to the Director of Personnel, we reject the Hearing Examiner's assumption (H.E. at 21) that the Director did not know about the memorandum.[7/] We also reject the

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7/ The employer has not alleged that its personnel officials relied upon any specific events outside the memorandum in discharging Ramos.

Hearing Examiner's conclusion (H.E. at. 25) that the contents of the memorandum were a pretext for discharging Ramos. We believe instead that the memorandum was part of the considerations that led to Ramos' discharge, considerations that included Ramos' initial resistance to performing clerical tasks as well as his continued resistance at the April 11 meeting in the form of his requests for union representation to help clarify his duties. However, we are not persuaded by a preponderance of the evidence that the April 5 memorandum by itself would have produced Ramos' discharge if he had not also angered Ellison by requesting union representation on April 11.

For over two years, Ramos was a model employee. But problems developed in March 1991 when Ramos resisted doing new duties which he believed were clerical and outside his job description. Ellison understandably resented that resistance and outlined several incidents of resistance in a memorandum that was placed in Ramos' personnel file. However, at that juncture Ellison did not intend to have Ramos discharged or otherwise disciplined and no other incidents happened between the April 5 memorandum and the April 11 meeting to change her mind. Instead of pursuing disciplinary action, Ellison elected to call a meeting to clarify the job duties of security guards in the hope that this previously outstanding employee would accept his new duties. She believed that Ramos had a right to have his duties and her expectations clarified, a goal she could not fully accomplish at that meeting because the

personnel department had not yet supplied the job description she had requested. Having already been frustrated by Ramos' resistance before the meeting, she was angered by his continuing resistance at the meeting in the form of his requests for union representation. Under these circumstances, we do not believe that Ellison would have recommended Ramos' discharge had she not been angered by Ramos' requests for union representation.

Nor does the preponderance of the evidence persuade us that other management officials would have independently decided to terminate Ramos had Ellison not recommended this course of action immediately after the meeting. Ellison's memorandum did not elicit any response from Clements or any other management official in the days between the memorandum and the meeting. Zalkind, like Ellison, believed that Ramos had a right to have his job duties clarified and that the April 11 meeting was properly held for that purpose -- discharging Ramos based solely on the April 5 memorandum would have been inconsistent with that belief while delaying the discharge until after the meeting would have served no purpose. Zalkind's testimony that he considered only the April 5 memorandum, and not the report that Ramos was allegedly insubordinate at the April 11 meeting, is incredible -- why would an administrator screen out the most recent and vivid report of an act of alleged insubordination to focus on earlier allegations of insubordination alone? We believe that Ellison's report of the meeting was part of his calculations. Further, it would have been unprecedented to have discharged an

employee without receiving a recommendation from the employee's supervisor or consulting with the supervisor; and it would have been unusual not to have accorded to Ramos some measure of progressive discipline given the policy's applicability to all Division employees, its stress on communicating duties and expectations clearly, and Ramos' previous outstanding record.

The employer asserts that the Hearing Examiner erred in excluding testimony concerning the alleged belief of CWA's local president that Ramos had been insubordinate. That belief was set forth in an April 17, 1991 letter alleging mitigating circumstances and urging Ramos' reinstatement. We are not deciding, however, whether there was cause to discipline Ramos. The relevant question in applying the Bridgewater test is not what a union official thought six days after the discharge, but what management officials thought and intended to act upon at the time of the discharge. The proffered evidence would not change our conclusion that had Ramos not requested union representation at the April 11 meeting, the employer's representatives would not have decided to terminate Ramos based upon the April 5 memorandum alone.

For these reasons, we hold that the employer violated subsections 5.4(a)(1) and (3) when it discharged Ramos. We adopt the Hearing Examiner's recommended order and specifically exclude any back pay liability attributable to the delay in starting the hearing.

ORDER

The County of Essex is ordered to:

A. 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 discharging employees for requesting union representation concerning their employment conditions.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by discharging employees for requesting union representation concerning their employment conditions.

B. Take this action:

1. Restore Hiram G. Ramos to his position as provisional security guard; make him whole for all monies and fringe benefits lost by reason of his termination on April 11, 1991, subject to mitigation, plus interest pursuant to R.4:42-11(a) for each year. Excluded from the "back pay plus interest period" is the period between February 13, 1992 and July 14, 1993.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure 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 has taken to comply with this order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz, Smith and Wenzler voted in favor of this decision. Commissioner Ricci voted against this decision.

DATED: September 29, 1994
Trenton, New Jersey
ISSUED: September 30, 1994

NOTICE TO 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by discharging employees for requesting union representation concerning their employment conditions.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by discharging employees for requesting union representation concerning their employment conditions.

