P.E.R.C. NO. 95-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY JUDICIARY,

Respondent,

-and- Docket No. CI-H-92-43

AVANT ROBINSON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Avant Robinson against the Atlantic County Judiciary. The charge alleges that the Judiciary violated the New Jersey Employer-Employee Relations Act when in retaliation for his filing an unfair practice charge, it denied him a medical leave of absence, excluded him from a disability leave pool program, suspended him for five days, and dismissed him for abandoning his job. The Commission finds that the charging party's failure to comply with administrative requirements, rather than his involvement in protected activity, motivated the personnel actions which led to his discharge.

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ATLANTIC COUNTY JUDICIARY,

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AVANT ROBINSON,

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General (Michael L. Diller, Senior Deputy Attorney General)

For the Charging Party, before the Hearing Examiner, Hardy & Morris, attorneys (Richard D. Morris, of counsel); on the exceptions, Avant Robinson, pro se

DECISION AND ORDER

On December 19 and 30, 1991, Avant Robinson filed an unfair practice charge and amended charge against the Atlantic County Judiciary. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (4) and (5),[1/] when, in

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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. (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

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retaliation for his filing an unfair practice charge, it denied him a medical leave of absence, excluded him from a disability leave pool program, suspended him for five days, and dismissed him for abandoning his job.

On April 2, 1992, a Complaint and Notice of Hearing issued. On April 23, the employer filed an Answer denying that it had discriminated against Robinson and asserting that it had acted with legitimate governmental and business justifications and that Robinson had failed to exhaust administrative remedies.

On July 9, 1992, the employer moved for dismissal or summary judgment. On September 4, Hearing Examiner Illse E. Goldfarb dismissed Robinson's allegation that the employer failed to notify his majority representative of certain adverse personnel actions. She also dismissed his subsection 5.4(a)(5) allegation.

On September 15, 16 and 18 and November 4 and 10, 1992, the Hearing Examiner conducted a hearing. Robinson was represented by counsel and the Judiciary was represented by a Deputy Attorney General. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

1/ Footnote Continued From Previous Page

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."

On March 8, 1994, the Hearing Examiner recommended dismissing the Complaint. Applying the tests outlined in In re Bridgewater Tp., 95 N.J. 235 (1984), she found that although Robinson engaged in protected activity that was known to three of the four managers involved in the series of decisions that resulted in his termination, Robinson did not prove that any of these individuals were hostile to his protected activities. She also found that Robinson would have been terminated even absent any hostility to protected activity.2/

On April 7, 1994, after an extension of time, Robinson filed exceptions pro se. He contends that the Hearing Examiner erred in finding that: his supervisor wanted to transfer him out of the family division because his writing skills made him unsuitable for the work; a supervisor received a complaint that Robinson and another employee had intimidated a secretary and that other employees had to cover Robinson's unattended telephone; and Robinson had decided not to return to work until after his doctor's visit on September 11, 1991. Robinson also contends that the Hearing Examiner erred in her findings concerning the notice and emergent nature of his transfer, and how he requested medical leave and inclusion in the disability pool. He excepts to the Hearing Examiner's conclusion that the Judiciary did not violate subsections

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2/ On March 9, the Hearing Examiner issued an errata clarifying that the employer's physician ultimately found Robinson eligible for the County disability pool.

5.4(a)(1), (3) or (4) when it moved him from the family division to the child support enforcement unit, and denied him access to the County disability pool thereby allegedly causing his suspension and termination under the guise of job abandonment.

On April 15, 1994, the employer filed a reply contending that even if the facts were adjusted in the manner suggested by the charging party, he still did not prove a violation of the Act. The employer attached its proposed findings of fact previously submitted to the Hearing Examiner to demonstrate a basis for the Hearing Examiner's findings concerning Robinson's writing skills and reassignment and the employer's attempts to remedy a perceived problem.

On April 25, 1994, Robinson wrote to us construing the employer's attachment as cross-exceptions and requesting permission to reply. On April 27, he replied. On May 10, the employer indicated that it had not intended to overturn any findings of fact or file cross-exceptions. We nevertheless consider all the filings.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-33) with certain minor modifications based on the charging party's exceptions.

In finding 2, the Hearing Examiner weighed all the evidence concerning Robinson's writing skills. We have no basis to disturb her findings.

In finding 4, the Hearing Examiner accurately described the circumstances surrounding Robinson's transfer.

In finding 12, the Hearing Examiner found that Richardson received a complaint from McCaffery's secretary. We accept that finding. Because it was based on hearsay alone, we do not infer that the allegations in that complaint are true. We also accept the finding that other employees had to answer Robinson's telephone when he was away from his desk.

In finding 20, the Hearing Examiner discredited Robinson's testimony that Richardson and Director Williams had assured him that they would provide him with what he needed for a medical and disability leave. The Hearing Examiner found Robinson's testimony "contradictory and self serving." Robinson testified that Richardson told him that he would send him the necessary papers. He later testified that he hadn't discussed the disability pool with Richardson. Those two statements are not necessarily contradictory. We accept Robinson's explanation that he did not discuss the disability pool with Richardson.

These allegations of retaliation for the exercise of protected rights are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party proved, by a preponderance of the evidence, that hostility to protected rights was a motivating factor in the adverse personnel action: in this case the denial of Robinson's requests for medical leave and for inclusion in the disability pool, and his suspension and discharge for abandoning his job. Only if the charging party met that burden must we consider the employer's defense that it would have taken the same action absent the protected conduct.

Robinson was transferred out of the family division at the division manager's request because of weaknesses in his writing skills. The Assignment Judge tried to arrange a transfer to a new position in street supervision, but staffing needs motivated the Vicinage Chief Probation Officer to have Robinson fill a vacancy in child support enforcement. Robinson filed a grievance and an unfair practice charge contesting his transfer. He was later reprimanded for disobeying his supervisor's instructions involving travel regulations. He was also suspended for his "actions and behavior" at a meeting where he was representing another employee. The reprimand and suspension are not challenged in this unfair practice charge.

In June 1991, Robinson told his supervisor that he would be going out on sick leave because his doctor had scheduled him for knee surgery the next day. Robinson did not comply with the employer's eligibility requirements for sick leave or inclusion in the disability pool. Robinson was notified of deficiencies in his leave and disability pool requests. His failure to meet administrative requirements initiated a chain of events that led to his discharge. We pass no judgment on the justness of the employer's action. We find only that Robinson's failure to comply with administrative requirements, rather than his involvement in protected activity, motivated the personnel actions contested in this unfair practice charge. Absent a showing that an adverse personnel action was taken in retaliation for protected activity,

our Act provides no recourse for a claim that a personnel action was unjust. No such showing was made here. Accordingly, we dismiss the Complaint in its entirety.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: July 28, 1994
Trenton, New Jersey
ISSUED: July 29, 1994

H.E. NO. 94-18

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

In the Matter of

ATLANTIC COUNTY JUDICIARY,

Respondent,

-and- Docket No. CI-H-92-43

AVANT ROBINSON,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends to the Commission to dismiss Robinson's Unfair Practice Charge, which alleged that the Judiciary violated subsections 5.4(a)(1), (3) and (4) of the New Jersey Employer-Employee Relations Act. The Hearing Examiner found that the Judiciary would have denied Robinson a medical or a disability leave and subsequently suspended him for five days and terminated him for abondoning his job in accordance with N.J.A.C. 4A:2-6.2(c), absent his being involved in protected activity. Robinson failed to meet the Bridgewater standards which requires that the charging party establish that his protected activity was a substantial or motivating factor in the employer's action.

