

P.E.R.C. NO. 91-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Respondent,

-and-

Docket No. CO-H-90-241

CARTERET POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 47,

Charging Party.

SYNOPSIS

Based on uncontested findings of fact and in the absence of exceptions, the Public Employment Relations Commission finds that the Borough of Carteret violated the New Jersey Employer-Employee Relations Act when it (a) solicited PBA Local No. 47 unit members to join FOP Lodge No. 90; (b) threatened to transfer PBA officials Robert J. Spolizino and Michael Materazzo; (c) retaliated against Michael Materazzo because of his activities as PBA state delegate by removing him as liaison officer and by transferring him from the detective bureau to the patrol division; (d) coerced Ralph Ercolino in the exercise of his right to refrain from joining the FOP; and (e) assigned PBA President Andrew Tarrant to a traffic post solely because of his union status. The Complaint was based on an unfair practice charge filed by Carteret Policemen's Benevolent Association, Local No. 47.

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Charging Party.

Appearances:

For the Respondent, Joseph P. Schiappa, attorney

For the Charging Party, Simon A. Bosco, Labor Relations
Consultant

DECISION AND ORDER

On February 27 and March 12, 1990, the Carteret Policemen's Benevolent Association, Local No. 47 filed an unfair practice charge and amended charge against the Borough of Carteret. Several allegations were withdrawn at hearing. The remaining allegations involve the Borough's alleged failure to implement unlimited lifetime major medical insurance coverage; the deputy police chief's alleged attempt to recruit members of the PBA unit into a rival FOP Lodge; and the transfer and assignment of PBA officials, allegedly in retaliation for their protected activities. The charge alleges that subsections 5.4(a)(1) through (6)^{1/} of the New Jersey

^{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

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., have been violated.

On April 16, 1990, a Complaint and Notice of Hearing issued. On June 19, 20, 21, 25 and 26, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally but waived post-hearing briefs.

On September 21, 1990, the Hearing Examiner issued his report and recommendations. H.E. No. 91-9, 16 NJPER ____ (¶____ 1990). He found that the major medical insurance issue was moot. He also found that the Borough violated the Act when its deputy chief solicited PBA unit members to join the FOP; when the deputy chief threatened to transfer two PBA officials; when the chief transferred a PBA official; when the deputy chief removed that official from his position as liaison officer to the Middlesex County Narcotics Task Force; and when the deputy chief gave the PBA's president an unfavorable assignment because of his union status.

1/ Footnote Continued From Previous Page

with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

The Hearing Examiner served his report on the parties and informed them that exceptions were due October 4, 1990. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. We incorporate the Hearing Examiner's uncontested findings of fact (H.E. at 5-30). Given these facts and in the absence of exceptions, we also adopt his conclusions of law.

ORDER

The Borough of Carteret 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 (a) soliciting PBA Local No. 47 unit members to join FOP Lodge No. 90; (b) threatening to transfer PBA officials Robert J. Spolizino and Michael Materazzo; (c) retaliating against Michael Materazzo because of his activities as PBA state delegate by removing him as liaison officer and by transferring him from the detective bureau to the patrol division; (d) coercing Ralph Ercolino in the exercise of his right to refrain from joining the FOP; and (e) assigning PBA President Andrew Tarrant to a traffic post solely because of his union status.

2. Assisting in the formation of employee organizations such as FOP Lodge No. 90 or otherwise interfering with the administration or existence of the PBA.

3. Transferring employees such as Michael Materazzo or otherwise discriminating in retaliation for engaging in protected activities.

B. Take the following affirmative action:

1. Rescind the February 27, 1990 transfer of Michael Materazzo from the detective bureau to the patrol division, restore him to his position in the detective bureau and make him whole for all monies to which he would have been entitled but for his transfer plus interest pursuant to R.4:42-11.


2. Reassign Michael Materazzo as liaison officer to the Middlesex County Narcotics Task Force.

3. 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.

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

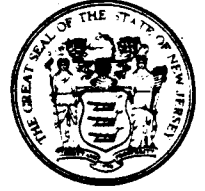
DATED: Trenton, New Jersey
October 26, 1990
ISSUED: October 26, 1990



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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by (a) soliciting PBA Local No. 47 unit members to join FOP Lodge No. 90; (b) threatening to transfer PBA officials Robert J. Spolizino and Michael Materazzo; (c) retaliating against Michael Materazzo because of his activities as PBA state delegate and by removing him as liaison officer and by transferring him from the detective bureau to the patrol division; (d) coercing Ralph Ercolino in the exercise of his right to refrain from joining the FOP; and (e) assigning PBA President Andrew Tarrant to a traffic post solely because of his union status.

WE WILL NOT assist in the formation of employee organizations such as FOP Lodge No. 90 or otherwise interfere with the administration or existence of the PBA.

WE WILL NOT transfer employees such as Michael Materazzo or otherwise discriminate in retaliation for engaging in protected activities.

WE WILL rescind the February 27, 1990 transfer of Michael Materazzo from the detective bureau to the patrol division, restore him to his position in the detective bureau and make him whole for all monies to which he would have been entitled but for his transfer plus interest pursuant to R.4:42-11.

WE WILL reassign Michael Materazzo as liaison officer to the Middlesex County Narcotics Task Force.

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BOROUGH OF CARTERET

(Public Employer)

Dated: _____

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

H.E. NO. 91-9

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

In the Matter of

BOROUGH OF CARTERET,

Respondent,

-and-

Docket No. CO-H-90-241

CARTERET POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 47,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated Section 5.4(a)(2) of the New Jersey Employer-Employee Relations Act when the Deputy Chief of its Police Department assisted in the formation of an FOP Lodge in January and February 1990 by actively soliciting officers to join it and attend an informational meeting in February. The Borough was bound by this conduct under ordinary agency principles since the Deputy Chief was found to be a supervisor under the Act.

Further, the Borough violated subsections (a)(1) and (3) of the Act when its Chief of Police transferred Michael Materazzo from the Detective Bureau to the Patrol Division as of February 27, 1990, in retaliation for Materazzo's exercise of the protected activity of serving as PBA's State Delegate. The Chief was found to have discriminatorily transferred Materazzo in a proceeding involving the same parties in 1986 [P.E.R.C. No. 88-81, 14 NJPER 238 (¶19086 1988)]. The Borough also violated the same provisions of the Act when its Deputy Chief removed Materazzo from a special assignment on February 9th because of his exercise of the same protected activity as State Delegate.

Finally, the Borough independently violated subsection (a)(1) of the Act when the same Deputy Chief: (1) threatened to transfer two employees, one of whom was Materazzo, on February 7, 1990, in part, because of Materazzo's PBA activities; (2) interfered with the right of an officer to refrain from joining the FOP; and (3) assigned the PBA President to a traffic post solely because of his union status.

H.E. NO. 91-9

By way of remedy, the Hearing Examiner ordered that the Borough rescind Materazzo's transfer of February 27th and restore him to his prior position and, additionally, make him whole for all monies lost plus interest. The Borough was also ordered to restore Materazzo to his former special assignment.

However, the Borough did not violate subsections (a)(1) and (5) of the Act with respect to the alleged failure to provide certain major medical insurance coverage since the issue had become moot during the course of the proceeding.

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. 91-9

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

In the Matter of

BOROUGH OF CARTERET,

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CARTERET POLICEMEN'S BENEVOLENT
ASSOCIATION, LOCAL NO. 47,

Charging Party.

Appearances:

For the Respondent, Joseph P. Schiappa, Attorney

For the Charging Party, Simon A. Bosco, Labor Relations
Consultant

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 27, 1990, and amended on March 12, 1990, by the Carteret Policemen's Benevolent Association, Local No. 47 ("Charging Party" or "PBA") alleging that the Borough of Carteret ("Respondent" or "Borough") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act") [Original Charge], in that (I) the Borough has failed to comply with the terms of an Interest Arbitration Award of August or September 1989 by refusing to reduce to writing and execute a successor collective negotiations agreement in accordance with the

said Award, notwithstanding that the Borough's attorney reviewed and approved language in the contract, as prepared by the PBA, on February 2, 1990;^{1/} (II) an Interest Arbitrator ruled in favor of the PBA and directed that the Borough include in the 1987-88 collective negotiations agreement a provision for "unlimited" lifetime major medical insurance coverage but the Borough has continued in its failure to so provide as recently as February 1990, notwithstanding representations by its agents that such a provision for "unlimited" lifetime coverage would be granted; (III) notwithstanding a scope of negotiations decision by the Commission in 1988, the Borough has refused to abide by an Interest Arbitration Award granting the PBA's demand for a "shift bid system" due to the fact that its Chief of Police has objected that it usurps his powers under N.J.S.A. 40A:14-118;^{2/} (IV) following an investigation conducted by the PBA in 1987, the Deputy Chief of the Police Department was found to have been attempting to recruit members of the PBA unit into a rival FOP Lodge, following which an FOP Lodge was chartered and on February 7, 1990, the said Deputy Chief, after confronting two PBA officials, Michael Materazzo and Robert Spolizino, regarding PBA business, threatened Spolizino with a transfer from the Detective Bureau; according to Spolizino, the Deputy Chief then acknowledged that this confrontation was about PBA

^{1/} This allegation was withdrawn at the hearing (5 Tr 11-13, 30).