WE WILL restore Hiram G. Ramos to his position as provisional security guard; make him whole for all monies and fringe benefits lost by reason of his termination on April 11, 1991, subject to mitigation, plus interest pursuant to R. 4:42-11(a) for each year. Excluded from the "back pay plus interest period" is the period between February 13, 1992 and July 14, 1993.

Docket No. CO-H-92-78 COUNTY OF ESSEX
(Public Employer)

Date: _____ By: _____

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, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 94-19

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

In the Matter of

ESSEX COUNTY,

Respondent,

-and-

Docket No. CO-H-92-78

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County independently violated §5.4(a)(1) of the New Jersey Employer-Employee Relations Act when it terminated Hiram G. Ramos because he requested union representation at a meeting with his supervisor. The same conduct of the County violated §5.4(a)(3) under Bridgewater because it was hostile to Ramos' exercise of his Weingarten right.

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. 94-19

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent, Stephen J. Edelstein, Essex County Counsel (Lucille LaCosta-Davino, Deputy County Counsel

For the Charging Party, Weissman & Mints, Attorneys (Steven P. Weissman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on September 16, 1991 by the Communications Workers of America ("Charging Party" or "CWA") alleging that the County of Essex ("Respondent" or "County") has engaged in Unfair Practices within tht meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"); in that one Hiram G. Ramos was employed within the clerical negotiations unit at the County's Division of Welfare until April 15, 1991; in or about March or April 1991, Ramos was requested to perform duties that he had not performed previously; on April 11th he was summoned to the office of the Field Office Manager, who wished to speak to Ramos about his duties; Ramos requested union

representation, which was denied; Ramos was then informed that certain duties were part of his job and he was asked whether he would perform these duties; Ramos again asked for union representation but his meeting with the Field Office Manager was terminated and Ramos was ordered to report to the Personnel Office where he was given written notice of termination, effective April 15, 1991; the matter was grieved by CWA on April 25th and this grievance was denied on May 10, 1991; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on December 27, 1991. Pursuant to the Complaint and Notice of Hearing, a hearing was held in Newark, New Jersey, on July 14 & September 7, 1993. The hearing had been preceded by several adjournments sought by CWA as it considered bringing in outside counsel. Ultimately it did not do so.

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. (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."

At the hearing in this matter, the parties were given an opportunity to examine witnesses, present relevant evidence[2/] and argue orally.[3/] The parties waived oral argument (2Tr41, 42). The parties filed post-hearing briefs by December 21, 1993.

* * * *

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The County of Essex is a public employer within the meaning of the Act, as amended, and CWA is a public employee representative within the meaning of the same Act.

2. For the purposes of this proceeding, Hiram G. Ramos is a public employee within the meaning of the Act.

3. Ramos was hired as a "Provisional" Security Guard by the Essex County Department of Citizen Services, Division of Welfare, in or around November 1988 (1Tr11, 12, 45, 90).

2/ At the commencement of the hearing on July 14th, counsel for the Respondent moved to dismiss on the ground that CWA had, by seeking and obtaining several adjournments from the original hearing dates of February 13 & 14, 1992, abandoned its Unfair Practice Charge by having failed to timely prosecute the matter (1Tr7, 9, 10). Should the motion be denied, and the matter allowed to proceed, then the Respondent argued that any back pay award should end as of February 13 or 14, 1992, the original hearing dates (1Tr8). After hearing the response of CWA, I denied the motion to dismiss without prejudice and the hearing proceeded (1Tr10).

3/ At the conclusion of CWA's case, it moved to amend its Unfair Practice Charge by adding a Section 5.4(a)(3) allegation and dismiss its Section 5.4(a)(2) and (5) allegations (1Tr23-31, 35). Both requests were granted (1Tr31, 35). Finally, the County moved to dismiss at this juncture but its motion was denied (1Tr32-42).

4. Prior to April 5, 1991, Ramos had never been suspended or disciplined. In his performance evaluation of January 25, 1991, the last one prior to the precipitating incident in this case, his performance was rated outstanding. [1Tr16, 20, 48-50; CP-1]. Prior to his evaluation of January 25, 1991, supra, Ramos had been evaluated once every six months and received the same "outstanding" evaluations (1Tr20).

5. Ramos' supervisor since August 1990 had been Joan Ellison, an Assistant Field Office Manager (1Tr48). Among other classifications of employees, Ellison supervised Security Guards (1Tr44).

6. In the early part of 1991, particularly in or around March of that year, Ellison started to notice some problems in Ramos' performance, i.e., his handling of the mail, his failure to wear appropriate uniform attire and Ramos' persistence in carrying handcuffs, which he was not suppose to do (1Tr50, 51; 68-72). Ellison did not reduce the above problems to writing until April 5, 1991 when she detailed complaints against Ramos from March 21, 1991 through April 3rd (R-1; 1Tr53-55, 72-74).