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. 94-18

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

In the Matter of

ATLANTIC COUNTY JUDICIARY,

Respondent,

-and- Docket No. CI-H-92-43

AVANT ROBINSON,

Charging Party.

Appearances:

For the Respondent,
Deborah T. Poritz, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party,
Hardy & Morris, attorneys
(Richard D. Morris, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 19 and 30, 1991, Avant Robinson filed an unfair practice charge and amended charge, respectively, with the Public Employment Relations Commission, alleging that the Atlantic County Judiciary violated subsections 5.4(a)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/] Robinson alleges that as a result of filing an

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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. (3) Discriminating in

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earlier unfair practice charge with the Commission, the Judiciary discriminated against him by (1) refusing to grant him a medical leave of absence; (2) refusing to allow him to participate in the County's disability leave pool program; (3) suspending him for five days; and (4) dismissing him for abandoning his job.

A Complaint and Notice of Hearing issued on April 2, 1992 (C-1).[2/] On April 23, 1992, the employer filed an Answer denying that it discriminated against Robinson and asserted that it had a legitimate business justification for its personnel actions. The Judiciary also asserts that the allegations do not state a cause of action under the Act and that Robinson failed to exhaust his administrative remedies.

On July 9, 1992, the Respondent filed a Motion to Dismiss or, alternatively, for Summary Judgment. On September 4, 1992, I denied the Motion in part and granted it in part, dismissing

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regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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."

2/ The exhibits are designated as follows: Commission exhibits are "C", joint exhibits are "J", the Charging Party's exhibits are "CP" and the Respondent's exhibits are "R".

Robinson's allegation that the employer failed to notify his majority representative when it took certain adverse personnel actions and concluding that Robinson lacked standing to raise allegations of violations of subsections 5.4(a)(5). I conducted a hearing on September 15, 16 and 18, 1992, and November 4 and 10, 1992.[3/] At the conclusion of the hearing, the parties waived oral argument but filed briefs and responses by January 29, 1993.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Avant Robinson was employed as a probation officer in the Atlantic-Cape May vicinage of the Judiciary from February 1988 until his termination effective September 19, 1991 (R-1; 1T26). From February 1988 to May 1990, Robinson was assigned to the family division in Atlantic County (1T18; 1T109). During that time, Robinson served as an elected representative on a grievance committee of the Atlantic County Probation Association, the majority representative (1T20; 1T109).

2. Article 15, Management Rights, of the parties' agreement states: "Among the rights which Management retains, but not limited to them, are the following: To hire, promote, assign and transfer personnel" (J-3). Probation department personnel may be transferred between the criminal and the family divisions by agreement between the division heads. If they cannot mutually agree

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3/ Transcript references for the consecutive days of hearing as designated as 1T, 2T, 3T, 4T and 5T.

to a personnel move, the Assignment Judge, Richard J. Williams, will then direct a transfer (4T10; 5T93; 5T109).

Early in November 1989, Judge Williams was asked by the manager of the family division, Catherine Turner, to arrange a "swap" of personnel with the probation department (5T92; 5T106). Turner wanted to transfer Robinson out of the family division.[4/] At Judge Williams' suggestion, Turner talked with Steven Green, the Vicinage Chief Probation Officer, about a transfer for Robinson (4T13; 5T93; 5T109).

In December 1989, Judge Williams talked with VCPO Green about the need for a new position in the probation department's juvenile supervision division.[5/]

4/ Turner felt that Robinson's poor writing skills made him unsuitable for much of work done by the division (5T91; 5T110) - writing comprehensive predisposition reports and custody evaluation reports on juvenile and domestic violence cases (5T92; 2T33-2T35; 4T14). She explained that "some attempts at remediation" had proven unsuccessful (5T92).

Robinson testified that there had been no complaints about his writing when he was in the Family division (2T34). I cannot credit this statement because he also testified that sometime in 1989, his immediate supervisor in the family division, Florene Alexander, complained to him about the quality of his writing and began to collect examples of his work (1T25; 2T33; 2T36). Thereafter, Robinson took a writing course given by the Administrative Office of the Courts (AOC) (2T34). Robinson erroneously testified that Alexander's actions, which occurred in 1989, were part of the "harassment" that resulted from his participation in an April 18, 1990 grievance discussion with Judge Williams (2T33).

5/ Judge Williams wanted a probation officer to work out of the office "on the streets" and provide intensive supervision of a small number of juvenile clients (12 to 15 cases) (5T109).

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Judge Williams referred to his proposal once more in January or February 1990 (4T12; 4T45), but Green did not implement the new position (4T12). Judge Williams talked with Green for a third time a few months later and suggested that Robinson be assigned the street supervision (4T40; 5T94; 5T112). Judge Williams felt that the job was a good match with Robinson's skills, and Robinson would not be burdened with writing reports (5T109; 5T112). In addition, the Judge thought that Robinson, an African-American male, would be particularly effective in relating to and supervising young African-American males (5T112). Neither Judge Williams nor Green mentioned Robinson's union activities during their discussion about his reassignment (4T15).

3. In March 1990 Robinson participated with other members of the POA's grievance committee in processing a grievance filed by a POA bargaining unit member, Derek Hall. The POA was contesting Hall's inability to file for a reassignment and the general lack of posting procedures for internal vacancies within the vicinage (R-5; 1T21-1T22; 2T17-2T18).

5/ Footnote Continued From Previous Page

This would also entail family and community involvement (4T9; 4T11; 4T40). Judge Williams had not indicated who should be assigned to the position he was proposing; but, based upon his discussion with Turner, VCPO Green felt that the Judge had Robinson in mind (4T12-4T13; 4T40).

Green discussed the Judge's proposal with his two division heads, Heather Delmar of juvenile supervision and John Sullivan of child support enforcement (4T14; 4T45). Both division heads were unsupportive of the proposal (4T44-4T45). Delmar felt that the new position couldn't provide any relief to her overworked staff because it wouldn't be responsible for a regular caseload (4T10-4T11).

On March 16, 1990, the POA wrote to Judge Williams suggesting that the grievance could be resolved. It acknowledged that under the parties' agreement, reassignments are a managerial prerogative, but it suggested a meeting to discuss procedures for transfers in order to avoid the situation that was the basis for the grievance - an immediate transfer to fill a vacancy (R-5).

On April 4, 1990, Judge Williams responded to the POA. He rejected their offer to settle the grievance, but he did agree to meet with them and discuss their concerns. He made it clear that the meeting was not to be considered a grievance hearing (R-6).

On April 18, 1990, Robinson and other members of the POA grievance committee met with Judge Williams (1T24; 1T111). VCPO Green, as the step two grievance hearing officer, also attended as a management observer (4T19-4T20; 4T54). Robinson stated that he spoke out against the transfer policy and that he "would not let the Judge get off the subject" of Hall's grievance (1T23; 2T21; 2T30). The parties were not able to settle the issue and the grievance proceeded to step three (R-7, attachment 1; 2T24).