^{2/} This allegation was withdrawn at the hearing (5 Tr 36, 37).

and FOP business; (V) three officers are alleged to have been discriminated against by way of assignments and lost compensation as a result of anti-union animus by representatives of the Borough;^{3/} (VI) the Borough unilaterally changed the method of providing legal counsel for officers facing charges arising out of the performance of their duties, notwithstanding a contract provision which grants that an officer the right to select his own counsel;^{4/} and [Amended Charge], in that (I) following his confrontation with the Deputy Chief on February 7, 1990, supra, Materazzo was on February 9th removed as Special Liaison Officer between the Police Department and the Middlesex County Narcotics Task Force, an assignment that he had held the previous two years, and on February 12th he filed an administrative complaint with the Chief of Police regarding his removal, as he had previously done on February 9th with respect to his confrontation with the Deputy Chief; also, on February 12th, Materazzo filed a third administrative complaint with the Chief of Police regarding the handling of a firearm by the Deputy Chief in Materazzo's presence on that date; on February 21, 1990, the Chief of Police transferred Materazzo as of February 27th from the Detective Bureau to the Patrol Division; and (II) on February 20, 1990, the PBA President, Andrew Tarrant, was assigned to a certain

^{3/} This allegation was withdrawn at the hearing (1 Tr 9, 10; 5 Tr 46).

^{4/} This allegation was withdrawn at the hearing since the parties mutually agreed to defer the matter to arbitration under their grievance procedure (5 Tr 53-56).

intersection in the Borough of Carteret in close proximity to where a strike was underway to make certain that there were "no traffic problems"; the Deputy Chief had ordered this assignment, allegedly because Tarrant is a "union man, he is the best man for the job. He can relate to those guys on strike and talk to them"; when, during the morning of this assignment, Tarrant was observed sitting in the car, he was summarily ordered to stand on the corner on this, an extremely cold day; the PBA implies that Tarrant's assignment was in retaliation for his protected activities as President of the PBA; all of the foregoing is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) through (6) of the Act.^{5/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 16, 1990. Pursuant to the Complaint and Notice of Hearing,

^{5/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

hearings were held on June 19 through June 21, 1990, and on June 25 and June 26, 1990 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs (5 Tr 26-61).

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The Borough of Carteret is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Carteret Policemen's Benevolent Association, Local No. 47 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

Original Charge--¶2: Major Medical Insurance--Unlimited Lifetime Coverage

3. The last executed collective negotiations agreement between the parties was effective during the term January 1, 1985 through December 31, 1986 (J-1; 1 Tr 10, 12). Article VII, "Health and Welfare," provides in Section A, "Medical Insurance," in part, that for the year 1985 the "Major Medical Lifetime Limit" was to be

increased to \$250,000 and for the year 1986 this limit was to be increased to "Unlimited" (J-1, p. 12). It was stipulated that the Borough never complied with this contractual requirement, and, thus, the \$250,000 limit has remained unchanged since 1987 (1 Tr 14).

4. Thomas F. Carey was appointed Interest Arbitrator in September 1987 to resolve the outstanding contract dispute between the parties regarding the terms for a two-year successor agreement covering the period January 1, 1987 through December 31, 1988 (J-2, pp. 3, 5). The PBA sought in this arbitration to have the language of Article VII, Section A, supra, changed so that major medical lifetime coverage would be incorporated into the agreement and extend beyond the year 1986 as previously provided in J-1 (J-2, p. 16). The Arbitration Award indicates that the PBA's proposal was "...acceptable to the Borough..." (Id.) and Carey so awarded. PBA President Andrew Tarrant testified without contradiction that this was the PBA's position before Carey and that the Borough had "agreed" that coverage would, following the Award, be unlimited (1 Tr 21, 22). Thereafter, the PBA prepared a form of agreement incorporating Carey's award, and forwarded it to the Borough but it was never executed (J-3, pp. 15, 33; 1 Tr 14, 17, 18). When asked why the PBA never pursued the Borough's failure to execute J-3, Tarrant testified that the PBA was about to enter into negotiations

for a 1989-90 successor agreement and that therefore "...it wouldn't serve any purpose..." (1 Tr 17).^{6/}

5. The 1989-90 contract negotiations appeared to have been resolved by an Interest Arbitration Award of Jeffrey B. Tener, dated August 21, 1989 (J-4; 1 Tr 24). However, unlike the Carey award, Tener did not address the continuing major medical coverage issue since there is no reference to it in his opinion. Once again the PBA prepared a form of contract, which included the same provision for "unlimited" major medical lifetime limit in Article VII, Section A, as had appeared in J-3, and submitted it to the Borough for execution on November 29, 1989 (J-5, J-6; 1 Tr 24, 25). It was stipulated that the 1989-90 agreement, supra, has also never been executed (1 Tr 14).

6. Tarrant testified that he became aware for the first time that the Borough had not purchased the unlimited major medical coverage at a PBA meeting in December 1989 when a retiring officer brought it to his attention, following which he pursued the matter with a Borough clerk as recently as February 1990 (1 Tr 22, 23).

^{6/} The Borough did honor the salary provisions in the unexecuted 1987-88 agreement and the unit members were paid retroactively in the summer of 1988 (1 Tr 18-20). Tarrant also testified that to the best of the PBA's knowledge all of the provisions of the 1987-88 "agreement" were being complied with by the Borough and it wasn't until the 1989-90 collective negotiations that the PBA learned that the Borough was still "...in the process of purchasing an unlimited major medical program..." (1 Tr 20, 21).

7. Joseph Sica, the Borough's Chief of Police, testified that to his knowledge the Borough had been attempting to "...increase the major medical..." and that it was just a matter of "...so many problems with the...Purchasing Department..." (3 Tr 14).

8. Peter J. Sica, the Mayor of the Borough, testified that his reason for refusing to execute the 1989-90 form of agreement, which was submitted to him by the PBA, was the inclusion of objectionable language within Article II, Section G, "Shift Bid and Assignment" (5 Tr 6, 7). It was elicited first "off the record" and then "on the record" that the objection was based upon certain errors in the Tener Opinion and Award (5 Tr 8-10). Thereafter, the Charging Party agreed to delete the objectionable language from Article II, Section G and the Mayor agreed without qualification that when this was done, he would "...sign it immediately..." (5 Tr 10, 11). The Charging Party then agreed to withdraw the allegation in ¶1 of the original Unfair Practice Charge, regarding the failure of the Borough to execute the 1989-90 collective negotiations agreement (5 Tr 11-13).^{7/} Since the Mayor testified unequivocally that he would execute J-5 upon the necessary correction being made by the PBA, which would necessarily include and cover the provision in J-5 for unlimited major medical coverage (Article VII, Section A, supra), the allegation in ¶2 of the original Unfair Practice Charge

^{7/} The withdrawal of this allegation in the original Unfair Practice Charge has been noted previously in the Hearing Examiner's summary of the six allegations contain therein, supra.

that the Borough has failed to provide unlimited lifetime major medical coverage is now moot.^{8/}

Original Charge--¶4: Borough Assistance To FOP

9. The PBA's collective negotiations unit includes the titles of Captain, Lieutenant, Sergeant and Police Officer (or Patrolman)[J-5, Article I, Section B (p. 2); 1 Tr 81]. There are approximately 47 members of the Police Department from the Chief and his two Deputy Chiefs down through the ranks to Patrolmen [1 Tr 81].

10. Joseph Sica has been the Borough's Chief of Police since September 1985, was a member of the PBA until sometime between 1984 and 1986 when "...they voted me out..." He never thereafter sought reinstatement into the PBA. [3 Tr 5, 6].

11. Dennis J. Nagy is one of two Deputy Chiefs in the Borough's Police Department and has been a Deputy Chief since 1986 (4 Tr 8). He had been a PBA member until in or around 1986 when he was brought up on charges by the PBA and was suspended for two years. This suspension was later reduced to one year on appeal, but he was then brought up on an additional charge of talking to other police officers about the formation of an FOP lodge. This time Nagy was expelled from the PBA. [4 Tr 9]. Nagy acknowledged that at that time he had spoken to a "few officers" about forming an FOP lodge and that these included Frank Kerekes and Robert Ercolino. A

^{8/} Thus, the Hearing Examiner will recommend dismissal of this allegation in ¶2 on the ground of mootness.

charter application "went around" and about eight or ten officers signed it. [4 Tr 9-11, 82, 83]. Nagy testified that the reason he became involved with the FOP in or around 1986 was that he thought that his suspension from the PBA had not been "right" and that he had intended to reapply to the PBA "...at some point in the future..." (4 Tr 10, 11, 83).

12. In 1989, Nagy reapplied for reinstatement to the PBA, having executed a formal Application for Membership sometime in the summer or fall of that year (CP-4; 4 Tr 83, 84). Nagy had received this application from Detective Michael Materazzo, the PBA's State Delegate (4 Tr 11, 84). Nagy's Application was presented to the December 1989 PBA meeting where a motion to reinstate Nagy was made by Detective David F. Csimbok and seconded by Steven Tardiff (1 Tr 53; 2 Tr 140).^{9/} The results of a secret ballot vote on Nagy's application for readmission to the PBA were announced at the January 1990 meeting. His application was rejected. [1 Tr 54].

13. After the PBA refused to readmit Nagy in January of 1990, he became involved in the formation of an FOP lodge.^{10/} He placed Csimbok and Tardiff in contact with a retired detective from Newark, Andrew McCormick, who had been involved with the Newark FOP. [4 Tr 12, 58, 59, 68, 95]. As a result, FOP Lodge No. 90 was chartered on January 31, 1990, and at the time of the hearing in

^{9/} Csimbok later became the President of FOP Lodge No. 90 and Tardiff became the Secretary (2 Tr 140, 141; 4 Tr 56).