7. Following Ramos' receipt of the above April 5th memorandum from Ellison, Ellison called Ramos to a meeting with another Security Guard, Peter Pacillo, on April 11th. Although Pacillo was present, he did not participate. [1Tr12, 13, 20, 21, 45, 46, 74]. At this meeting, Ramos asked for union representation since he wanted to "clarify" his job duties and he felt that he

could do better by having union representation (1Tr13).[4/] According to Ramos, Ellison's demeanor in response was that "...she was mad, angry...," based on her tone of voice in "...denying me union representation..." (1Tr13).[5/] After stating to Ramos that union representation was not necessary since the meeting was not disciplinary, Ellison proceeded to explain what his duties were (1Tr13, 14).[6/] Ramos "indicated" to Ellison that her explanation involved "...clerical duties and that he was not going to do them..." [1Tr46, 76-78]. When Ellison proceeded to discuss his job duties, Ramos again asked her for union representation "...so I can ask her questions about my job duties...," which she refused (1Tr14, 15, 77, 78). At that point Ellison told Ramos to return to his post and she stopped the meeting. [1Tr13, 14, 47].

8. Thus, Ramos had twice asked for union representation and twice Ellison had stated that it was not necessary (1Tr77, 78). Ellison acknowledged that she knew how to contact a union representative but that she knew that there was no one available at

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4/ Pacillo made no request for union representation (1Tr76).

5/ I credit Ramos' testimony that Ellison expressed anger toward him. Further, I find that the conduct of Ramos was an affront to Ellison's authority as a supervisor. I reject Ellison's denial that she was angered by Ramos' conduct. I find Ellison's post-meeting testimony implausible at best (see infra, F/F Nos. 10-12).

6/ This testimony of Ellison is credited as is the balance of this F/F No. and F/F Nos. 8 & 9, infra. As authority for crediting/discrediting the same witness, see: Salem County, P.E.R.C. No. 87-122, 13 NJPER 294 (¶18124 1987).

that time. This fact had been confirmed by Ellison's secretary, Yvonne Adams. [1Tr78-80].

* * * *

> The evidence regarding the effort of the County to procure union representation for Ramos is essentially irrelevant to the issue raised by his request for representation under Weingarten, infra. Thus, I am not especially concerned with whether or not Ramos was interested in having a Mr. Hairston represent him or David H. Weiner, the President of the Charging Party (1Tr80; 2Tr39, 40).

* * * *

9. According to Ellison, the purpose of the meeting was to explain the job responsibilities of the Security Guards and, as she was trying to do so, Ramos asked for union representation, which she felt was unnecessary since the matter was in no way a "disciplinary hearing..." [1Tr45, 46]. On cross-examination, Ramos acknowledged that the meeting with Ellison had nothing to do with discipline but had to do with raising the "...question on what my job duties were" (1Tr21).

10. After the conclusion of her meeting on April 11th, Ellison said that she "immediately" went "upstairs," seeking a copy of Ramos' job description (Security Guard) and at that time learned that he was being terminated (1Tr55, 56). She was so informed by George Clemens, Director of Personnel (1Tr 83, 86, 87; 54). With no credible intervening linkage, this precipitous occurrence defies logic. At this point, who in the County could have had any facts

justifying a decision to discharge Ramos?[7/] Clemens told Ellison that, based upon her memorandum (R-1), and prior incidents involving Ramos, he "should be terminated". Clemens added that since Ramos was not a permanent employee the County did not have to "...put up with that kind of actions or non-actions..." [1Tr87, 90]. This sequence of events does not ring true. Where is the County's progressive discipline procedure and that requiring supervisor input/recommendation prior to discipline [see CP-2 and F/F No. 13]? What was the great rush?

11. Ellison next returned to her office where she received a telephone call from James Petrone of Personnel, following which Petrone gave Ellison a form (R-2) for her signature, which was a "Request for Formal Disciplinary Action" against Ramos (1Tr59, 60, 84, 87-89; R-2). Again, Id., as to the great rush.

12. Later in the afternoon of April 11th, Ellison called Ramos into her office, and, based on prior instructions from James Petrone of Personnel, she told him to report to Petrone of Personnel (1Tr62, 63). Ramos did not request union representation at this time. Ramos did not see Alan Zalkind, the Department Director of the Respondent. He only saw Petrone (1Tr63). Compare 1Tr14, 15 where Ramos said it was Zalkind that he saw. Ramos was formally terminated by letter at the end of the week of April 11th (1Tr89).

7/ I do not credit Ellison's testimony that she did not intend to recommend the discharge of Ramos, following the conclusion of the April 11th meeting. I am asked to believe that this task was undertaken by Clemens without her knowledge. [1Tr56, 57, 82, 83].