VCPO Green testified that he had attended an earlier grievance hearing on another matter in which Robinson had participated. During this hearing, Judge Williams used a simile describing the vicinage as a baseball team. Robinson claimed that the Judge used this description to imply that he wasn't a team player (1T23; 2T30). Green testified credibly that the Judge's comment was not directed at Robinson (4T22).

4. Two or three days before May 25, 1990, Judge Williams called VCPO Green and directed that he and Turner arrange immediately for Robinson's reassignment (4T14; 4T46). Judge Williams told Green that if it were possible, he wanted Robinson transferred to juvenile supervision to do street supervision (4T14; 5T109). However, the Judge let Green decide when and into which division Robinson would be transferred (4T47; 5T94; 5T111; 5T112-5T113). Two days later, Green reassigned Robinson to child support enforcement (4T39; 4T15; 5T113). Although Green knew that the supervision position would be a "step up" for Robinson (4T41), he also saw the position as a "luxury" that his department couldn't afford (4T11). He decided that the best interests of the department were served by putting Robinson in child support enforcement, which had a caseload of 1,000 cases per staff person and vacant positions (4T15; 4T48).

On Friday, May 25, 1990, Director Turner told Robinson that he was to report to the child support enforcement division when he returned from the Memorial Day weekend (R-4, attachment 2; 1T26; 1T105; 2T37-2T38). When Turner asked Robinson to sign his transfer papers, he refused. He characterized the transfer as "involuntary" (R-4, Exhibit 4) and "without any previous notice" (2T65-2T66).

5. Shortly before Robinson was transferred into the child support enforcement division, John Sullivan was replaced as its director by Robert Richardson (1T26; 1T105; 2T37; 5T6). Sullivan's transfer was implemented immediately after Judge Williams directed

it (4T52). Green noted it wasn't unusual to complete a personnel transfer within a day (4T17-4T19; 4T52). Other employees had been transferred immediately after being notified: Derek Hall (4T52); Tom Clark (4T17; 4T72); and Louis Carresquillo (4T18; 4T51). Robinson continued as shop steward after his reassignment to child support enforcement until the POA elected a replacement sometime later (1T109-1T110; 2T32).[6/]

6. On June 5, 1991, Robinson asked the POA to represent him on a grievance he had filed the day before, wherein he claimed that he had been reassigned in retaliation for his participation in the April 18, 1990 meeting with Judge Williams (R-8; 2T26-2T27). On June 20, the POA notified the Judge that, after reviewing the matter with Robinson, it concluded that there was no basis to the grievance because the parties' agreement reserved to management the right to transfer personnel. However, the POA suggested that the parties should negotiate transfer and reassignment procedures for its officers (R-9; 2T28-2T30). Judge Williams refused to reopen negotiations on this matter and on June 21, 1990, he denied Robinson's grievance (R-10; 2T30).

7. On June 27, 1990, Trial Court Administrator Charles McCaffery distributed copies of the County's revised motor vehicle regulations to the division directors. TCA McCaffery instructed

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6/ Robinson asserted that Judge Williams conspired with the POA to remove him from his shop steward position (1T23; 1T110; 2T32); however, he offered no evidenced to support this claim.

division directors that any employee who might drive a County vehicle assigned to the Judiciary must read the regulations (4T62; 4T94-4T95) and sign an acknowledgment after they had read them (4T96; 4T73-4T74).[7/]

On July 30, 1990, Robinson and Hall refused to read the regulations and sign the division's acknowledgment sheet (R-27) on "advice of counsel" (4T32; 5T7; 5T9-5T10). Richardson warned him that if he failed to comply, he might be disciplined and be denied the use of a County car (5T11).[8/]

8. On August 2, 1990, Robinson and Hall filed a written grievance with Richardson protesting his failure to provide them with appropriate AOC training for child support enforcement (R-28; 2T38-2T39; 5T14). Richardson denied the grievance. He pointed out that they had taken the training that was currently being offered (4T29; 5T15). Moreover, they had been afforded the usual "on the job" training - both had been assigned to experienced probation officers for 30 days when they first arrived in the division, which in the case of Hall, was two years before (R-29; R-33; 5T17-5T18; 4T31-4T32; 4T49).

7/ Section 2.1(e) of the regulations requires all drivers to "...submit a written statement indicating that they have read the driver's extract of these regulations and agree to comply with the same" (R-26).

8/ Robinson felt that he didn't have to read the regulations because he wasn't doing any investigative field work in the division (2T54; 5T9; 5T55). Green testified that over the years child support enforcement had become a desk job ("99.9%"). However, occasionally probation officers appear in court, serve papers or attend training (4T36).

9. The next day, August 3, 1990, Robinson and Hall met with Richardson to complain that working with ACSES, a computer file and correspondence system that generates 90% of the division's correspondence. They felt that working with ACESE was demeaning to a probation officer (R-30; 2T54). Richardson told them that filling out the ACSES forms was a required job duty (5T19); if they disagreed with this, they should file a grievance or request that the State Department of Personnel do a desk audit (5T20).[9/]

These meetings with Robinson and Hall prompted Richardson to write a memo to VCPO Green requesting the they discuss the impact that Hall's "confrontational behavior" was having his staff (R-30). Richardson testified that he "might" have had this discussion with Green (5T80). I find it reasonable to conclude that they did, and particularly, that they discussed Hall's influence on Robinson. However, I do not find enough evidence to conclude that Richardson or Green also discussed this with TCA McCaffery.

10. On August 8, 1990, Richardson again asked Robinson to read the travel regulations and sign the acknowledgment. When Robinson refused a second time (5T9), Richardson recommended to Green that Robinson be disciplined (5T11-5T12).[10/]

9/ Robinson did request a desk audit. On September 4, 1990, the State DOP concluded that Robinson was properly performing the duties of a probation officer (R-31; 5T21).

10/ Hall also refused (4T96).

11. On August 8, 1990, Robinson filed an unfair practice charge, CI-91-7, against the POA (R-4). Robinson alleged that the POA had refused to support his June 1990 grievance contesting his transfer to child support enforcement. He stated that the POA had "arbitrarily influenced the behavior of Judge Williams" by stating that his grievance was unfounded (R-4, attachments 1-7).

12. Between the months of June and August, 1990, Richardson and Robinson's immediate supervisor, Senior Probation Officer George Wolf, noticed that Robinson was taking numerous "breaks" away from the first floor office area (5T64; 5T65; 5T66). Whenever Hall got up to leave the office, Robinson would leave also (5T22). Richardson received a complaint from TCA McCaffery's secretary who claimed that Richardson and Hall had "intimidated" her by leaning over her desk to date stamp grievances they were hand delivering (5T26; 5T66). On other occasions, Richardson observed Robinson going to the second floor personnel office (5T66-5T67). As a consequence, Richardson and other staff members had to cover Robinson's unattended phone. Since much of the division's work is done by the phone, this affected the efficiency of all the other probation officers in the division (2T45; 5T24; 5T62; 5T67).[11/]

11/ Robinson's testimony generally corroborates this testimony, but from a different perspective and with a different conclusion. He testified that from the time he was transferred into child support enforcement until he went on leave for his operation in June 1991, he was "constantly

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On August 9, 1990, Richardson called Robinson and Hall into his office and told them that they were not to leave their work stations unless they advised a supervisor first - either him, Wolf, or VCPO Green, whomever was available (R-33; 5T23-5T24; 5T25). Richardson told them that he was restricting their access to the third floor and the personnel office on the second floor except on their break time and lunch period (2T46; 2T47).[12/]

11/ Footnote Continued From Previous Page

monitored" by Richardson and Wolf (1T28-1T29; 2T42). He felt his phone calls were being monitored because his clients would tell him that they had spoken to Richardson before they were referred back to him (1T30). He testified that his trips to the bathroom and lunch breaks were closely watched (1T29). However, the physical layout of the office facilitated constant eye contact among the employees. Robinson described the area in which he worked as "one large room" separated into work stations by partitions (2T42). Richardson and Wolf were "in close proximity" to Robinson and they could observe him from their respective offices (1T29; 2T42). Robinson filed a harassment charge with the AOC's Equal Employment Opportunity/Affirmative Action office over these incidents (2T58-2T59).