^{10/} Nagy is now a member of the FOP (R-5, p. 2).

this matter in June 1990, there were eleven members (4 Tr 15, 62). That the FOP was a going concern by early February 1990 is evident from an "Open Letter" on the stationery of FOP Lodge No. 90 (CP-2), which was posted on an open bulletin board in the Police Department around February 6th. Exhibit CP-2 was prepared in response to a letter posted by the PBA on February 6th, in which it had raised the issue of dual-membership. [CP-2; 1 Tr 56-61; 4 Tr 15, 16].

14. Sometime immediately prior to the chartering of FOP Lodge No. 90 on January 31, 1990, an informational meeting was convened by the FOP at the St. Demetrius Men's Club on Roosevelt Avenue in Carteret (4 Tr 14, 61). When Nagy learned that there was to be an "informational meeting" he "...promulgated that information to people that I felt might be interested in attending..." (4 Tr 13). Further, he spoke "...to about half of the Department..." and named specifically Ralph Ercolino, Kerekes, Thomas Resko and Mark A. Makwinski (4 Tr 13, 98).

a. Thomas Resko, who is a Patrolman and the Sergeant-at-Arms of the PBA, testified forthrightly that in January 1990, while he was on duty, Nagy approached him and requested that he "...come and listen at the meeting..." at the St. Demetrius Men's Club (1 Tr 112, 113, 115). Resko also testified credibly and without contradiction that Nagy mentioned that "...certain benefits" of the FOP were better and that Nagy may have referred to the amount of FOP dues (1 Tr 114).

b. Mark A. Makwinski, a Patrolman and a PBA member, testified credibly that on February 5, 1990, he was approached by Nagy while he was working desk duty, adding that he believed that Nagy was also on duty (2 Tr 3-5). Nagy asked Makwinski if anyone had asked him to join the FOP and, when Makwinski replied in the negative, Nagy mentioned an FOP meeting which was to take place at the "Men's Club" and that Makwinski "...should attend that meeting..." (2 Tr 5, 6). On cross-examination, Makwinski reiterated his certainty that the date of the occurrence was February 5th, and he also repeated his testimony that Nagy told him of the meeting and that he would like Makwinski to attend (2 Tr 7, 8).

c. Dennis McMickle, a Lieutenant and a PBA member, testified with candor and without contradiction that around January 10, 1990, he was approached by Nagy who asked him to come into his office at Police Headquarters. Both men were on duty. [2 Tr 38-40]. Nagy asked McMickle to take a seat and then stated that a representative from the FOP was "coming down" to talk about the benefits of the FOP, adding that there was going to be a meeting "...that Wednesday night with any member of the PBA that would like to talk to him at the men's club at St. Demetrius Hall at 7:00 p.m...." (2 Tr 40, 41). Nagy never approached McMickle again nor has anyone else, including Csimbok (2 Tr 41, 42).

d. Michael Pusillo, a Lieutenant and a member of the PBA, testified as a witness for the Borough and stated that he was asked to join the FOP by Nagy but refused (3 Tr 54, 55). On

cross-examination, Pusillo stated that Nagy was "involved" with the FOP, that Nagy may have asked Captain Barany to join the FOP, and that Nagy asked Pusillo to join the FOP sometime prior to the "...forming of the charter..." (3 Tr 64-66).

e. Ralph Ercolino, a Patrolman and a PBA member, testified candidly and without contradiction that he became aware of FOP activity when he saw a list at the desk in Police Headquarters, which invited "...anybody if they were interested, to please sign their name..." (1 Tr 119, 120). Around February 14, 1990, Ercolino, who had been assigned to his patrol unit, left Headquarters and was on patrol. Within ten minutes Nagy summoned him back to Headquarters by radio. [1 Tr 121, 122]. When Ercolino returned, Nagy called him into his office whereupon he was handed a "...piece of paper with a list of several names on it..." with a "...little paragraph...about the FOP." Ercolino was asked by Nagy to read it, and when he did, Nagy stated that he wanted him to "...sign and become a member of the FOP..." Nagy then began to state reasons why Ercolino should sign, pointing out that when he (Ercolino) was "in trouble" the PBA did not come to his assistance. [1 Tr 122, 123]. At that point Nagy stated that he was going to telephone Ercolino's father-in-law, Louis R. Orlando, the Deputy Mayor of the Borough. Ercolino then gave Nagy Orlando's telephone number and, when Orlando answered, Nagy said, "...Lou, I have Ralphy here in front of me...I just asked him to do me one favor and he flat out refused me...I just want you to know that I had asked him to join the FOP and he

said, 'No, he wasn't going to do it'..." [1 Tr 123, 124]. Nagy then "hung up" and, after asking Ercolino again "to sign," Nagy stated to Ercolino that "...maybe you could keep an eye out for me in Headquarters..." When Ercolino asked what Nagy meant, he stated that he wanted Ercolino to "...let him know who was going against him or if any patrol officers were doing anything wrong..." Nagy then mentioned a patrolman Gary Juliano. But Ercolino refused and left Nagy's office. [124, 125]. On cross-examination, Nagy acknowledged that he had spoken to Ercolino regarding the FOP in his office and that he had asked him whether or not he wanted to join (4 Tr 96). Further, Nagy freely admitted that he had called Ercolino's father-in-law, Louis Orlando. However, according to Nagy, he had done so for the purpose of discussing with Orlando his prior request to Nagy that he "...keep an eye on Ralph to keep him out of trouble..." [4 Tr 97]. Nagy also stated that his having called Orlando was triggered by Ercolino's lack of interest in the benefits provided by the FOP [insurance and reimbursement of legal fees]. Thus, when Nagy called Orlando, he said, "...Lou, I did my best for this guy but there is just no talking to him because the FOP has a defense fund which the PBA doesn't and if his legal bills come up as a problem, I don't think the PBA has that kind of money or are they going to back him up. But you asked me to look out for him...." [4 Tr 97].

15. Based upon the overwhelming weight of the evidence, the Hearing Examiner cannot credit the denial of Nagy that, in

speaking to various police officers about the FOP and soliciting their joining it or attending the meeting at the St. Demetrius Men's Club, he acted only as a "co-worker" and did not act in his official capacity as Deputy Chief (4 Tr 14). Further, notwithstanding his denial that he used his position as Deputy Chief to intimidate any officer into joining the FOP,^{11/} the Hearing Examiner finds to the contrary, citing, in particular, the Ercolino incident on February 14, 1990, supra. [4 Tr 14, 96-98; 1 Tr 124, 125].

16. Chief Sica is a member of the FOP but has never personally solicited any police officer to join the FOP. While he has observed other persons solicit named patrolmen to join the FOP, he has never seen Nagy do so. [3 Tr 91]. However, the Chief testified that while he knew that Nagy had told people there would "be a meeting" to explain the difference between the FOP and the PBA, he added that this was Nagy's "constitutional right" (3 Tr 92). Chief Sica denied that such activities by Nagy had occurred in Nagy's office (3 Tr 92, 93). Chief Sica denied that he had any role in the "founding" of the FOP nor has he ever expressed a preference between the FOP and the PBA, adding that the Borough's

^{11/} Tarrant testified credibly that 12 members of the PBA approached him as President and objected to Nagy's having asked them if they would like to become members of the FOP (1 Tr 65, 66).

representatives have never attempted to influence him to foster the FOP over the PBA (3 Tr 7, 8).^{12/}

17. Mayor Sica stated that only the PBA has been recognized by the Borough and that there has been no attempt to eliminate the PBA as the collective negotiations representative (5 Tr 14, 15). In May 1990, Mayor Sica convened a meeting, regarding the off-duty work of police officers. In addition to the PBA having been invited, the Mayor also invited Csimbok as President of the FOP. [1 Tr 78-80; 3 Tr 101-105; 4 Tr 75-77]. The Hearing Examiner finds as a fact that the action of the Mayor, in convening this meeting, was evenhanded and did not manifest a preference for the FOP over the PBA.

18. The Hearing Examiner attaches no weight to the Borough's evidence that: (1) the FOP is a fraternal association, which was never intended to become a rival labor organization in opposition to the PBA (4 Tr 22); (2) the FOP "...is much like the Knights of Columbus..." (4 Tr 59); (3) the FOP's by-laws expressly state that the FOP will not become involved in "union activities" (4 tr 60, 61); and (4) the FOP has made no application "...to represent anyone in any bargaining or labor disputes or grievance disputes..." (3 Tr 8). This evidence is deemed self-serving with respect to the legal issue presented.

^{12/} Nagy's testimony was similar to that of Chief Sica, namely, that neither Chief Sica nor any representative of the Borough had ever directed him to do anything to undermine the position of the PBA (4 Tr 18).

19. The Hearing Examiner finds as a fact that Nagy is a "supervisor," who, as one of the two Deputy Chiefs in the Borough's Police Department, is excluded from the collective negotiations unit (J-5, Article I, Section B) and, who, in the absence of Chief Sica, becomes "Acting Chief" with all of the powers, duties and responsibilities of the Chief of Police (4 Tr 101, 103-105).