13. David H. Weiner, the President of the Charging Party's Local 1081 for twelve years, testified without contradiction regarding the Respondent's disciplinary policies and procedures. He has been involved in literally hundreds of disciplinary proceedings and has represented at least 25 provisional employees, as distinct from permanent employees, in these proceedings (2Tr13, 16). Weiner stated that when a supervisor wishes to initiate disciplinary action, it is done on a form so requesting (2Tr21, 22, 25; CP-3).

14. The County has had a policy of "progressive discipline," of which Ellison was aware and which is found in its Procedures Manual and has been in effect since August 1, 1985 (1Tr72, 73; CP-2). It was in effect when Ramos was terminated in April 1991, and it is applied to both permanent and provisional employees, each of whom Weiner has represented (2Tr18, 19, 21). The Manual states, inter alia, that the first step in discipline shall be counseling, followed by an oral warning. The next step is a written reprimand, followed by suspensions of five or thirty days or more. The policy recognizes that in the case of a severe violation an employee may be suspended or discharged immediately. Further, the policy is quite explicit as to the steps which must be undertaken by supervision before the imposition of the next disciplinary step. Finally, Weiner testified credibly that he was not aware of any instance in which an immediate supervisor had not offered input into or initiated a recommendation to discipline an employee; this has applied to both permanent and provisional

employees (2Tr26). Ellison acknowledged her "ability" (authority) to recommend discipline but that she failed to do so as to Ramos (1Tr72, 73).

15. Weiner filed a grievance on behalf of Ramos (1Tr97, 98). The third page of R-1 indicates that Ramos had filed such a grievance. The County's position was that it was non-grievable. [See memorandum to Weiner from James J. Williams, dated May 10, 1991: R-1, p.3].

16. On April 11th, Zalkind received a telephone call from either the Division Director, Judith Goldstein, or the Assistant Field Office Manager [who must have been Ellison] (2Tr5,6; 1Tr48) informing him that Ramos had walked out of a meeting where his job duties were to be discussed (2Tr7). Zalkind asked for "their" recommendation, which was that "he (Ramos) should be terminated." Zalkind concurred.

17. Zalkind testified that Ramos was "deficient and unfit to carry out his duties. The charges were insubordination..." Also, Ellison's memorandum of April 5th (R-1) played a definite part in his decision to terminate Ramos, i.e., "a pattern of incidents that suggest to me that Mr. Ramos was either unwilling or unable to adhere to directives he received from his superiors" (2Tr6, 7).

18. At no time had Zalkind learned on April 11th that Ramos had asked for union representation at "that meeting," only that Ramos had "walked out of a meeting" (2Tr7, 8).

19. Zalkind explained that the County does not generally suspend provisional employees such as Ramos but rather terminates them (2Tr9).

ANALYSIS

The Issues

1. Has the CWA, on behalf of Ramos, proved that the County independently violated Ramos' Weingarten rights under Section 5.4(a)(1) of the Act?

2. If not, did Ramos' requests for union representation on two occasions during his meeting with Ellison on April 11, 1991, constitute the exercise of a protected activity under our Act. Query: Did the County thereafter violate Section 5.4(a)(3) of the Act when it terminated Ramos within hours of his requests for union representation on April 11th?

The Positions Of The Parties

1. The Position Of The County: The County first states that it did not violate the Act by Ellison's refusal to accede to Ramos' request for union representation at the meeting on April 11th. Further, the County is of the view that it had adequate grounds to terminate Ramos based on the content of Ellison's memorandum of April 5th (R-1). The April 5th incidents indicate to the County that Ramos had trouble following orders and that, although Ellison did not recommend discipline, her superiors decided to terminate Ramos' employment. Zalkind testified that his decision to terminate Ramos was based solely on the content of R-1 and the

fact that unsatisfactory provisional employees are terminated and not suspended. Because no anti-union animus or hostility was evident from the testimony, the County argues that it did not violate Bridgewater, infra. Even assuming the existence of hostility and/or animus, the County's decision to terminate meets the second part of the Bridgewater test, namely, that Ramos would have been terminated even in the absence of any protected activity.

2. The Position of CWA: Ramos' twin requests for union representation constituted protected activity under the Act, a proposition with which I agree. CWA's further contention that Ramos reasonably believed that his interview/meeting with Ellison might result in disciplinary action is something to be discussed further hereafter. Although the County plainly had knowledge of Ramos' protected activity (F/F Nos. 7-9, supra) there remains the question as to whether or not the County was hostile toward this exercise by Ramos. CWA then turns to the County's explanation as to whether or not the discharge of Ramos was based solely upon the April 5th memorandum. From there CWA contends that Ellison's explanation of the events following her ending of the meeting on April 11th should not be credited, either as defying common sense or because her testimony contradicted Zalkind. And, finally: Ellison's testimony is inconsistent with the County's disciplinary procedures.