Robinson also complained that Richardson would "sneak up" on him and look over the top of his partition (2T42) or that Wolf would walk by his desk to talk to three other officers seated behind him, or seat himself at a nearby unoccupied desk (2T45). I cannot credit this testimony. Robinson admitted that he hadn't actually seen Richardson do this. He also admitted that he was not aware whether Wolf was supervising other staff members because he was "too busy doing his work" (2T43; 2T45).

12/ During this meeting, Richardson testified that he used the phrase "you people" to identify Richardson and Hall as the members of his staff who were to be subject to his new reporting directive (5T32). Robinson, however, testified that Richardson used the term in a racially derogatory manner (1T31-1T32; 2T47-2T48). This incident became the subject of a EEO/AA complaint filed by Robinson (2T32). I do not construe this incident as indicative of anti-union animus on the part of Richardson.

Richardson then turned to another matter involving a complaint about Hall from one of his clients. Hall requested that Robinson remain as his "representative" during this part of the discussion (5T71). Within a short time, Robinson was yelling that "this is all bullshit," and shaking his finger in Richardson's face (R-33; 5T26; 5T72).[13/] Richardson described Robinson manner as "loud, agitated and threatening" (R-33; 5T26). Richardson immediately informed VCPO Green about the incident (5T27; R-33).

Richardson, VCPO Green and TCA McCaffery discussed the threats that Robinson had made to him (5T78; 5T83). Richardson also discussed the earlier incident concerning the complaint about working with the ACSES system with Green. Richardson could not remember discussing any other topic relating to Robinson with McCaffery. I find that this was the only conversation Richardson had with McCaffery about Robinson. Richardson had little contact with McCaffery (5T83); most of his discussions were with Robinson's immediate supervisor, Wolf, or with Green (5T83).

13. The next day, August 10, 1990, VCPO Green issued a written reprimand, charging Robinson with insubordination for twice refusing to follow his supervisor's instructions involving the

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13/ Richardson reported that Robinson warned him that he was a combat veteran who identified his enemies and then pounded them into the ground; and that he was a member of the Masons, a statewide organization. And when their paths crossed, it would be a day of retribution for Richardson (R-33; 5T25-5T26).

County's travel regulations.[14/] In addition, at the suggestion of Richardson, Green included in the reprimand a warning that Robinson would not be able to use a county car or be reimbursed for mileage on his own car if used for business purposes (R-22; 4T32; 5T12). VCPO Green and TCA McCaffery agreed that the penalty was appropriate for the circumstances (4T63; 4T66-4T67; 4T70).

14. On August 16, 1990, Green signed a Notice of Minor Disciplinary Action, giving Robinson a two day suspension for his "actions and behavior" at the August 9, 1990 meeting (R-34). Robinson served the suspension on August 22 and 23, 1990 (R-34; 2T60).[15/]

15. On August 30, 1990, Robinson amended his earlier unfair practice charge to also name Judge Williams as a co-respondent (R-7). Robinson alleged that the Judge reassigned him in retaliation for his statement to the Judge at the April 18, 1990 meeting with other POA representatives (R-7, attachments 1-3). Docket CI-91-7 was deemed withdrawn by the Director of Unfair Practices on May 7, 1991 (R-11).[16/]

14/ Hall was also reprimanded (4T96).

15/ The Undersheriff issued a memo addressed to all courthouse officers banning Robinson from the Courthouse at the request of VCPO Green, except on "pressing emergent personal matters" (P-19). The prohibition was in effect from the date of the memo, August 13 (Monday), to the following Monday at 8:30 a.m., August 20, 1990 (P-19). Robinson put neither witnesses' testimony nor documents into the record to link this incident to any of the other events substantiated in the record.

16/ Robinson's appeal to reopen the case was denied by the Commission on November 1, 1991 (R-12; 2T67-2T68).

16. On September 2, Robinson and Hall filed a step two grievance with Green, contesting their letters of reprimand for insubordination over the county's travel regulations. Green denied the grievance on September 10, 1990 (R-23; 4T33). This grievance was not appealed to the third step and the matter was never discussed with Judge Williams (4T73). On September 28 and October 2, 1990, Robinson submitted a travel voucher, seeking mileage reimbursement for attending training earlier in the month (R-21; 1T39; 4T34; 5T13). Green rejected the vouchers, citing Robinson's refusal to sign the required travel regulation acknowledgment (R-24; R-25; 1T36; 2T56; 4T34-4T35; 4T70; 5T13).

17. After September 1990, there were "no subsequent incidents" between Richardson and Robinson (5T33). Robinson had testified that on unspecified times between June 1990, when he was transferred into the division, and June 1991, when he went out on a medical leave, Richardson had continually harassed him (1T28). I find no merit in these allegations.

Robinson claimed that Richardson would approve his leave at the last minute (1T41). This allegation was never supported by any evidence. Robinson complained that Richardson overcharged his vacation time on August 31, 1990 (1T32). However, the record shows that Robinson had erroneously requested a 1/2 vacation day (5T31; 3T10). The County policy does not allow vacation time to be taken in amounts less than a full day (R-36). Therefore, Robinson was charged one day's vacation even though he only used a 1/2 day.

Robinson claimed that Richardson hadn't given him the option of choosing a later starting time for his work day (1T41; 2T58). I do not credit this allegation either. Richardson testified that his staff worked either an 8 am to 4:30 pm or 8:30 am to 5 pm schedule (2T58). Robinson, in fact, did work the later schedule because of his long commute (5T24). Finally, Robinson asserted that, after Hall was terminated (1T41), Richardson subjected him to "non-verbal" intimidation" by smirking at him in a "smart aleck" way (2T57). I note that Robinson is a robustly build person, whereas Richardson is of average size and build. I cannot infer that such non-verbal actions alone would be sufficient to intimidate Robinson. Richardson did an interim evaluation of Robinson in March 1991 (5T34; R-37). Richardson felt that Robinson had a "good heart" and was motivated to help his clients; however, he had his own way of doing things (5T60; 5T79; 5T87).

18. On February 28, 1991, Phillip Hill replaced Green as Vicinage Chief Probation Officer (3T113-3T114). VCPO Hill and Richardson had discussed Robinson (3T155; 5T83). Hill was generally aware that there had been "run-ins" between the two (3T155). Hill never discussed these matters with Trial Court McCaffery or Judge Williams, nor had they asked him to treat Robinson differently (3T132). Therefore, he didn't have any specific knowledge of Robinson's past actions (3T155), just the general impression from the supervisors in his department that there was "something in the air" (3T157-3T158). Yet Hill didn't feel that Richardson had

treated Robinson any differently than other members of his staff (3T132; 3T158).