Original Charge - ¶4: Nagy's Threat Of
February 7, 1990 To Transfer Robert J.
Spolizino^{13/}

20. Spolizino has been a Detective for four years and is under the supervision of Nagy in the Detective Bureau (2 Tr 9, 10). He testified without contradiction that in late January or early February 1990, he was on duty and was summoned to Nagy's office. Nagy was at that time Spolizino's supervisor and he was also on duty. When Spolizino entered Nagy's office, Nagy closed the door and began questioning him as to how the "...vote is going, the sealed envelopes..." [2 Tr 14, 15, 29].^{14/} Spolizino objected to Nagy's inquiry, stating "...It's not right..." and that Nagy was

^{13/} The PBA, in its oral argument, failed to address the issue of Nagy's alleged threat to transfer Spolizino on February 7, 1990. [compare C-1, pp. 5, 6 with the oral argument (5 Tr 37-45)]. The Hearing Examiner will, however, make the appropriate Findings of Fact as to the alleged transfer of Spolizino and, additionally, that of Michael Materazzo, since the record indicates that Spolizino and Materazzo were like-situated on February 7th.

^{14/} Although Spolizino did not testify directly that Nagy must have been referring to the secret ballot vote taken by the PBA in January 1990 on Nagy's application for readmission to the PBA, prior record references have established that this was the fact (1 Tr 52-54; 2 Tr 17).

"...trying to intimidate..." him since he was alone in Nagy's office with the door closed and "...didn't feel right about it..." (2 Tr 15, 16, 29). At that point Spolizino got up and left Nagy's office (2 Tr 16). On cross-examination, Spolizino acknowledged that Nagy did not threaten or harass him nor did he indicate to Spolizino that he was acting on behalf of the Detective Bureau (2 Tr 29, 30).

21. a. On February 7, 1990, Spolizino and Materazzo, who was a Detective at the time, were at Police Headquarters at about 5:00 p.m. for the purpose of picking up equipment for a narcotics surveillance (2 Tr 18, 82, 85, 86; CP-5).^{15/} Just as Spolizino and Materazzo were about to leave Headquarters, the telephone rang and it was Lt. Pusillo [previously identified], who was calling from his home, having left Police Headquarters at 3:00 p.m. (2 Tr 18, 86, 87). Materazzo spoke with Pusillo and, according to Materazzo, he was told that he and Spolizino should "...get out on the road..." When Materazzo asked Pusillo what was the matter, Pusillo said that he had just received a call from Nagy, who was aggravated and stated that Materazzo and Spolizino were "...in there rabble-rousing and stirring up PBA members..." [2 Tr 18, 87; 3 Tr 69].

^{15/} Exhibit CP-5 is an Administrative Submission of Materazzo, which he submitted to Chief Sica on February 9, 1990. In it Materazzo set forth a detailed exposition as to what had happened on February 7, 1990. Since Materazzo's testimony would have been duplicative of Exhibit CP-5 in many instances, and the Borough having so acknowledged at the hearing, the Hearing Examiner obtained the Borough's consent that CP-5 could be used by him as if Materazzo had so testified (2 Tr 89).

b. Pusillo, testifying for the Borough, essentially confirmed Materazzo's version of what he (Pusillo) had stated to him on February 7th, namely, that Nagy had called him at home and said that Materazzo and Spolizino were at Headquarters and were "...soapboxing or rabble-rousing the remainder of the crew..." and that Pusillo should "...get them back out on the road..." (3 Tr 56-58). Pusillo then called and spoke to Materazzo at Headquarters. When he related what Nagy had said to him, Materazzo said that he was "shocked" and did not know what Pusillo was talking about. He said that he and Spolizino would leave Headquarters. [3 Tr 59; 2 Tr 18, 87, 88]. Nagy's version of this incident was that on February 7th he received a telephone call at his home from someone whom he did not recall, who said that Materazzo "...had taken a few guys into the Detective Bureau and was talking to them about...this PBA-FOP stuff..." (4 Tr 43, 44, 107). Nagy then called Pusillo and directed him to "...get them out on the road for surveillance work. I don't want them in Headquarters..." (4 Tr 45, 107, 108).^{16/} At the conclusion of Materazzo's telephone conversation with Pusillo, he and Spolizino were stopped by Nagy, who had just arrived on the premises. Nagy told them to go into Materazzo's office and, upon doing so, the door was closed. [2 Tr 19, 20, 88; 4 Tr 46].

^{16/} Nagy made no reference in his testimony, *infra*, to having used the phrase "soapboxing or rabble-rousing" in his telephone conversation with Pusillo. The Hearing Examiner credits the testimony of Pusillo that Nagy used this phrase since Pusillo impressed the Hearing Examiner as a candid witness with no interest in the outcome of this proceeding, unlike Nagy.

c. According to Spolizino, Nagy started yelling at them and asked why they were in Headquarters when they were supposed to be on surveillance, also stating that he was their "boss" and their "commander." When Spolizino asked if there was any problem with their work, Nagy replied in the negative. [2 Tr 20, 34]. Spolizino then said that the "...heated argument went a little further..." and that Nagy stated "I'm the guy that could transfer...There could be transfers..." (2 Tr 20, 22).

d. Materazzo's testimony was that Nagy said that he and Spolizino were rabble-rousing and stirring up PBA members and that he was the "boss" and the "commander" (2 Tr 88; CP-5, pp. 1, 2). Nagy also stated that there could be transfers and that he had the "authority" (2 Tr 91). Nagy noticed an envelope on Materazzo's desk, which made reference to "PBA." Materazzo voluntarily showed Nagy the contents, which consisted of State PBA contracts and benefits materials. When Materazzo, referring to the argument, supra, stated that "...this is all about the PBA and not the job, Nagy replied "that's right." [2 Tr 90, 91; 4 Tr 126-128; CP-5, p. 1]. Near the end of this 35-minute encounter with Nagy, Nagy again used the word "transfer" and complained that the PBA was "...filing all these grievances..." and that it should not be doing so (2 Tr 91, 92; CP-5, p. 2).

e.

According to Nagy, a two or three-minute heated argument took place in Materazzo's office on February 7th where he "probably" accused Spolizino and Materazzo of "...stirring up PBA members or

rabble-rousing..." adding that "...It wasn't that big of a deal..." (4 Tr 46-50, 121, 123-125). The Hearing Examiner does not credit Nagy's denial that he threatened to transfer either Materazzo or Spolizino. This is based upon the respective demeanors of Materazzo and Spolizino on this issue, plus his prior discrediting of Nagy on the FOP issue (Findings of Fact Nos. 11, 13-15). Nagy did not credibly deny that he had stated to Materazzo that the PBA was filing grievances that should not be filed. He merely acknowledged that he may have "...said something that [sic] 'we don't have to have as much formality as goes on' [sic] or something..." (4 Tr 50). The Hearing Examiner credits instead the forthright testimony of Materazzo to the contrary (2 Tr 92; CP-5, p. 2).

Amended Charge--¶1: Removal of Michael Materazzo As Liaison Officer on February 9, 1990, And His Involuntary Transfer As Of February 27, 1990.

22. During sixteen of the twenty years that Materazzo has been employed in the Borough's Police Department, he has worked as a Detective in the Detective Bureau except for several years between 1986 and 1988 when he was involuntarily transferred by Chief Sica from the Detective Bureau to the Patrol Division (2 Tr 65, 66).^{17/} After Materazzo was restored to the Detective Bureau by

^{17/} This transfer was rescinded by the Commission on March 21, 1988, as a result of an Unfair Practice Charge filed by the Charging Party herein on August 19, 1986 (2 Tr 66-68). Hearing Examiner Edmund G. Gerber found that Chief Sica was

the Commission, Chief Sica again transferred him from the Detective Bureau to the Patrol Division on February 21, 1990, effective February 27th (2 Tr 69, 102, 103; CP-8).^{18/}

23. At the time of Materazzo's reinstatement into the Detective Bureau by order of the Commission, he was the Liaison Officer between the Borough's Police Department and the Middlesex County Narcotics Task Force, which required his attending one meeting per month. Materazzo described his relationship with the Prosecutor's Office as "fine," and added that he had never heard of any complaints about his work performance. [2 Tr 70-72; 4 Tr 148, 152]. On February 9, 1990, two days following his confrontation with Nagy, supra, Materazzo was replaced as Liaison Officer by Csimbok at the direction of Nagy (2 Tr 93, 94; CP-6; R-4).^{19/}

17/ Footnote Continued From Previous Page

illegally motivated when he involuntarily transferred Materazzo on June 25, 1986. The Hearing Examiner's recommendation that Materazzo be restored to his prior position in the Detective Bureau and be made whole, including interest, was adopted by the Commission in the absence of exceptions [H.E. No. 88-31, 14 NJPER 83 (¶19030 1988), adopted P.E.R.C. No. 88-81, 14 NJPER 238 (¶19086 1988)].

18/ On February 27, 1990, Deputy Chief Michael Hack advised the Borough's payroll clerk of Materazzo's change in assignment and requested the necessary payroll adjustment to reflect his transfer (CP-9; 2 Tr 104, 105). Materazzo's transfer into the Patrol Division resulted in a loss of earnings of \$1300 per year (2 Tr 105, 130, 131).

19/ Exhibit CP-6 is an "Administrative Submission," which Materazzo submitted to Chief Sica on February 12, 1990. He never received a response. [2 Tr 96]. Exhibit R-4 is the Memorandum of Nagy, regarding the replacement of Materazzo as Liaison Officer, and was prepared by him on February 21st.