The Rule of Weingarten As To
A Section 5.4(a)(1) Violation

The initial question with which I am confronted is whether the termination of Ramos on April 11, 1991, violated §5.4(a)(1) of

our Act, i.e., NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975).[8/]

The Court in East Brunswick had stated that:

> Weingarten recognizes that requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the NLRA was designed to eliminate and bars recourse to the safeguards the act provides "to redress the perceived imbalance...between labor and management." Weingarten, 420 U.S. at 260-262. [Slip Opinion at pp. 6-8].[9/]

* * * *

The Supreme Court, in defining the scope of the Weingarten right, set forth five "contours and limits of the...right...," only four of which need be referred to here (see 88 LRRM at 2691):

1. The right of an employee to refuse to submit to an interview without union representation, which he reasonably believes may result in disciplinary action, is based upon Section 7 of the

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8/ The Commission adopted the holding of Weingarten, following its decision in E. Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (1980).

9/ Since East Brunswick, the Commission has applied the Weingarten rule in many cases: see, State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563, 565 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 377, 378 (¶19146 1988); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 304, 305 (¶19109 1988); Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Stony Brook Sewerage Auth., P.E.R.C. No. 83-138, 9 NJPER 280 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982); Cape May Cty., P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981); Camden Vo-Tech. School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981).

NLRA, which guarantees the right of employees to act in concert for "mutual aid and protection." [somewhat different language in §7 than in our Act but of like intent].

2. The Weingarten right arises only in situations where the employee requests representation.

3. The employee's right to request representation as a condition to participation in an interview is limited to situations where the employee "...reasonably believes the investigation will result in disciplinary action...," supra, as measured by objective standards.

4. The exercise of the right may not interfere with legitimate employer prerogatives.

In Finding of Fact No. 7, supra, I found that Ramos asked for union representation but, in so doing, he stated that the purpose was to "clarify" his job duties and that he felt he could do better by having union representation. After Ellison stated to Ramos that his request for union representation was not necessary since the meeting was not disciplinary, she proceeded to explain what his duties were. Ramos again requested union representation, indicating that her explanation involved "clerical duties and that he was not going to do them." Ramos' second request for union representation was, as he stated, "...so I can ask her questions

about my job duties..." Ellison again stated that this request was not necessary.[10/]

Resort to precedent in the federal sector is helpful at this point[11/] since it follows directly from the "contours and limits" of the Court's defining of the statutory Weingarten right, supra. Without repeating the facts as found in F/F No. 7, Ramos could not have reasonably believed that his meeting with Ellison was an "interview" or an "investigation" that would result in disciplinary action. Ellison's meeting of April 11th seems closer to the situations presented in two NLRB decisions where no §8(a)(1) violation was found.

[1] In Amoco Chemicals Corp., 237 NLRB No. 69, 99 LRRM 1017 (1978) two employees were required to attend counseling interviews regarding excessive absences. Their requests for union representation were denied since they had been informed that no discipline would be forthcoming. Thus, they had no reasonable ground for believing that the interviews would result in disciplinary action.

[2] In U.S. Postal Service, 252 NLRB No. 14, 105 LRRM 1200 (1980) the Board agreed with its ALJ that the required "fitness for

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10/ Ellison acknowledged that she knew how to contact a union representative but knew that no one was available, this having been confirmed by her secretary, Yvonne Adams. [F/F No. 8]. I find this fact to be irrelevant to whether a Weingarten right has been violated.

11/ Recognized in Lullo v. IAFF, Local 1066, 55 N.J. 409, 421-24 (1970).

duty examinations" were not part of any disciplinary proceedure. They were prompted by personnel problems such as excessive absenteeism, etc., which did "...not fall within the purview of Weingarten..." (105 LRRM at 1200).

These two Board decisions are predicated upon an earlier holding of the Board in Quality Manufacturing Co., 195 NLRB No. 42, 79 LRRM 1269 (1972) where it stated that it would not apply what later became the Weingarten rule:

> ...to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview...79 LRRM at 1271.

It seems to me that there can be no other tenable conclusion but that Ellison's meeting of April 11th with Ramos and Pacillo was of the exact type found in Amoco and Postal Service and as posited earlier by the Board in Quality. Ramos' own testimony convinces me that at no time was he in apprehension of discipline, by either subjective or objective factors. Basically, what Ramos sought from Ellison was her acceptance of his wishes as to how her meeting was to be conducted.

CWA's contention that Ramos was in apprehension of discipline when he met with Ellison on April 11th, must be rejected since, as indicated previously, the testimony of Ramos demonstrates that he was not in apprehension of discipline. In F/F No. 7, I found as a fact that Ramos acknowledged that his meeting with

Ellison had nothing to do with discipline but had to do with raising the "...question on what my job duties were..." (1Tr21). He understood fully that he was there to have his duties explained and the evidence adduced by Ramos and Ellison confirms this fact.