Sometime after Hill arrived, he and Robinson had a brief talk about their mutual interest in track (3T119). Hill characterized his relationship with Robinson as "cordial" (3T128).

19. The vicinage follows Atlantic County's policies on medical leave (J-2) and the disability pool program (J-1; J-3, Article 11, section 3; 3T5-3T6). Both programs ensure employment security for employees without sufficient sick, vacation or administrative days to cover extended absences for medical reasons (4T107).

The County's policy for unpaid medical leave protects an employee's position when he or she is on an extended leave of up to six months. An employee is required to submit a request for approval in writing at least two weeks in advance, if circumstances permit, as well as a doctor's certification stating (1) that the employee is unable to perform his or her duties; (2) the nature of the disability and (3) the estimated date of return to work. The employee may continue his or her health benefits while on a medical leave by paying the monthly premium (J-2; P.S. 2.08; 4T107).

The County's disability leave pool ensures the continuation of an employee's wages and health benefits during a medical absence by advancing the employee up to 120 days from a County-wide pool of sick days. The pool is formed from an initial contribution of two days from all employees, which is matched by the employer. The

County will "reclaim" the advanced sick days when the employee returns to work (J-1; 2T137; 4T105-4T106).

To participate in the disability pool, an employee must fill out an application which includes (1) a detailed medical statement explaining the disability; (2) how it prevents the employee from performing his or her duties; and (3) an estimated date of return to work. Disability pool requests are reviewed by the Trial Court Administrator or the Assignment Judge before being submitted to the County (2T111; 3T47; 3T48). The County may request medical verification as well as a confirming medical examination by its doctor before it approves a disability pool request (J-1; P.S. 2.12; P-4; 2T138).

20. On Thursday, June 12, 1991, Robinson told Richardson that he would be going out on sick leave immediately because his doctor had scheduled him for knee surgery the next day (P-1; 1T47; 5T37; 5T38). Richardson was not pleased that Robinson had given him only one day's notice before leaving (5T38). He told Robinson he would need a doctor's note (P-1; 1T53; 5T38; 5T84). Robinson responded that Richardson would get everything he needed "in the mail" (5T38).

Robinson then went to see the recently appointed Director of Personnel, Kathleen Williams (1T48; 2T98).[17/] Williams told

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17/ Williams began as the vicinage's personnel officer on August 6, 1990. She was appointed acting director in late September 1990 and became director in March 1991 (2T97). Williams knowledge of Robinson's protected activity was limited to his grievance contesting his transfer (3T56; 3T58).

Robinson that he would need to provide a doctor's note "ASAP" for an extended medical absence (2T99; 1T49). Robinson told Williams that he had enough time to cover his absence (2T99-2T100).

Robinson asserted that when he asked for forms, Richardson and Williams assured him that they would provide him with what he needed for a medical and disability leave. (1T48; 1T121; 1T123; 2T74). I cannot credit Robinson's testimony. I find his testimony on this matter to be contradictory and self serving.

Robinson testified that Richardson told him, "I will take care of it, I will send you the necessary papers" (1T47-1T48; 2T74). However, on cross examination, Robinson changed his testimony. He stated that he hadn't discussed the disability pool with Richardson because he had "unexhausted time" to cover his absence (1T122); therefore, he wouldn't need leave forms (5T84). Robinson also testified that Richardson had assured him that he would continue to receive a pay check while he was out (1T53). Robinson interpreted this mean that "forms were going to be processed properly as requested" (2T74). But I infer that Richardson was merely assuring Robinson that because he was using his leave time to cover his absence, he would remain in pay status and continue to receive his paychecks.

Williams, who testified separately from Robinson and Richardson, stated that she and Robinson didn't discuss the disability pool or any other leave (2T100), because Robinson had assured her that he had enough leave time (2T99). This is

consistent with Richardson's testimony; therefore, I credit it. Further, Robinson didn't testify that he actually requested forms from Williams. Instead he testified, "As prior experience from being out prior to this on disability leave, I received all the papers in the mail, it was my understanding all I had to do was to go in and tell her that I was having surgery and they would be forwarded to me, the disability papers" (1T123). Later, he testified that he "was under the impression that the disability pool would be granted to me as part of my contractual right (2T12; 3T108), because the pool "didn't have criteria" (1T117). I conclude from these statements that Robinson assumed that Richardson or Director Williams would take care of the administrative details of his medical absence.

21. County policy requires that an employee formally request to use vacation, administrative or compensatory time. The request must be approved in advance, "except in the most emergent of circumstances" (R-14; R-36; 3T90). In the case of medical absences, the County requires that an employee report in on each day of an absence or provide a doctor's note prior to the absence (2T104; 3T23). After June 12, 1991, Robinson failed to contact the office or send in a doctor's note (3T25). Hill was concerned about what arrangements he needed to make in order to cover Robinson's caseload (4T101; 2T103). He advised Judge Williams and TCA McCaffery about Robinson's one day notice before he left for his surgery and the

effect it had on the office (4T79; 4T92; 5T96-5T97).[18/] In order to determine how long Robinson intended to be out, Hill attempted unsuccessfully to call him at his home phone number, his emergency phone number, the local hospital in Bridgeton and at the Veteran's Hospital (3T117; 3T124; 3T127; 4T79).

Hill decided to contact Robinson by mail. After seeking Williams' advice on the appropriate wording, Hill sent a certified letter to Robinson on Wednesday, June 19, 1991 (2T101; 3T134).[19/] The letter stated that neither the required doctor's note nor a request for use of vacation or administrative time had been received. Therefore,

> each day you are absent from work may be recorded as a "W" day (leave of absence without pay). Employees failing to return to return to work for five consecutive days are considered as having resigned, 'not in good standing.' (P-2)

His letter ended with a request that Robinson call him or Richardson as soon as possible (P-2; 1T54; 2T103; 3T118).[20/]

22. Robinson did not call or write Hill or Richardson as requested in the letter (3T50). Instead, on June 21, 1991, his doctor, Dr. Jatin Gandhi, faxed a letter to Hill, with a copy to Robinson (2T56-2T57), stating that Robinson had orthoscopic surgery

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18/ Richardson was no longer involved in any subsequent events (3T39).

19/ Williams provides advice on human resource matters to all the managers in the viscinage (3T5).

20/ Hill's letter was Robinson's first indication that there was a problem with his medical leave (2T77).

on June 13, 1991 and was being treated for "internal derangement of his right knee" (P-3). Dr. Gandhi excused Robinson from work from June 13, 1991 until July 15, 1991 (P-3; 1T55-1T57). He indicated that Hill should contact his office if he had any question. The letter was stamped with Dr. Gandhi's signature.

Dr. Gandhi's letter was the first indication of how long Richardson would be out (3T46). Williams was not satisfied with Dr. Gandhi's letter (3T34). She noted that Dr. Gandhi had not addressed the issue of whether Robinson could perform his essentially sedentary job if reasonable accommodations were made for his condition (2T105). Therefore, on or about June 21, 1991, Williams and Hill called Dr. Gandhi (2T105; 3T50). Dr. Gandhi explained that Robinson needed to move around, that he could not be sedentary. When Williams indicated they could make arrangements to accommodate this (3T53), Dr. Gandhi replied that Robinson could not return to work because he was going to therapy during the day (2T106; 3T34). Williams told Dr. Gandhi that she wanted a written explanation of his prognosis (3T30-3T31). Hill then told Dr. Gandhi to submit a document with a signed, rather than a stamped signature (3T141).

