P.E.R.C. NO. 86-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Respondent,

-and-

Docket No. CO-85-153-89

P.B.A. LOCAL #167,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the County of Mercer violated the New Jersey Employer-Employee Relations Act when the Warden of the Mercer County Detention Center told the President of PBA Local No. 167 that if he won a grievance, the Warden would abolish his job and transfer him wherever he liked. The Commission, adopting the recommendations and conclusions of its Hearing Examiner, concludes that this statement intended to interfere with the employee's right to pursue a grievance.

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In the Matter of

COUNTY OF MERCER,

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-and- Docket No. CO-85-153-89

P.B.A. LOCAL #167,

Charging Party.

Appearnces:
For the Respondent, Paul T. Koenig, Jr., Esquire, County Counsel (Paul D. McLemore, Deputy County Counsel)

For the Charging Party, Strauss, Wills & O'Neil, Esqs. (G. Robert Wills, of Counsel)

DECISION AND ORDER

On December 15, 1984, P.B.A. Local #167 ("PBA") filed an unfair practice charge against the County of Mercer ("County") with the Public Employment Relations Commission. The PBA alleged that the County violated subsections 5.4(a)(1), (3) and (5)[1/] of the

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (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."

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, on December 6, 1984, the warden of the Mercer County Detention Center allegedly threatened the PBA president by stating that if the PBA won a grievance concerning the president's job, the warden would abolish the job and reassign him.

On February 6, 1985, a Complaint and Notice of Hearing issued. The County did not deny that the warden said he would abolish the president's job if the PBA won the grievance; instead, it asserted that this statement was simply a peaceful, non-threatening assertion of the warden's managerial prerogative.

On March 4, 1985, Hearing Examiner David F. Corrigan conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by March 15.

On May 22, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-45, 11 NJPER ___ (¶_____ 1985). He found no evidence that subsections 5.4(a)(3) and (5) had been violated, but concluded that subsection 5.4(a)(1) had been because the warden's statement tended to interfere with employees in the exercise of their right to file grievances. To remedy this violation, the Hearing Examiner recommended a cease and desist order and a notice to employees of the illegal statement and remedial action taken.

On July 1, after receiving an extension of time, the County filed exceptions. The County objects to the finding that states that the warden was angry, loud and threatening when he made the

statement in question; to the characterization of the warden's comment as overkill; and to the Hearing Examiner's alleged predisposition against the warden.

On July 11, the PBA filed a response supporting the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-7) are accurate. We specifically adopt his finding that the warden spoke in an angry, loud and threatening voice when he told the PBA's president that if he won his grievance, his job would be abolished and he would be reassigned wherever the warden saw fit. This finding was squarely based on the Hearing Examiner's observation of the demeanor of the witnesses and his ensuing credibility determination crediting the accounts of three PBA witnesses who so testified and discrediting the accounts of two County witnesses who disagreed. We also reject the County's assertion that the Hearing Examiner was "predisposed" to make such a finding. A review of the record and of the Hearing Examiner's report shows that the Hearing Examiner conducted the hearing and examined the issues fairly, neutrally and thoroughly.[2/]

2/ The County particularly objects to the Hearing Examiner's having asked the warden why he threatened the president. The County, however, did not object to this question at the hearing and the Hearing Examiner immediately and on his own accord rephrased the question. The County has not objected to any other question the Hearing Examiner asked or any other aspect of his conduct of the hearing. Under all these circumstances, we do not believe that

(Footnote continued on next page)

Accordingly, we adopt and incorporate the Hearing Examiner's findings of fact.

Based on these findings of fact, and under all the circumstances of this case, we agree with the Hearing Examiner that the warden's statement tended to interfere with the right of his employees to present grievances against him. We adopt and incorporate his extensive analysis (pp. 7-17). We specifically agree with his determination (p. 16) that the warden's statement constituted overkill since there was no managerial need to abolish the position if the PBA won its grievance.[3/] Accordingly, we hold that the warden's statement violated subsection 5.4(a)(1) of the Act. We adopt the Hearing Examiner's recommended remedy. Finally, we dismiss those portions of the Complaint alleging a violation of subsection 5.4(a)(3) and (5) of the Act.