Given that there was no element of discipline involved in the meeting of April 11th between Ramos and Ellison, any suggestion that the County violated the rule of "Weingarten" under §5.4(a)(1) of the Act must fall.

The Bridgewater "Test":
Determining Employer Motivation
In Cases Of Discipline

Since the sudden termination of Ramos raises the question of whether or not the County was illegally motivated, it is necessary to set forth the criteria for determining whether or not the County violated Section 5.4(a)(3) of the Act. In doing so, we apply the analysis devised by our Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984) to assess employer motivation. The Court there articulated the following test: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

Further, the Court stated that no violation may be found unless the Charging Party has proved by a preponderance of the

evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence, which demonstrates that:

(1) the employee engaged in protected activity; and

(2) the employer knew of this activity; and

(3) the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].12/

But if the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have been taken even in the absence of protected conduct [Id. at 242]. This affirmative defense need only be considered if the Charging Party has first proven on the record as a whole that hostility or animus was a "...motivating force or substantial reason for the employer's action..." [Id].

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or, if its explanation has been rejected as pretextual or a sham, then

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12/ Note, however, that the Court in Bridgewater stated further that the "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..." (95 N.J. at 242).

there is a sufficient basis for finding a violation of the Act without more.[13/]

* * * *

Ramos' Protected Activity

As noted above under the Bridgewater analysis, the Charging Party must first demonstrate by direct or circumstancial evidence that the employee involved engaged in protected activity.

There appears to be no Commission precedent for the proposition that an employee who seeks to invoke his Weingarten right, but without success, based upon the facts, has nevertheless engaged in protected activity within the meaning of Section 5.4(a)(1) of our Act. Again, resorting to the federal sector for precedent [i.e., Lullo, supra], the Supreme Court in Weingarten analyzed at length Section 7, upon which the right to union representation is based. For example, the Court stated: "...The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that 'employees shall have the right...to engage in...concerted activities for the purpose of...mutual aid or protection...'" (88 LRRM at 2692).

The Court in Weingarten stressed that the Section 7 right obtains even though a single employee may have the sole stake in

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13/ Because I am persuaded that this case is one of pretext or sham, I will later expand upon the pretext analysis as articulated by the NLRB in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).

the outcome. This is significant here since our Act does not specifically refer to either "concerted activities" or "mutual aid or protection." However, when the Commission adopted Weingarten in or around 1980, supra, its rationale and holding necessarily embraced the right of an individual employee to assert the Weingarten right under our Act in the same manner as an employee covered by the NLRA. [See 88 LRRM at 2693].

In Anchortank, Inc. v. NLRB, 615 F.2d 1153, 104 LRRM 2689 (5th Cir. 1980), the Court stated, inter alia, that: "...Section 7 protected concerted activity by employees, and one employee's request for the presence of another unit employee at an interview is concerted activity. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 269 & n.1..." [104 LRRM at 2691].

Finally, as authority for the proposition that the exercise of the Weingarten right is a protected activity under our Act, as well as under the NLRA, see Slaughter v. NLRB, 876 F.2d 11, 122 LRRM 2867 (3rd Cir. 1986). After referring to the five "contours and limits" of Weingarten and Quality Mfg. Co., supra, the Third Circuit Court of Appeals stated unequivocally that "...We think it is plain beyond cavil that the Weingarten right is rooted in §7's protection of concerted activity..." (122 LRRM at 2872).

Accordingly, I find and conclude that Ramos was engaged in protected activity under our Act when he twice sought union representation during his meeting with Ellison on April 11th.[14/]

* * * *

Hostility And/Or Animus

The next and final question is whether or not CWA has proven that the County by its agents and representatives was hostile towards Ramos' exercise of the protected activity of seeking union representation. Ramos testified that Ellison, by her demeanor and tone of voice, indicated that she was "mad" and "angry," following his first request for union representation. I have not credited Ellison's denial of Ramos' testimony on this point because I have found her overall testimony as to what transpired after she ended the meeting with Ramos to be unworthy of belief.

In other words, if I have serious problems with the post-meeting phase of Ellison's testimony, infra, then I clearly have grave doubts as to whether or not I should believe her denial that she did not manifest a hostile attitude toward Ramos when he requested union representation earlier in the day of April 11th.

It defies logical explanation as to why Ellison would (1) go directly "upstairs" for a copy of Ramos' job description and (2)

14/ There can, of course, be no question but that the County had knowledge through Ellison of Ramos' exercise of the protected activity of twice requesting union representation at her April 11th meeting.

there be confronted immediately with the fact that Ramos was being terminated. Presumably, this event occurred only minutes after she left her meeting with Ramos (1Tr84). How could Clemens of Personnel have known about Ramos, a low-profile provisional employee with two and one-half years of employment, when Ellison had never even spoken to Clemens (1Tr83)?