Nagy's explanation for the change was that Materazzo's duties as PBA State Delegate required him to leave the Department from time to time and, when coupled with the time required of him for the Middlesex County Task Force, it interfered with his narcotics work in the Department (4 Tr 50-52). Also, since Csimbok had been attending intelligence meetings at the Prosecutor's Office for almost two years, he was better suited to be the Liaison Officer than Materazzo (4 Tr 51, 52, 144, 145, 148, 149). Nagy insisted that Materazzo's State Delegate duties required him to spend too much time away from Headquarters even though he had never documented it. He recalled that only Pusillo had ever complained to him. [4 tr 150-154]. Chief Sica did not agree with Nagy that the time spent by Materazzo on PBA State Delegate duties had ever been a problem, at least not until the instant proceeding (3 Tr 138-141). Further, Materazzo has always been permitted by the Chief to attend PBA meetings and functions. The Chief also testified at the hearing that "He can continue to be the State Delegate..." (3 Tr 138-141). The Chief disclaimed having had anything to do with the decision to remove Materazzo from his assignment as Liaison Officer, that having been the prerogative of Nagy (3 Tr 138). However, the Chief volunteered that Materazzo's PBA State Delegate activities were not related to his removal as Liaison Officer (3 Tr 138-140).

24. Exhibit CP-7 is an "Administrative Submission," which was prepared by Materazzo on February 12, 1990, wherein he described the "gun incident" of February 9th (2 Tr 84, 97). This incident

involved the alleged threatening display by Nagy of a new weapon in the Detective Room in the presence of Materazzo, Pusillo and Capt. Andrew Kovacs (2 Tr 97-101, 110, 111). Nagy did not dispute Materazzo's description of the incident. The Hearing Examiner credits his denial of any intention to intimidate Materazzo when he removed the weapon from his holster on February 9th (4 Tr 52-54, 160-166, 168-170). Chief Sica, after investigating the incident, concluded that Materazzo had "overreacted" since it is quite common for officers to display a new gun to other officers (3 Tr 42, 43, 144, 145).

25. Sometime between February 12th and February 15, 1990, Chief Sica encountered Materazzo, who told him of an argument that he had had with Nagy concerning Nagy's reinstatement in the PBA and Materazzo's removal as Liaison Officer. The Chief's response was that Materazzo had to learn to get along and to work with Nagy. When the discussion turned to "transfers," the Chief told Materazzo that he had no anticipation of "...transferring anybody..." [3 Tr 30, 31; 2 Tr 127, 128]. Materazzo testified that the Chief clearly stated that he had no intention of transferring him (2 Tr 127, 128). However, the Hearing Examiner credits Chief's Sica testimony over that of Materazzo for the reason that it appears more likely that the Chief would have spoken in general terms as to his lack of intention to transfer.

26. Upon returning to his office early on February 21st, after having been out due to illness, the Chief read the three

Administrative Submissions of Materazzo (CP-5 through CP-7). He then investigated further by obtaining Administrative Submissions from Pusillo and Kovacs on the gun incident (R-1 & R-2) and a memorandum from Nagy (R-4). [3 Tr 31-35, 132-134]. The Chief considered the gun incident "more important," the first two being "...just a petty argument between petty people..." (3 Tr 32, 33). At about 10:00 or 10:15 a.m. the Chief convened a staff meeting, which lasted 10 or 15 minutes. The meeting included Nagy, Kovacs, a Capt. Barany and Deputy Chief Hack but not Pusillo (3 Tr 36, 40, 84, 134). The discussion centered on the argument between Materazzo and Nagy on February 7th, the gun incident and Nagy's complaint that Materazzo spent too much time away from his duties in the office (3 Tr 36-38). The Chief's testimony that Nagy and Materazzo had not gotten along for an extended period is credited (3 Tr 117, 126).^{20/} The Chief stated his belief that the submissions of Nagy and Materazzo were slanted in their respective favors, but the submissions indicated clearly that there was a serious confrontation between them and "...that he had to take some kind of action..." (3 Tr 134, 135). Although the Chief accepted the fact that Materazzo's duties as PBA State Delegate kept him away from the Department, he added that he had also received complaints "...from another department..." that Materazzo was spending too much time there (3 Tr

^{20/} Nagy confirmed that he thought his relationship with Materazzo had been breaking down over the last several years (4 Tr 86, 93).

37, 38). Chief Sica's stated reasons for transferring Materazzo were (1) the necessity to separate Materazzo from Nagy because they could not get along and (2) Materazzo's having spent too much time away from the Detective Bureau (3 Tr 33, 35-38). The record does not indicate that the Chief relied, additionally, upon the "gun incident," which he initially described as "more important." This is explained by his having later found the "gun incident" to be "unsubstantiated." [Compare 3 Tr 32 with 3 Tr 37].^{21/}

27. Between 12:00 noon and 1:00 p.m. on February 21, 1990, Materazzo was ordered to the Chief's office where Deputy Chief Hack was also present (2 Tr 113; 3 Tr 134). The Chief discussed with Materazzo his Administrative Submissions (see CP-5 through CP-7, supra) but, according to Materazzo, the Chief gave no "credence" to his submissions and said that he had found that "...nothing was wrong..." (2 Tr 102, 103, 113, 114). According to Materazzo, the only reason given to him by the Chief for his transfer was that since he could not get along with Nagy, he was transferring him because "...he can't transfer a Deputy Chief..." (2 Tr 103, 104, 128, 129, 135). The Hearing Examiner credits Materazzo's testimony of this conversation with Chief Sica. Materazzo was given his order of transfer to the Patrol Division under Deputy Chief Hack, effective February 27th, and his meeting with the Chief ended (2 Tr 103; 3 Tr 41; CP-8).

^{21/} He saw no reason to review Materazzo's evaluations since he knew that they were "...average and slightly above average (3 Tr 39, 40, 72; 2 Tr 69, 70).

28. Nagy denied that he ever told the Chief that he wanted Materazzo transferred (4 Tr 129), but he did state in his memorandum of February 21, 1990, to Chief Sica that in view of Materazzo's three Administrative Submissions (CP-5 through CP-7):

...I am appealing to you for some type of intervention. It would seem to me, that Det. Materazzo is going to now initiate a formal campaign of intimidation and harassment...I require accountability, maturity, respect and professionalism...(and)...It seems to me that...(he)...falls far short on all of these counts...I feel that he is a serious stumbling block to the overall improvement of the division, and his actions reflect poorly on the rest of the department... [R-4, p. 3].

Amended Charge--¶2: Andrew Tarrant's
Traffic Assignment On February 20, 1990

29. On February 19, 1990, Chief Sica received a Superior Court injunction with a request to make service upon strikers at a private company (GATX). He personally learned on that day that there was the potential for a violent strike. The Chief assigned Nagy to take charge of the "strike detail" and to maintain a low profile. Mayor Sica had said that he wanted to have an officer on duty directing traffic at the intersection of Driftway and Roosevelt Avenue to avoid any backup of traffic. The Chief learned later that Nagy had selected Tarrant for assignment to this post on February 20th. [3 Tr 44-46, 151, 152]. Nagy relayed his order assigning Tarrant to the Driftway and Roosevelt intersection to Lt. McMickle, who actually made the assignment of Tarrant at the beginning of the 7:00 a.m. shift on February 20th. McMickle told Tarrant to take his patrol car to the intersection, park in a lot across the street and

to sit in his patrol car and observe traffic, which he did. McMickle also told Tarrant to get out of his car to correct any problems. [1 Tr 37-39; 2 Tr 43-45]. All witnesses agreed that it was a cold day. Tarrant stated that it was approximately 20 to 25 degrees F. with heavy gusting winds. [1 Tr 39, 2 Tr 45; 3 Tr 153]. Before Tarrant left for his assignment at the intersection, McMickle stated to Nagy that he thought there should be rotation due to the cold temperature. Nagy stated that he wanted Tarrant "...out there directing traffic...all day..." [2 Tr 45, 46].

30 About one-half hour after Tarrant left Headquarters, McMickle received a radio transmission from Nagy to meet him at the parking lot. When he arrived Nagy was in the company of Chief Sica and appeared to be very annoyed with McMickle. Nagy wanted to know why Tarrant was sitting in his patrol car in the parking lot. Nagy then gave McMickle a direct order to get Tarrant out to the intersection. [1 Tr 42, 91, 92; 2 Tr 48, 49]. When McMickle asked Chief Sica about Nagy's order to direct Tarrant to the intersection, the Chief's response was that "...anything that Deputy Chief has to say to me, to consider that as a direct order..." (2 Tr 48, 49; 4 Tr 32).

31. Later that morning McMickle spoke to Nagy about the weather conditions and the assignment of Tarrant to direct traffic all day at the intersection, to which Nagy replied that "...Tarrant was the PBA President and he was the best selection because possibly he would feel sympathetic toward the strikers..." (2 Tr 50). Nagy

acknowledged that he selected Tarrant for the GATX strike situation because he was "...the best qualified...considering he had (the) most labor background and experience..." (4 Tr 28). He denied that the selection of Tarrant had anything to do with whether or not he was the PBA's President or even past President (4 Tr 29). When the Chief learned that Nagy's reason for assigning Tarrant to the intersection was because he was the PBA President and "...could work out the problem...", the Chief's response was, "fine" (3 Tr 153, 158). Although the Chief would not have kept Tarrant at the intersection the entire day, as Nagy did, he had earlier stated that he would not overrule Nagy's "legal order" (3 Tr 154, 160).