23. Based upon the length of leave indicated in Dr. Gandhi's letter, Williams adjusted Robinson's payroll records. Because Robinson had not yet requested to use his vacation time, Williams charged his earned sick days and four previously authorized vacation days, which covered his absence from June 13 through Friday, July 5, 1991 (2T105; 2T107; 3T27-3T28). Thereafter,

beginning with Monday, July 8, 1991, Robinson was charged with "W" days (2T108; 3T91).

24. On Friday, July 12, 1991, Robinson called Williams (2T108). This was the first communications that Williams had with Robinson since he left for his surgery on June 12 (2T109; 3T37). Williams advised Robinson that he had been on "W" time since July 5, 1991, because she did not know "what else he wished to do" (2T109). Robinson agreed to come in and see her that afternoon (2T109; 2T113).

When Robinson arrived at Williams' office, he asked Williams why she had not sent him medical forms (1T58; 1T121; 2T69; 3T45). He wrote out a note requesting a medical leave and authorizing that his paycheck be mailed to his home address (P-6). He also filled in a request form for disability pool leave (P-4), as well as a medical leave of absence form (P-5). Both forms indicate that medical documentation is required. He gave these documents to Williams (J-1; 1T58; 1T60; 1T62-1T64; 1T119; 2T110-2T112; 3T29; 3T38). Robinson did not submit a request to use his remaining vacation and administrative leave.

Williams noticed that Robinson had indicated a different length of absence on his leave requests than that stated in Dr. Gandhi's June 21, 1991 letter to Hill (P-3; P-4; P-6; 3T46; 3T54).

Robinson had revised his leave request to begin on April 12 and end on August 26, 1991.[21/]

Hill come down to Williams' office shortly after Robinson and Williams finished talking (2T113; 3T121). Hill asked Robinson why he hadn't replied to the June 18 letter (P-2; 3T122). Robinson stated that his doctor had responded. Then he handed Hill a note from Dr. Gandhi (P-15). Hill refused to accept it because Dr. Gandhi's signature was stamped. Both Robinson and Hill were talking loudly. The meeting was brief and ended abruptly when Robinson left the office with the note after warning Hill that he was "playing in the big time" (3T127; 1T65; 2T114; 2T118; 3T125; 3T147).[22/]

21/ Robinson testified that he chose April 12 as the beginning date because he wanted the disability pool to reimburse him for the sick days he had used before he left for surgery on June 12 (1T61; 2T90); August 25 was the new return date that Dr. Gandhi had authorized (1T60).

22/ There was conflicting testimony from Robinson and Hill as to what was said. Williams apparently was in the same room with Robinson and VCPO Hill (1T65; 3T44; 2T115). Robinson testified that he was aggravated (2T85) and only got belligerent after Hill got belligerent (2T85-2T86). Robinson testified that Hill "threw" the doctor's note down and said "I'm going to get you" (1T65) or "I'm going to fix you" (2T85). Hill testified that Robinson seemed sarcastic and hostile (3T123) and that the meeting ended with Robinson warning him to watch out, because he (Hill) was "in the big time" (3T127). Hill denied throwing the note at Robinson (3T125; 3T146). Williams, who testified separately from Robinson and Hill, had no recollection of how Robinson got the note back (2T115). Her recollection of Robinson's parting words does corroborate Hill's testimony. She stated that Robinson told Hill that he "...had better get an attorney or you had better watch out. It was, you are playing in the big leagues now." (2T116). I credit the testimony of Hill and Williams. Their recollections matched in a significant, yet unrehearsed way that I found to be credible.

25. Because TCA McCaffery was on vacation in the month of July, Director Williams took Robinson's medical and disability leave requests to Judge Williams for his approval on the following Monday, July 15, 1991 (2T115-2T116; 2T118; 3T39). Director Williams advised the Judge that the County would reject Robinson's disability pool request because they had not received an adequate explanation from Dr. Gandhi in compliance with the County's disability pool policy (2T119). Dr. Gandhi had not given a detailed enough explanation of why Robinson couldn't continue to perform his desk job (2T118; 2T119; 2T125; 3T47; 5T98).[23/]

On July 17, 1991, Judge Williams sent Robinson a letter denying both his request for medical leave and participation in the disability pool because he failed to explain how the disability prevented him from performing the specific duties of his position (P-7). Judge Williams warned Robinson that once his accumulated sick time and authorized vacation time were exhausted, each day he was absent would be considered an unauthorized absence or a "W" day, and

> Accumulation of 5 days of unauthorized leave may subject you to sanctions pursuant to the Atlantic County personnel policies and procedures. Accumulation of 15 calendar days of unauthorized leave will result in loss of health

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23/ Robinson's disability pool request was the first such request that Director Williams had processed (3T17). She noted however, that disability pool requests are not that different than other, more common medical leaves such as pregnancy leaves (3T17; 3T35; 3T36), five of which she had granted (3T18).

> benefits. Please contact the Acting Director of Human Resources for more precise details concerning these matters in order that your interests will not be jeopardized...I urge you to bring yourself into compliance in order to avoid serious consequences (P-7).

Because the Judge had denied Robinson's requests for medical leave and disability pool, Director Williams continued to charge Robinson with "W" days (2T119; 3T47; 3T90). By July 19, Robinson had accumulated 10 "W" days (3T46; 3T63).

26. Robinson did not call Director Williams. On July 22, 1991, Dr. Gandhi's office faxed a short form "Certificate to return to work or school" to her, dated that day (P-11; 1T66; 1T70; 1T73-1T74; 2T77-2T78; 2T120). Dr. Gandhi indicated that the medical leave was now April 12 to August 26 (1T66), the same leave period that Robinson had requested on his medical and disability pool requests (P-4; P-6).[24/]

On Friday, July 26, 1991, Dr. Gandhi's office also faxed a letter to Director Williams. She noted that it was the same letter that Dr. Gandhi's office had faxed to her on June 21, 1991 (P-3), except that the period of absence was changed. The beginning date

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24/ This certificate (P-11) is identical to the note that Robinson tried to hand deliver to Hill on July 12, 1991 (P-15), except it appears that Dr. Gandhi signed his signature on P-11.

of June 13 was the same, but the return date was changed from July 15 to August 26, 1991 (R-2; P-11; 2T120-2T121).[25/]

After receiving the letter, Director Williams called Robinson on July 26, 1991 (2T119). She told him that Dr. Gandhi's letter still lacked the necessary specificity, and therefore it could not be used to support his leave requests (2T118-2T119; 2T121). Williams also explained that, to date, he had more than 10 days of unauthorized absences (2T120; 3T46); therefore, he was in jeopardy of losing his job. She suggested that if he had enough vacation time left to cover the coming week, he might be able to save his health benefits. But she pointed out that he would have to authorize the use of these days before she could use them to return him to pay status. Robinson agreed to do this (2T120).