Recall that Weiner's uncontradicted testimony in this proceeding was that he had never seen an instance where an immediate supervisor, i.e., Ellison, had not recommended discipline, in writing, before it was imposed. It is beyond belief that Ellison had no role in the termination of Ramos, as she insisted, when it was she who had to recommend discipline, in this case termination, before it was imposed pursuant to the County's own procedures.

For the same reasons, I cannot credit Ellison's "story" about what transpired from the time that she "immediately" went "upstairs," after her meeting, until she later summoned Ramos into her office. As I ponder the statement made to Ellison by Clemens, regarding her memorandum (R-1), and the fact that since Ramos was not permanent, the County did not have to "...put up with that kind of actions or non-actions..." I must ask: How could Clemens have become so deeply enmeshed, so early, in the termination of a low-profile provisional Security Guard, hired just two and one-half years earlier.

Next lets look at the "Request for Formal Disciplinary Action" form (R-2), which Petrone, also of Personnel, proferred to Ellison during the afternoon of April 11th, for her signature. Why would Petrone have given this form to Ellison, who according to her version of events was in no way involved in the discharge of Ramos? Or, put differently, isn't it odd that Ellison, who insists that she had nothing to do with the termination of Ramos, and who claims that she first learned of the termination when she bounded "upstairs" after ending her meeting with Ramos, should shortly thereafter sign Ramos' "death warrant" (R-2, supra)? Note that her errant behavior above is completely contrary to the procedures set forth in the County Manual, both as to "progressive discipline" and as to the testimony of Weiner, concurred in by Ellison, that discipline must be preceded by a recommendation and/or input from the immediate supervisor (here Ellison).

We move next to Zalkind, the Department Director, whose testimony is, at best, based upon sparse knowledge of the facts as of the afternoon of April 11th. Initially, he placed himself "out of the decisional loop," regarding the termination of Ramos by stating that he received an unsolicited telephone call on April 11th from either the Division Director, Judith Goldstein, or an Assistant Field Office Manager, one of whom was Ellison, Ramos' supervisor. After they told Zalkind that Ramos had walked out of a meeting where his job duties were to be discussed, Zalkind asked for "their recommendation," which was "termination." He concurred.

The County's script throughout the afternoon of April 11, 1991, forecloses any contention by the County that its actions that day constituted the exercise of a legitimate business justification under Bridgewater or Wright Line. For one thing, it seems strange, indeed, that so many of the "top brass" of the County's Department of Citizen Services reached such a quick and unanimous decision to fire a low-profile provisional Security Guard. What possible threat did Ramos pose, that obviated the following of the normal course of progressive discipline under the County's long-standing procedures? What the County's scenario does suggest is that the three representatives, who were involved in the Ramos termination, manifested the requisite hostility or animus, i.e. suspect timing, infra, to satisfy fully the first part of the Bridgewater analysis.

Zalkind's testimony raises many questions relevant to the County's true motivation in terminating Ramos. Where, for example, did Zalkind obtain the data upon which he concluded that Ramos was "deficient and unfit to carry out his duties..."? Also, considering Ellison's testimony, it was less than clear that the charges included "insubordination" (1Tr69-72 v. F/F No. 17). He stated that he relied upon R-1 as a basis for termination, but Zalkind was not even "copied." Do we not return, essentially, to the fact that Zalkind first learned anything about Ramos when he received a telephone call on April 11th from either Goldstein or Ellison, who informed him that Ramos had walked out of a meeting where his job duties were to be discussed. Zalkind then asked for

"their recommendation", which was that Ramos be terminated. Zalkind concurred and thereafter he terminated Ramos. What this testimony of Zalkind does indicate is that Ellison was one of two persons to whom Zalkind spoke, i.e., at least a 50% possibility exists that Ellison was enmeshed early in the decisional process to terminate Ramos. If so, this refutes her testimony of total non-involvement in the termination.

I take note here of the facts in Bridgewater, which established employer hostility and which are applicable to the case at bar. The Court stated:

> ...Longo's transfer, so soon after his March 5th protest and his recent promotion; the absence of any written complaints about his employment; and the failure of the Township to follow its own written procedures and give Longo thirty days' written notice of the elimination of his position and his transfer. (95 N.J. at 247) (Emphasis supplied).

There can be no doubt whatsoever but that the timing of the discharge of Ramos, which occurred in the short span of time from the end of Ellison's meeting on April 11th until sometime during the afternoon of the same day, is prima facie suspect. The County's action on that date by three of its "top brass" is rife with hostility and animus toward Ramos for having invoked his Weingarten right.