32 Tarrant returned from his intersection assignment for lunch at Headquarters where he encountered Nagy, who asked him what he was doing there. Tarrant explained that he was there to have lunch. Shortly thereafter Nagy entered the lunch room and asked for McMickle, adding that there was a problem at the GATX. When Tarrant continued eating his lunch, Nagy asked him what he thought he was doing, adding that he was putting lives in jeopardy and to get to GATX immediately. [1 Tr 45, 46]. After Tarrant had arrived, McMickle told him that there was no problem and to return to Headquarters. Tarrant then returned to Headquarters, finished his lunch and reported back for duty at about 12:20 p.m. where he remained. [1 Tr 46-48]. Nagy claimed that at 12:02 p.m. he received an emergency call on his radio at Headquarters. When he later passed the lunch room he saw Tarrant, who seemed not to have

heard the call. Nagy then ordered him to get to GATX (R-6; 4 Tr 35, 36, 179, 180).

ANALYSIS

The "Unlimited" Lifetime Major Medical Insurance Coverage Issue Is Moot.

The second paragraph of the original Unfair Practice charge alleged that, notwithstanding the Award of the Interest Arbitrator in its favor, the Borough had as recently as February 1990 refused to obtain and provide "unlimited" lifetime major medical insurance coverage. If proven, this would have constituted a violation of Sections 5.4(a)(1) and (5) of the Act. However, an examination of the record, which is incorporated into Findings of Fact Nos. 3-8, indicates that at the hearing Mayor Sica agreed without qualification that when the PBA deleted certain objectionable language from the proposed 1989-1990 collective negotiations agreement he would "...sign it immediately..." (Finding of Fact No. 8, supra). The PBA then agreed to withdraw the allegation in paragraph one of the original Unfair Practice Charge, which had alleged that the Borough had refused to execute the 1989-1990 agreement. Since the execution of this agreement would necessarily cover the provision for "unlimited" Major Medical Insurance coverage, by which the Borough would be bound, the matter appeared then to be moot.

The above events have been incorporated into Finding of Fact No. 8 and occurred on the final day of hearing, June 26, 1990. The Hearing Examiner has not been advised since then of any problem

in the Borough's having executed the 1989-1990 agreement (J-5). Therefore, he must conclude that the provision in Article VII, Section A, pertaining to "unlimited" Major Medical Insurance coverage has been implemented. Thus, insofar as the instant unfair practice proceeding is concerned, the matter is now moot.^{22/} See Tp. of Rockaway, P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982); Rutgers, The State University, P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987); State of N.J. (AFT), P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd Docket No. A-3021-87T7 (1988); and Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd. Docket No. A-4871-88T1 (App. Div. 1990).@

The Borough Violated Sections 5.4(a)(1) And (2) Of The Act By The Conduct Of Deputy Chief Nagy In Assisting In The Formation Of FOP Lodge No. 90 By Actively Soliciting Officers To Join The FOP And Attend An Informational Meeting In February, 1990.

The Hearing Examiner, having previously found that Nagy is a "supervisor" under our Act (Finding of Fact No. 19), concludes that the Borough violated Sections 5.4(a)(1) and (2) by Nagy's conduct in aiding in the formation of FOP Lodge No. 90 under ordinary agency principles. That such a violation occurred is

^{22/} Assuming that the 1989-90 agreement (J-5) has now been executed, any subsequent problems with compliance with Article VII, Section A of J-5 lie in other forums than the Commission

evident from Findings of Fact Nos. 11-15 and prior decisions of the Commission.

A clear-cut rule for determining when a public employer has violated Section 5.4(a)(2) of the Act is found in Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599 (¶17224 1986): "...To establish such a violation, it must be proved that such participation (by a supervisor in a union meeting) constitutes domination or interference with the formation, existence or administration of the employee organization..." (12 NJPER at 600). The Commission has further refined its test for finding such a violation, namely, the employer's conduct must:

...constitute pervasive employer control or manipulation of the employee organization itself...Duquesne University, [198 NLRB No. 117] 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., [239 NLRB No. 107] 100 LRRM 1118 (1978)...

North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). [Emphasis supplied].

To the same effect, see like holdings of the NLRB:

Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Ona Corp., 285 NLRB No. 77, 128 LRRM 1013 (1987); and Bell Energy Mgt. Corp., 291 NLRB No. 23, 130 LRRM 1499-1501 (1988). The Bell Energy decision provides a significant parallel to the facts presented herein by the egregious conduct of Nagy. There, the employer had engaged in the following acts of assistance to an outside union with which it did not have a contractual relationship: (1) it initiated the contact with the outside union; (2) it solicited an employee to organize a meeting with the outside

union; and (3) it encouraged its employees to support the outside union.

Nagy's motivation for assisting in the formation of the FOP is clear, namely, his long-smoldering dissatisfaction with the PBA over having been suspended as a PBA member in or around 1986, followed by his expulsion from membership several years later (Finding of Fact No. 11). In 1989, Nagy applied for reinstatement but his application was rejected in a secret ballot vote by the PBA membership in January 1990 (Finding of Fact No. 12). After the PBA's refusal to readmit him in January 1990, Nagy immediately became involved in the formation of an FOP Lodge. First he placed Csimbok and Tardiff in contact with a retired Newark detective, who is active in the FOP. This led to the obtaining of an FOP charter on January 31, 1990. [Finding of Fact No. 13].

In late January and early February 1990, Nagy solicited "...about half of the Department..." to attend the St. Demetrius Men's Club meeting (Finding of Fact No. 14). He also actively solicited five named officers to join the FOP and touted the benefits of FOP membership to McMickle in some detail. He literally attempted to coerce Ercolino into joining the FOP on February 14th. [Id.] Nagy obtained from Ercolino the telephone number of his father-in-law, Louis Orlando, who is also the Deputy Mayor of the Borough. Then, in the presence of Ercolino, Nagy telephoned Orlando and advised him that Ercolino had refused Nagy's entreaty to join the FOP. When Nagy "hung up" he again asked Ercolino "to sign" and

then cryptically asked him to "keep an eye out" for Nagy in Headquarters and to "let him know who was going against him, etc.," mentioning specifically Patrolman Juliano. However, Ercolino flatly refused and left Nagy's office. [Finding of Fact No. 14e].

Nagy freely admitted that he had made the telephone call to Orlando but his reason for so doing is not credited. Nagy claimed that he was merely honoring Orlando's prior request that he "...keep an eye on Ralph to keep him out of trouble..." The testimony of Ercolino, who impressed the Hearing Examiner as a forthright and candid witness with no axe to grind, is plainly more persuasive in the context of this encounter and is fully credited as against that of Nagy.

The evidence is overwhelming that Nagy was deeply involved in assisting in the formation of FOP Lodge No. 90 in January and February 1990. Further, Nagy clearly acted as a "supervisor" of the Borough in his active solicitation on behalf of the FOP. In other words, he acted de facto, if not de jure, in his capacity as Deputy Chief. He was not, as he described himself, an innocent "co-worker." Also, Nagy's denials that he ever used his position as Deputy Chief to intimidate an officer into joining the FOP are plainly refuted by his conduct vis-a-vis Ercolino at their encounter in Nagy's office on February 14th. [Findings of Fact Nos. 15 & 19].

The testimony of Chief Sica, a member of the FOP, singularly fails to persuade the Hearing Examiner that Nagy's

conduct on behalf of the FOP was that of a benign bystander, who merely exercised his "constitutional right" to inform people that there would be a meeting to explain the difference between the FOP and the PBA. [Finding of Fact No. 16]. The Mayor's testimony that only the PBA has been recognized by the Borough and that there has been no attempt to eliminate the PBA as the representative is essentially irrelevant although the Hearing Examiner has found as a fact that the Mayor's convening of a meeting in May 1990 did not manifest a preference for the FOP over the PBA. [Finding of Fact No. 17].

In having found that the Borough violated the Act in January and February 1990, the Hearing Examiner stresses that it was the scope and extent of Nagy's assistance to the FOP that led him to conclude that Nagy, as its agent, had exerted "pervasive employer control or manipulation" within the meaning of North Brunswick, supra. See, also, Bell Energy Mgt. Corp., supra. The Hearing Examiner has also taken administrative notice of the prior proceeding involving the same parties, supra, where the Commission adopted the conclusion of Hearing Examiner Gerber, inter alia, that Chief Sica's conduct in requesting an increase in his convention allotment was violative of the same Section 5.4(a)(2) involved herein.

Additionally, the Hearing Examiner is persuaded that the conduct of Nagy in his office encounter with Ercolino on February 14th, tended to interfere with Ercolino's statutory rights and was

devoid of any legitimate or substantial business justification. Therefore, the Hearing Examiner also concludes that the Borough independently violated Section 5.4(a)(1) of the Act.

The Commission has held that a public employer independently violates Section 5.4(a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish an independent violation of Section 5.4(a)(1) of the Act.

Because of the egregious nature of Nagy's conduct toward Ercolino, the Hearing Examiner has concluded that this conduct constituted an unwarranted intimidation of Ercolino, who repeatedly made clear to Nagy that he had no interest in joining the FOP. Section 5.3 of our Act states explicitly that "...public employees shall have...the right...without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..." [emphasis supplied]. Thus, Ercolino's statutory right to "refrain" from joining the FOP was blatantly interfered with by Nagy's insistence that he join the FOP, even to

the extent of telephoning Orlando for the purpose of placing additional pressure upon Ercolino.^{23/}

Accordingly, the Hearing Examiner will recommend an appropriate order to remedy these violations of Sections 5.4(a)(1) and (2) of the Act.