ORDER

The County of Mercer is ordered to:

A. Cease and desist from interfering with, restraining or coercing members of the PBA Local #167 negotiations unit in the exercise of the rights guaranteed to them by the Act by threatening

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(Footnote continued from previous page)
this question, standing alone, suggests predisposition against the warden.

3/ In this regard, we add that the warden's statement that he would place the president anywhere he wanted after abolishing his position appears to be inconsistent with the provisions of Article 4.4 of the collective negotiations agreement concerning job reassignments following the abolishment of positions.

to abolish Raymond Morgano's position and assign him to a new position in the event he were successful in a pending grievance arbitration.

B. Take the following affirmative action deemed necessary to effectuate the purposes of this Act.

1. Post the following notice marked as Appendix "A" in all locations where the Respondent normally posts notices to employees represented by it. Copies of said notice on forms to be provided by the Commission, shall, after being signed by the Respondent's representative, immediately upon receipt thereof, be posted and maintained by it for a period of sixty (60) days thereafter in conspicuous places at the aforementioned locations. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by any other materials.

2. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of this order what steps have been taken to comply herewith.

Those portions of the Complaint alleging a violation of subsections 5.4(a)(3) and (5) are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioner Graves, Hipp, Johnson, Suskin and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing members of PBA Local #167 negotiations unit in the exercise of the rights guaranteed to them by the Act by threatening to abolish Raymond Morgano's position and assign him to a new position in the event he were successful in a pending grievance arbitration.

COUNTY OF MERCER

(Public Employer)

Dated _____ By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. NO. 85-45

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

In the Matter of

COUNTY OF MERCER,

Respondent,

-and- Docket No. CO-85-153-89

P.B.A. LOCAL #167

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the County of Mercer violated the New Jersey Employer-Employee Relations Act when Warden Van Lieu of the Mercer County Detention Center stated to Raymond Morgano, Sr., President of PBA Local #167, that in the event his union were successful in a pending grievance arbitration concerning the status of his assignment, his position would be abolished and he would be assigned to another position.

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

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

In the Matter of

COUNTY OF MERCER,

Respondent,

-and- Docket No. CO-85-153-89

P.B.A. LOCAL #167,

Charging Party.

Appearances:
For the Respondent, Paul T. Koenig, Jr., Esq., County Counsel (Paul D. McLemore, Esq., Deputy County Counsel)

For the Charging Party, Strauss, Wills & O'Neil, Esqs. (G. Robert Wills, Esq., of Counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On December 13, 1984, PBA Local #167 ("PBA") filed an unfair practice charge against the County of Mercer with the Public Employment Relations Commission. The PBA alleged that the County violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act, and (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."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when, on December 6, 1984, Warden Albert Van Lieu of the Mercer County Detention Center threatened Ray Morgano, Sr., President of the PBA, that in the event his union was successful in a pending grievance arbitration, his job would be abolished and he would be placed in another position at the warden's discretion.

On February 6, 1985, the Commission designee issued a Complaint and Notice of Hearing. On February 11, 1985, the County filed its Answer. It admitted that there is a pending grievance arbitration, but denied that the statements made by Warden Van Lieu were threatening. As a separate defense, it asserts, inter alia, the statements were "one of amiability whereby Warden Van Lieu merely informed Morgano of the managerial options available to him in order to maximize the efficient and effective operation of the Mercer County Detention Center."

On March 4, 1985, I conducted a hearing in Trenton, New Jersey. The parties examined witnesses, and argued orally. Post-hearing briefs were filed by March 15, 1985.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The County of Mercer ("County") is a public employer within the meaning of the Act and is subject to its provisions.
2. PBA Local #167 is a public employee representative within the meaning of the Act and is subject to its provisions. PBA is the majority representative of all corrections officers employed by

the County. PBA and the County are parties to a collective negotiations agreement from January 1, 1983 to December 31, 1984. (J-1) The parties have agreed to a grievance procedure which culminates in binding arbitration.