Two hours later, Dr. Gandhi's office faxed Director Williams another note (2T120). It was handwritten and signed by Dr. Gandhi. It stated that

> Mr. Robinson cannot work desk job because (1) he is on physical therapy prog(ram) for knee surgery (and) (2) he can have his knee give out and collapse due to weakness. This can be

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25/ Apparently Dr. Gandhi's office had attempted to revise the dates of the original letter to reflect the revised leave prescribed on the July 22, 1991 Certificate (P-11). However, the beginning date of June 13 was not changed to April 12, 1991.

detrimental to his knee. This is to clarify previous note of 6/13/91. (P-8).[26]

The note (P-8) was a reiteration of the explanation given by Dr. Gandhi to Williams and Hill in their telephone conversation of June 21, 1991 (2T106; 3T34). Although Williams felt that the note was "getting closer" to what the County required, she was as unsatisfied with the explanation at this time as she had been on June 21. The note still did not address whether an accommodation could be made that would enable Robinson to return to work (2T122). She had another telephone conversation with Robinson and told him that this note was also deficient (3T49-3T50).

27. On Monday, July 29, 1991, the day that Trial Court Administrator McCaffery returned from his vacation, Director Williams sent a letter to Robinson confirming their July 26 telephone conversation. Williams set out the total number of hours of sick, vacation and administrative leave remaining to Robinson. She indicated that if he requested the use of all of his available time, he would be returned to paid, authorized leave status from July 22 to July 26, 1991. But, after this time was exhausted, he would be charged "W" time again. Williams warned Robinson that if

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26/ This reference is the first and only indication that a "previous note of 6/13/91" existed. Robinson had a copy of the first of Dr. Gandhi's notes (P-3) received by Williams on June 21, 1991 (2T105; 2T56-2T57). Robinson argued that a note must have been sent to Williams on June 13, 1991 because of the reference in P-8 (2T77). But he and Williams testified that they never saw an earlier note (2T76-2T77; 2T125). I infer that the reference to 6/13/91 was a clerical error on the part of Dr. Gandhi's office.

he accumulated five "W" days for that week of July 29 to August 2, 1991, he would be considered resigned not in good standing. She reminded him that he had not yet received an authorized medical leave of absence because the note faxed on July 26 had not explained how his disability prevented him from performing his duties. She listed a phone number that Robinson could call if he need "further explanation." (R-3). Williams enclosed a self-addressed stamped envelope and a "Request Form for vacation, administrative or compensation time" already filled in with dates for his signature (R-14; 2T122). Robinson returned the form but did not call Williams (3T109).

Sometime after July 19, 1991, Williams recommended to Hill that disciplinary action be taken against Robinson for the 10 "W" days he accumulated from July 8 through July 19, 1991 (2T131; 3T63-3T64). Williams indicated to Hill that other employees had been suspended for "W" days (2T131) and she did not want to treat Robinson's case any differently (3T65). After discussing the options available to them, Hill agreed with Williams' recommendation of a five-day suspension (3T65; 3T131).[27/] Director Williams and the Judge discussed the need to issue the discipline as soon as possible after the "W" days had been accumulated (2T129). Director Williams and Hill prepared the disciplinary notice (2T131), with the suspension to begin on August 26, the date Robinson was scheduled to

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27/ Hill, as the Vicinage Chief Probation Officer, must bring the recommendation to either McCaffery or Judge Williams (2T130).

return to work according to his revised leave of absence, and end on August 30, 1991 (2T129). Therefore, Robinson's would be expected to return to work on September 3, 1991 (4T85).

28. After TCA McCaffery returned from vacation on July 29, 1991, he, Director Williams and Judge Williams met to review outstanding administrative matters that McCaffery would be handling after Judge Williams left for his vacation on August 1 (4T80; 4T92; 5T100). One of the matters discussed was Robinson's requests for medical or disability pool leaves (5T114-5T115). McCaffery reviewed the Judge's July 17 letter to Robinson (P-7; 4T92). The Judge wanted McCaffery to ask the County if it would provide a second medical opinion on Robinson's ability to return to work (4T93; 5T113). After Judge Williams left on vacation, McCaffery talked to the County's head of administrative services. He told McCaffery that the County's doctor, Dr. Stetzer, could review Robinson's medical records (4T93).

On August 1, 1991, Hill approved Robinson's request for use of his vacation and administrative days from July 22 through July 26, 1991 (R-14; 2T123). McCaffery decided to put Robinson on an unpaid "personal leave of absence" from July 29 to August 26, 1991 (4T84; 3T91). Director Williams indicated that a personal leave and a medical leave are different names for the same thing - an authorized leave without pay (3T76; 3T102). An employee needs to provide medical documentation if the leave is to be granted for medical reasons (3T77). At this time, Robinson had provided three doctor's notes.

29. On August 5, McCaffery reviewed and signed off on the Notice of Minor Disciplinary Action imposing a five day suspension against Robinson for (1) failure to provide a doctor's note in compliance with the County's medical leave policy, which resulted in (2) the accumulation of 10 "W" days from July 8 to July 19, 1991, and (3) failure to notify management in sufficient time to permit alternative arrangements for his caseload (P-14; 4T85-4T86; 2T131). The Notice was delivered to Robinson's home on August 6, 1991 (R-17).[28/] Robinson did not appeal the discipline (1T85).

30. On August 7, 1991, McCaffery wrote to Robinson. He referred to Dr. Gandhi's second July 26, 1991 note (P-9), where he excused Robinson from returning to work because of his weak knee and because he was undergoing physical therapy. McCaffery indicated that the County doctor would be reviewing his medical records before his request for a medical leave could be approved. Therefore, Robinson needed to sign and return the enclosed authorization for the release of medical records by August 14, 1991 (P-10). Finally, McCaffery stated that "I wish to remind you that you are currently on a leave of absence without pay and that based on this status you will have to pay for your health benefits as of August 19th" (P-9; P-10; 4T84).

28/ Robinson testified that he did not get the Notice until August 11, 1991 (1T83; 1T106). However, he was sure that it came by overnight mail and that he saw it as soon as his mother signed for it (1T107-1T108). The certified mail receipt is dated "8-6-91" (R-17).

Robinson received McCaffery's letter with the authorization on August 11, 1991 (1T77; 1T84). He returned the authorization that day (1T78; 4T81). On August 13, 1991, McCaffery forwarded Robinson's medical authorization to Dr. Gandhi and requested that Robinson's medical records be sent to Dr. Stetzer (P-12; 4T109). On August 23, 1991, McCaffery wrote to Dr. Gandhi and Robinson's physical therapist requesting that more information be sent to Dr. Stetzer (P-13; P-14; 4T110).

31. On August 26, 1991, when Judge Williams returned from vacation (4T116), he and McCaffery reviewed Robinson's minor disciplinary action (4T91; 4T117). Judge Williams wanted the situation monitored (4T85). On August 30, 1991, the five day suspension expired. Robinson decided not to return to work until after his next doctor's visit on September 11, 1991 (2T5; 2T6). But as of September 8, 1991, he had not contacted his employer to request an extension of his unpaid leave of absence (2T133; 4T86).

On September 9, Director Williams recommended to McCaffery that Robinson be terminated (3T67). With McCaffery's approval, she prepared a Preliminary Notice of Disciplinary Action, charging Robinson with abandonment of position pursuant to N.J.A.C. 4A:2-6.2(c), by failing to return to work for five consecutive days

(2T134).[29/] On September 10, 1991, McCaffery issued the Preliminary Notice (P-16; 4T85).