The Borough Independently Violated Section 5.4(a)(1) Of The Act When Nagy On February 7, 1990, Threatened To Transfer Spolizino and Materazzo.

There is little need to repeat again the many facts previously found as to what transpired between Nagy, Spolizino and Materazzo in the confrontation, which occurred on February 7th, in Materazzo's office [Finding of Fact No. 21a to 21e]. But first, by way of background to this confrontation, Spolizino was summoned into Nagy's office sometime shortly before February 7th. Nagy closed the door and began questioning him as to how the PBA vote "is going" [Finding of Fact No. 20]. Both Spolizino and Nagy were on duty. Spolizino objected to Nagy's questions, stating that it was "not right," and that Nagy was trying to intimidate him. Spolizino voluntarily left Nagy's office. While Spolizino admitted that Nagy did not threaten him, the Hearing Examiner finds that the setting

^{23/} Although the PBA failed to allege that the Borough violated the Act by this conduct of Nagy, it was fully and fairly litigated during the hearing: Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983).

per se was intimidating given the fact that Nagy had closed the door to his office and was questioning Spolizino about PBA activities during on-duty time. Since this conduct of Nagy tended to interfere with Spolizino's Section 5.4 and 5.4(a)(1) rights, it constituted a second independent violation of Section 5.4(a)(1) violation of the Act by the Borough.^{24/}

Turning now to the February 7th confrontation between Nagy, Spolizino and Materazzo, there can be little doubt but that a "heated argument" occurred in Materazzo's office on duty-time, which resulted in a series of verbal outbursts between and among them. The Hearing Examiner has found that Nagy accused Spolizino and Materazzo of "rabble-rousing" and stirring up PBA members. Even Nagy acknowledged that he "probably" did so. Further, the Hearing Examiner has credited the testimony of Spolizino and Materazzo that Nagy threatened to transfer them (Finding of Fact No. 21c-e).

In so doing, the Hearing Examiner has noted the following: (1) a "heated argument" occurred at a meeting convened by Nagy; (2) Nagy made accusations that Spolizino and Materazzo had "rabble-roused" for the PBA [this on the strength of anonymous hearsay information]; (3) near the end of the meeting Nagy noticed PBA materials on Materazzo's desk; (4) when Materazzo claimed that the argument "...was all about the PBA..." Nagy agreed; and (5) Nagy again referred to "transfer" and then complained that the PBA

^{24/} See authorities cited above re: Nagy's conduct toward Ercolino.

"...was filing all these grievances." Thus, it is clear to the Hearing Examiner that this encounter was permeated from beginning to end by Nagy's wrong-headed perception that Spolizino and Materazzo were engaged in PBA activity during duty time.

The atmosphere created by Nagy is completely consistent with the credited evidence that he threatened to transfer Spolizino and Materazzo on February 7th and the Hearing Examiner so concludes. Thus, the Borough has again independently violated Section 5.4(a)(1) of the Act under the authorities previously cited.^{25/} An appropriate remedy will be recommended.

The Borough Violated Sections 5.4(a)(1) And (3)
Of The Act When Chief Sica Transferred Materazzo
As Of February 27, 1990, And When Nagy Removed
Materazzo As Liaison Officer On February 9th.

The Transfer:

The Hearing Examiner's backdrop to finding that the Borough violated the Act in the instant proceeding by Chief Sica's transfer of Materazzo on February 21, 1990, effective February 27th, is a like conclusion of the Commission in the prior case, involving these parties, supra, where Chief Sica's involuntary transfer of Materazzo on June 25, 1986, was found to have been discriminatorily motivated

^{25/} As in the case of Ercolino, supra, this conclusion is also reached as to Materazzo, notwithstanding that the PBA failed to allege that the Borough violated the Act by Nagy's threat to transfer Materazzo since the issue was fully and fairly litigated: see Commercial Tp. Bd. of Ed., supra.

under the tests enunciated in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

The Supreme Court there articulated the following test in assessing employer motivation: (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 the employee engaged in protected activity, that the employer knew of this activity, and, finally, that the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].^{26/}

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, then there is a

^{26/} However, 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).

sufficient basis for finding a violation of the Act without more.

However, where 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 occurred even in the absence of protected conduct [Id. at 242].^{27/}

Returning again to the illegal transfer of Materazzo in 1986, Hearing Examiner Gerber discredited the testimony of Chief Sica that the transfer was made because of Materazzo's poor performance as a Narcotics Detective. [14 NJPER at 85]. The Hearing Examiner then stated that Chief Sica appeared to be "...reaching for a justification of Materazzo's sudden transfer....," noting that the Chief had never warned Materazzo of a transfer unless his performance improved. [Id.]. These essential findings led Hearing Examiner Gerber to conclude, as a matter of law, that the Chief transferred Materazzo from the Detective Bureau to the Patrol Division "...because of Materazzo's opposition to increasing Chief Sica's convention stipend..." [14 NJPER at 87].

In addressing the instant transfer of Materazzo, this Hearing Examiner finds and concludes that the Chief was once again discriminatorily motivated in transferring Materazzo. This is grounded upon several factors: (1) Materazzo was reinstated by the

^{27/} This affirmative defense need only be considered if the Charging Party has proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id.].

Commission to the Detective Bureau by the Commission's order of March 21, 1988, and thereafter performed in a satisfactory manner with totally satisfactory evaluations for almost two years; (2) Chief Sica reached his decision to transfer him upon returning to his office from illness on February 21st, during the course of several hours following his arrival at 6:30 a.m. or 7:00 a.m.; (3) during these several hours the Chief read the various submissions of Materazzo, Pusillo, Kovacs and Nagy, and then held a 15-minute staff meeting at around 10:00 a.m.; and (4) before summoning Materazzo into his office at about noon, the Chief decided within the two hours following the staff meeting to transfer Materazzo again from the Detective Bureau to the Patrol Division for two reasons - (a) the necessity to separate Materazzo from Nagy because they could not get along and (b) Materazzo's having spent too much time away from the Detective Bureau. [Finding of Fact No. 26].^{28/}

The Hearing Examiner finds that the Chief's decision to transfer Materazzo was pretextual. Note first, the very brief time span within which the decision-making process occurred. This suggests illegal motivation since the question naturally arises, how and why did the Chief, who has been in the Department for many years, only come to realize during that morning (1) that Materazzo and Nagy could not get along and (2) that Materazzo was spending too

^{28/} It is noted here that the Chief ultimately did not rely upon the "gun incident," which initially he deemed "more important" since he later found it to be "unsubstantiated." [Id].

much time away from the Bureau. Admittedly, he did have Materazzo's and Nagy's submissions as to the argument of February 7th. But the Hearing Examiner has previously found that sometime between February 12th and February 15th, the Chief encountered Materazzo who told him of the argument that he had had with Nagy on February 7th. Thus, the Chief knew of the argument at least a week prior to February 21st. Also, Materazzo told the Chief of his involuntary removal by Nagy as Liaison Officer. [Finding of Fact No. 25]. In the same conversation the Chief told Materazzo that he had to learn to get along with Nagy. Finally, the conversation ended when Materazzo mentioned "transfers," to which the Chief replied that he had no anticipation of transferring anyone. [Id.].

Nagy was a vociferous complainer about Materazzo's spending too much time out of the Department either on his liaison assignment or on PBA activities as State Delegate. However, the Chief disagreed with Nagy on this score and so testified in clear terms. [Finding of Fact No. 23]. Query: What would legitimately motivate Chief Sica to conclude during the morning hours of February 21st that Materazzo was suddenly spending too much time away from the Department when the Chief had for an extended period of time approved and/or condoned Materazzo's taking time off for union activities as PBA State Delegate and serving as Liaison Officer? Also, why did not Chief Sica state this as a reason to Materazzo when he met with him around 12 o'clock noon on February 21st? According to Materazzo's testimony, which the Hearing Examiner has

credited, the Chief's only stated reason for the transfer was that Materazzo could not get along with Nagy and that Materazzo was being transferred since the Chief "...can't transfer a Deputy Chief..." [Finding of Fact No. 27].

The Commission has found that when an employer offers "shifting reasons" for its alleged discriminatory conduct this fact is relevant to evaluating motivation. The Commission found "suspect" and rejected the administrative reasons proffered by the employer in Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985), citing Coca-Cola Bottling Co., 232 NLRB 794, 97 LRRM 1290 (1977). See, also: NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 100 LRRM 2303 (9th Cir. 1978) and Akron General Medical Center, 232 NLRB No. 140, 97 LRRM 1510 (1977).

Even assuming that the inability of Nagy and Materazzo to get along is undisputed, the Hearing Examiner is not persuaded that this was a valid reason for transferring Materazzo on February 21st, given the fact that he had been able to work under Nagy in the Detective Bureau for almost two years since his reinstatement by the Commission in March 1988. Further, the Hearing Examiner draws a negative inference from the Chief's having failed to disclose to Materazzo at their noon meeting on February 21st his second reason for the transfer, namely, that Materazzo had been spending too much time away from the Department on PBA activities and at liaison meetings. The bottom line is that the Hearing Examiner has, based upon the record, concluded that the Chief's two reasons for

transferring Materazzo, only one of which was disclosed to Materazzo, were pretextual, i.e., the truncated decisional process on February 21st was tainted by animus toward Materazzo.