Thus, for example, the Commission has on many occasions found "suspect" timing to be an important factor in assessing motivation, from which hostility or animus may be inferred.

University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16, 18 (¶17005 1985); N.J. Dept. of Human Services, P.E.R.C. No. 87-88, 13 NJPER 117, 118 (¶18051 1987); City of Margate, H.E. No. 87-46, 13 NJPER 149, 152 (¶18067 1987), adopted, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); and Newark City Housing Auth., P.E.R.C. No. 93-10, 18 NJPER 432 (¶23195 1991) at Note 9. Also, see Jim Causley Pontiac v. NLRB, 620 F.2d 122, 104 LRRM 2190, 2193 (6th Cir. 1980).

* * * *

It appearing, in summary, that CWA has met the three requisites in its burden of proof vis-a-vis a Section 5.4(a)(3) violation under Bridgewater,[15/] I am pursuaded that this case presents a classic example of employer "pretext" or "sham" rather than the usual "dual motive" defense. It is, therefore, apposite to quote from Wright Line, supra, where the NLRB succinctly set forth the distinction between a "pretext" case and a "dual motive" case:

> "In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action.

15/ Namely, the exercise of a protected activity by Ramos, the County's knowledge thereof and the County's having manifested the requisite hostility and/or animus toward Ramos' exercise of a protected activity.

> Examination of the evidence may reveal, however, that the asserted justification is a sham and that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual[16/] Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." (Emphasis supplied (105 LRRM at 1170). (Emphasis supplied).

The County's conduct in this case, particularly its "hostility and/or animus" (discussed at pages 20-24 above), fits squarely into the pigeonholes of "pretext" and "sham" as defined by the Board in Wright Line. The County's alleged justification for terminating Ramos was totally lacking in legitimacy and was, therefore, pretextual. The County's defense is, therefore, rejected as a sham.

* * * *

Based upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent County independently violated N.J.S.A. 34:13A-5.4(a)(1), particularly, when its representatives terminated Hiram G. Ramos, a provisional Security Guard, on April 11, 1991, because he twice requested union representation at a meeting with his supervisor.

16/ In like manner, the Commission concluded in UMDNJ, P.E.R.C. No. 86-5, 11 NJPER 447-449 (16156 1985) that "...we believe this failure to give notice prior to the non-renewal decision is strong evidence, at least under these circumstances, that the proffered business justification was pretextual. See, Morris., The Developing Labor Law, at 213-214 (2nd Ed. 1983)."

2. The Respondent County violated N.J.S.A. 34:13A-5.4(a)(3), particularly, when its representatives terminated Ramos for having engaged in the protected activity of requesting union representation at a meeting with his supervisor, and by the County's representatives' "suspect timing" in terminating Ramos within hours of the event.

RECOMMENDED ORDER

The Hearing examiner recommends that the Commission ORDER:

A. That the Respondent County 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 terminating employees such as Hiram G. Ramos because of his exercise of the protected activity of requesting union representation at a meeting with his supervisor, which when denied, was followed immediately by his termination on April 11, 1991.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by precipitiously terminating employees such as Hiram G. Ramos because of his exercise of the protected activity of requesting union representation at a meeting with his supervisor on April 11, 1991.

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

1. Forthwith restore Hiram G. Ramos to his position as provisional Security Guard; Ramos is to be made whole for all monies and fringe benefits lost by reason of his termination on April 11, 1991, subject to mitigation, plus interest pursuant to R.4:42-11(a) for each year. [The "back pay plus interest period" shall run from April 11, 1991 to February 13, 1992 (original scheduled hearing date) and, following a hiatus (1Tr8), shall continue to run thereafter from July 14, 1993 (first day of actual hearing) to date of reinstatment.

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 shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure 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 has taken to comply with this order.

Alan R. Howe
Hearing Examiner

Dated: March 21, 1994
Trenton, new Jersey

Recommended Posting

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, paricularly, by terminating employees such as Hiram G. Ramos because of his exercise of the protected right of requesting union representation at a meeting with his supervisor on April 11, 1991.

WE WILL NOT discriminate in regard to 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 precipitiously terminating employees such as Hiram G. Ramos because of his exercise of the protected activity or requesting union representation at a meeting with his supervisor on April 11, 1991.

WE WILL forthwith restore Hiram G. Ramos to his position as provisional Security Guard and WE WILL make Ramos whole for all monies and fringe benefits lost by reason of his termination on April 11, 1991, subject to mitigation, plus interest pursuant to R.4:42-11(a) for each year. [The "back pay plus interest period" shall run from April 11, 1991 to February 13, 1992 (the original scheduled hearing date) and, following a hiatus (*1Tr8), shall continue to run from July 14, 1993 (first day of actual hearing) to date of reinstatement.

Docket No. CO-H-92-78 _____ County of Essex _____
(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.