Robinson received the Preliminary Notice for termination the next day (1T125). He did not request an appeal, nor did he appear on the hearing date of September 18, 1991 (1T135; 2T136).[30/] On September 19, 1991, McCaffery issued a Final Notice of Disciplinary Action, terminating Robinson (R-1; 2T136-2T137).

On September 25, 1991, Dr. Stetzer notified McCaffery that after reviewing Robinson's medical records, he was satisfied that Robinson was eligible for the disability pool (4T82-4T84).

ANALYSIS

Robinson alleges that the Judiciary discriminated against him by denying him a medical or disability leave and subsequently terminating him for abandoning his job in retaliation for his exercising protected rights. Allegations of retaliation for

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29/ Director Williams filled in the hearing date on the Preliminary Notice after she confirmed McCaffery's availability for a September 18, 1991 hearing date (2T135). Another handwritten notation was added to indicate that a request for a departmental hearing must be received within five days rather than the 10 days indicated on the form (2T135).

30/ Robinson asserted that he made one attempt to talk to McCaffery (1T90). First he testified that they hung up on him (1T91). Then he testified that he talked to the secretary, but that McCaffery didn't call back (1T90; 1T128-1T129). McCaffery testified that he was not given any messages from Robinson (4T88-4T89).

Robinson stated that he couldn't attend his hearing because he was still experiencing pain when he moved. But he thought that the hearing was a "set up" because everybody, including Judge Williams was hostile (1T136).

engaging in protected activity, such as filing grievances or unfair practice charges under the Act, are governed by In re Bridgewater Tp., 95 N.J. 235 (1984); also Hunterdon Cty. and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd 116 N.J. 322 (1989). Based upon the following, I find that the Judiciary did not violate the Act.

Under Bridgewater, 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 a motive unlawful under our Act and another motive 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 first resolved by the hearing examiner.

Robinson has clearly established that he was engaged in activity protected by our Act and that this was known to three of the four managers that were involved in the series of decisions that resulted in Robinsons' termination: Assignment Judge Williams, Trial Court Administrator Charles McCaffery and Director of Human Resources Williams. However, there is neither direct or indirect evidence that Vicinage Chief Probation Officer Phillip Hill knew of Robinson's protected activity.

VCPO Hill was appointed to his position at the end of February 1991, six months after Robinson filed his last grievance and an unfair practice charge with the Commission. Therefore, Hill had no direct knowledge of Robinson's protected activities. I also find that Hill did not have any indirect knowledge either. Hill knew that there had been "run-ins" between Richardson and Robinson before he was appointed VCPO, but this translated into a vague awareness of "something was in the air."

But I conclude that Robinson did not prove that any of these individuals were hostile to his protected activities.

Robinson raised several issues in support of his claim of hostility or animus. In his post-hearing brief, Robinson argued that his immediate supervisor, Richardson, discussed him with members of the "management team"; that Hill knew there was a

negative feeling among members of the "management team" toward Robinson; and that Judge Williams was hostile towards him because he had been outspoken in his support of a grievance during a April 1990 meeting between the POA and the Judge. These arguments lack merit.

Richardson did talk with then VCPO Green about Hall, Robinson's co-worker, and how his "bad attitude" was affecting Robinson (Finding of Fact 9). But I also concluded that VCPO Hill had never discussed any of these events with Richardson, TCA McCaffery or Judge Williams (Finding of Fact 12). I find that Robinson did not prove that Williams was hostile towards him. She knew of the grievance contesting his transfer, but she did not know of any unfair practice. Based upon her testimony, I conclude that Director Williams had not discussed Robinson's protected activity with Judge Williams, TCA McCaffery or Hill when she deliberated over the appropriate actions to take during Robinson's absence. A vague impression that something was in the air is not proof that the "management team" - presumably Judge Williams, TCA McCaffery, VCPO Hill and Director Williams - had negative feelings toward Robinson or that these negative feelings constituted animus.

Robinson argued that Judge Williams' decision to transfer him was an example of the Judge's long-standing hostility toward him. Judge Williams neither initiated nor implemented Robinson's transfer. Turner, Robinson's previous director, wanted him reassigned because his poor writing ability was affecting his performance. The Judge directed the transfer because Green was not

cooperating with Turner's request. But he left Robinson's final placement up to then VCPO Steven Green to make whatever decision he felt was best for his department. Green chose child support enforcement because of its severe staffing needs.

Contrary to Robinson's assertions, I find that Judge Williams viewed Robinson in a positive way. In acknowledgment of Robinson's professional strengths, the Judge promoted the idea of a special juvenile supervision position for Robinson. In effect, the Judge wanted to give Robinson a "plum" assignment. This does not suggest a hostile attitude.

Robinson also argued that the Judge, by using a baseball game simile, had indirectly accused him of not being a "team player." This exchange, which took place at an third step grievance hearing held before the April 1990 meeting, is too remote in time to support a finding of hostility. Timing is an important factor in assessing motivation. City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

Finally, Robinson asserted that the speed with which his transfer took place was indicative of hostility. I cannot infer this. Robinson's transfer was implemented by then VCPO Green in much the same way as other probation department transfers. In fact, one of the earlier grievances processed by the POA that Robinson

participated in, contested a same day transfer in the department of probation.

However, assuming that Robinson had proved that there was hostility or animus towards him, I find that Robinson would have been denied his request for a disability leave, which lead to a discipline for being on an unapproved leave and his termination.

Robinson assumed that he was entitled to a disability pool leave as a contractual right. Based upon a prior experience where he was granted a disability pool leave, Robinson apparently felt that all he had to do in order to "apply" for the pool was to notify Richardson and Director Williams that he would be out for medical reasons. Thereafter, all paper work would be handled by his employer, However, Director Williams, as the new head of human resources, insisted upon following the County's policy for medical and disability pool leave, which required Robinson to submit medical documentation explaining why he couldn't return to work. He did not do this.

Robinson's first doctor's note of June 21, 1991 (P-3) lacked the appropriate medical justification for a medical leave. Robinson argued that he was not able give his employer a second and presumably more acceptable note on July 12, 1991, because Hill had rejected it based on an arbitrarily imposed rule that doctor's notes had to be signed, not stamped with the doctor's signature. A public employer has the prerogative to require an employee to provide proof of illness, including appropriate doctor's verification, in order to

be eligible for sick leave benefits. See South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982).

I find that Robinson's employer would have disciplined Robinson absent his protected activity for accumulating ten "W" days because he failed to provide a doctor's note acceptable under the County's disability leave policy. Robinson had ample warning from Hill, Director Williams and Judge Williams of the consequences of being out on an unapproved absence. However, Robinson's doctor did not submit a second note until July 22, 1991. By that time Robinson had accumulated the ten "W" days and his employer took appropriate disciplinary action to suspend him for five days. Similarly, Robinson's termination was based upon his failure to return to work for five days at the end of the suspension or to contact his employer to explain why he would not be returning. Therefore, I find that the Judiciary would have terminated Robinson for these reasons even in the absence of his protected activity.

Accordingly, on the basis of the entire record and the analysis set forth above, I made the following:

CONCLUSIONS OF LAW

The Atlantic County Judiciary did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (4) when it denied Robinson a medical or a disability leave and subsequently suspended him for five days for being on an unapproved leave of absence and terminated him for abandoning his job in accordance with N.J.A.C. 4A:2-6.2(c).

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.

Illse E. Goldfarb
Hearing Examiner

DATED: March 8, 1994
Trenton, New Jersey