This finding of animus satisfies the third and final requisite of the first part of the Bridgewater test, supra. Further, although the second part of the Bridgewater analysis need not to be applied in instances of pretextual discrimination, the Hearing Examiner finds that the Borough has failed to prove that Materazzo's transfer would have occurred even in the absence of Materazzo's having engaged in PBA activities.

Accordingly, the Borough violated Sections 5.4(a)(1) and (3) of the Act. Therefore, the restoration of Materazzo to the Detective Bureau with a make whole remedy will be recommended.

Removal As Liaison Officer

In addition to Materazzo's having been transferred from the Detective Bureau by Chief Sica on February 21st, he was also removed as Liaison Officer by Nagy on February 9, 1990, two days after the confrontation and heated argument of February 7th, supra. Nagy's motivation in removing Materazzo was inspired by his extreme displeasure with the amount of time that Materazzo had been spending on his PBA State Delegate duties and his liaison meetings at the Prosecutor's office. The Hearing Examiner has found as a fact: (1) that Materazzo had had no problems with the Prosecutor's Office since his return to the Detective Bureau in March 1988 (by order of

the Commission, supra); and (2) that Nagy admitted that he removed Materazzo because of the time spent by him on PBA business and liaison meetings. [Finding of Fact No. 23].

Given Nagy's displeasure with Materazzo's PBA and liaison activities, the Hearing Examiner cannot conclude other than that Nagy's replacement of Materazzo with Csimbok was pretextual and was a manifestation of animus toward Materazzo in retaliation, particularly for his exercise of the protected activity of serving as PBA State Delegate. Thus, the Bridgewater requisites have been fully met since the Borough failed to prove that Nagy's action in removing Materazzo as Liaison Officer would have occurred even in the absence of his protected PBA activities.

Ironically, this conclusion is reinforced by the testimony of Chief Sica, who expressed his disagreement with Nagy that Materazzo spent too much time on PBA business. Significantly, the Chief did not recall that Materazzo's State Delegate duties had ever been a problem, adding that Materazzo "...can continue to be the State Delegate..." [Finding of Fact No. 23]. Nevertheless, Nagy, a "supervisor" under the Act, exercised the requisite authority to bind the Borough by his illegally motivated removal of Materazzo as Liaison Officer on February 9th.

Therefore, in addition to the recommended restoration and make whole remedy as to Chief Sica's illegal transfer of Materazzo on February 21st, supra, the Hearing Examiner will also recommend that Materazzo be restored to his assignment as Liaison Officer.

* * * *

The Borough Also Independently Violated
Section 5.4(a)(1) Of The Act By Nagy's
Assignment Of Andrew Tarrant On
February 20, 1990.

The standard for finding an independent violation of Section 5.4(a)(1) has been previously set forth. It will be recalled that the Borough violates the Act whenever the action of one of its agents tends to interfere with the exercise of a statutory right by one or more of its employees in the absence of a legitimate or substantial business justification. Findings of Fact Nos. 29-32 establish clearly that the PBA has proven by a preponderance of the evidence that Nagy's assignment of Tarrant to the intersection of Driftway and Roosevelt Avenue on February 20, 1990, was made solely because Tarrant was the President of the PBA. There was no conceivable legitimate or substantial business justification involved: Jackson Tp., supra.

The Hearing Examiner cannot and does not question the fact that Chief Sica had legitimately determined that an officer was needed to direct traffic at the above intersection, following the issuance of an injunction on February 19th. What is at issue is why Nagy, after being delegated the responsibility to assign an officer to the post, decided to select Tarrant for the assignment.

Nagy's motive for selecting Tarrant surfaced at the beginning of the shift when he told McMickle that he wanted Tarrant on the post "all day." This might not have been deemed punitive if it were not for the fact that Nagy later admitted to McMickle and

others that his actual reason for selecting Tarrant was that he was the "...PBA President and...the best selection because possibly he would feel sympathetic towards the strikers..." [Finding of Fact No. 31]. The Chief, upon learning of Nagy's reason for the assignment of Tarrant, responded that it was "fine." Incredibly, the Chief then testified that although he would not have kept Tarrant at the intersection for the entire day as Nagy had done, he would not overrule Nagy's "legal order." [Id.]

Nagy never arranged for Tarrant to have a break in recognition of the low temperature on February 20th (20°-25° F.). Rather, when he encountered Tarrant at Headquarters at noon, eating his lunch, he demanded to know why he was there. Shortly thereafter, Tarrant was abruptly ordered back to his post by Nagy because an apparent emergency existed. However, upon reporting, McMickle told him that there was no problem and that Tarrant should return to Headquarters to finish his lunch. [Finding of Fact No. 32].

Although an independent violation of subsection (a)(1) does not require a finding of illegal motivation, the Hearing Examiner so concludes in this instance. Nagy's stated reason for assigning Tarrant to the Driftway and Roosevelt Avenue traffic post on February 20th was solely because Tarrant was President of the PBA. Additionally, Nagy's course of conduct on that date was calculated to make an example of Tarrant as PBA President and to make his tour of duty as difficult as possible.

Accordingly, an appropriate cease and desist order will be recommended.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) with respect to its alleged failure to provide "unlimited" lifetime major medical insurance coverage since the issue is moot.

2. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (2) by the conduct of Deputy Chief Nagy in having assisted in the formation of a rival organization, FOP Lodge No. 90, in January and February 1990, by having actively solicited officers to join the FOP and attend an informational meeting in February 1990.

3. The Respondent Borough independently violated N.J.S.A. 34:13A-5.4(a)(1) when Deputy Chief Nagy: (1) threatened to transfer Robert J. Spolizino and Michael Materazzo on February 7, 1990, during a confrontation which involved, in part, Materazzo's PBA activities and the PBA's filing of too many grievances; (2) on February 14, 1990, egregiously interfered with Ralph Ercolino's right to refrain from joining the FOP; and (3) on February 20, 1990, assigned PBA President Andrew Tarrant to a traffic post solely because of his union status.

4. The Respondent Borough violated N.J.S.A. 34:13-5.4(a)(1) and (3) when its Chief of Police transferred Michael Materazzo from the Detective Bureau to the Patrol Division, effective February 27, 1990, in retaliation for Materazzo's exercise of the protected activity of functioning as the PBA's State Delegate as he had done for over five years. The Respondent Borough also violated the same provisions of the Act when Deputy Chief Nagy removed Materazzo from his assignment as Liaison Officer on February 9, 1990, because of his exercise of the protected activity of functioning as the PBA's State Delegate.

5. The Respondent Borough did not violate N.J.S.A. 34:13-5.4(a)(4), (5) or (6) by its conduct herein, no supporting evidence having been adduced.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough 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, (a) by assisting rival organizations such as FOP Lodge No. 90; (b) by threatening to transfer employees such as Robert J. Spolizino and Michael Materazzo; (c) by retaliating against Michael Materazzo because of his activities as PBA State Delegate and by removing him as Liaison Officer and by transferring him from the Detective Bureau to the Patrol Division; (d) by coercing Ralph Ercolino in the exercise of his right to refrain from

joining the FOP; and (e) by assigning PBA President Andrew Tarrant to a traffic post solely because of his union status.

2. Assisting in the formation of rival organizations such as FOP Lodge No. 90 or otherwise interfering with the administration or existence of the PBA.

3. Transferring employees such as Michael Materazzo or otherwise discriminating against him in retaliation for his engaging in protected activities as PBA State Delegate.

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

1. Forthwith rescind the transfer of Michael Materazzo from the Detective Bureau to the Patrol Division, which became effective February 27, 1990, and restore him to his prior position in the Detective Bureau and make him whole for all monies to which he would have been entitled but for his transfer and, additionally, make payment to Materazzo of interest on the monies due him at the rate authorized by R.4:42-11 for 1990.

2. Forthwith reassign Michael Materazzo as Liaison Officer to the Middlesex County Narcotics Task Force.

3. 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.

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

C. That the allegations that the Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(4), (5) or (6) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: September 21, 1990
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES**PURSUANT TO**

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, (a) by assisting rival organizations such as FOP Lodge No. 90; (b) by threatening to transfer employees such as Robert J. Spolizino and Michael Materazzo; (c) by retaliating against Michael Materazzo because of his activities as PBA State Delegate and by removing him as Liaison Officer and by transferring him from the Detective Bureau to the Patrol Division; (d) by coercing Ralph Ercolino in the exercise of his right to refrain from joining the FOP; and (e) by assigning PBA President Andrew Tarrant to a traffic post solely because of his union status.

WE WILL NOT assist in the formation of rival organizations such as FOP Lodge No. 90 or otherwise interfere with the administration or existence of the PBA.

WE WILL NOT transfer employees such as Michael Materazzo or otherwise discriminate against him in retaliation for his engaging in protected activities as PBA State Delegate.

WE WILL forthwith rescind the transfer of Michael Materazzo from the Detective Bureau to the Patrol Division, which became effective February 27, 1990, and we will restore him to his prior position in the Detective Bureau and make him whole for all monies to which he would have been entitled but for his transfer and, additionally, we will make payment to Materazzo of interest on the monies due him at the rate authorized by R.4:42-11 for 1990.

WE WILL forthwith reassign Michael Materazzo as Liaison Officer to the Middlesex County Narcotics Task Force.

Docket No. CO-H-90-241BOROUGH OF CARTERET

(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.