3. Raymond Morgano, Sr., is a corrections officer for the County and is assigned to the Mercer County Detention Center. He is also President of PBA Local #167. (T9)[2/]

4. The PBA has pending in arbitration a grievance involving the nature of Raymond Morgano's job assignment at the Detention Center. Morgano is presently stationed at the receiving and discharge station along with another corrections officer and a corrections sergeant. The Detention Center is one of three County correctional facilities. The other two are the correction center and the Juvenile Center. The specific nature of the dispute is whether Morgano's assignment is a "pool post" or a "non-pool post." (T12) (Otherwise known as "special assignment" officer.) (T74) A non-pool post, according to the PBA, is a "permanent" position and generally an employee in such a position cannot be reassigned to another position on a daily basis. However, a pool post is not "permanent" and therefore the corrections officer "could be utilized on a daily basis for pooling off of that assignment to another job." (T47) Therefore, employees prefer a "non-pool post." (T47) The

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2/ T refers to transcript of the March 4, 1985 hearing.

County, however, contends that a non-pool post pertains only to the table of organization and may be reassigned. (T53-54) The grievance resulted from the assignment of Morgano to another position at the Detention Center. The County's position is that when the receiving and discharge area is not busy, Morgano may be reassigned to other areas, regardless of whether it is a "pool" or "non-pool" post. (T53-54) The PBA's position is that Morgano is in a permanent post and may not be reassigned.

5. On December 6, 1984, a meeting was held between Warden Albert Van Lieu and the following members of PBA Local #167: Morgano; Ben Wuensch; and Leon Post and Captain Gaetano Messina were also present.. This meeting was called to discuss a pending grievance on behalf of the PBA. The grievance concerned the appropriate procedure to follow in calling in to request an "immediate" vacation day and to call in sick. (T10) and several other matters (T31). The parties presented their positions and apparently had reached a tentative accord. However, during the course of this discussion, a verbal dispute occurred between Warden Van Lieu and Morgano. Morgano told Van Lieu that he was "twisting around what Leon Post" (T11) said. Morgano then, referring to the pending grievance arbitration, said "just like...the pending arbitration." (T73) Van Lieu and Morgano began discussing the pending arbitration and the issue of officers being pulled from their permanent assignments. (T35) Van Lieu angrily[3/] responded that he wished that issue

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3/ Van Lieu denied being angry, but given the circumstances, and especially the forthright testimony Leon Post and Ben Wuensch, I find that he was angry and spoke in a loud and threatening manner.

would finally be resolved. Van Lieu said that in the event the PBA won the arbitration, Van Lieu would abolish the job, create another one and put Morgano anywhere he wanted. (T12) Morgano then said to Wuensch, "Didn't I tell you he'll threaten me." Van Lieu then banged on the desk, had a copy of the collective negotiations agreement in hand and said, "Let's put the chips on the table. In the event that you win the case, I have the right and I will abolish your job, create another one, give you the first opportunity to bid on it and I'll put you anywhere in this institution I want." (T13; 23; 33).[4/] Captain Messina, upon hearing this statement, "put his hands on his ears and said he didn't hear that."[5/]

6. Article 4 of the parties' agreement reads:

> 4.1 The County (Warden/Superintendent) retains the absolute authority to determine, establish, define, and change the work shifts and/or job assignments at both the Correction and Detention Centers.
>
> 4.2 Whenever a vacancy occurs in a regular work shift and/or job assignment in the classifications of County Correction Officer, employees holding such title will be given preference of shifts and job assignments in

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4/ Van Lieu did confirm the statements concerning the abolishment of the position and the bidding on the new position. (T73-74).

5/ Messina denied making that statement. I credit, however, Wuensch's testimony that he did say this. Such a statement, however, is only tangentially relevant to the issues involved in this appeal since, at most, it lends some credence to the contention that an angry and threatening confrontation existed as opposed to a friendly discourse. I also do not believe Messina's testimony that the atmosphere at the December 6 meeting was one of "laughter." (T116)

accordance with their seniority as established by Article 8 of this Agreement.

The County (Warden/Superintendent) retains the absolute authority to permanently remove and reassign any employee from his job assignment, but such removal shall not be made without cause.

Further, the County (Warden/Superintendent) reserves and retains the right to change job assignments within shifts on a temporary basis to meet the needs of the institution.

4.3 Where a vacancy occurs in accordance with Paragraph 4.2 above, said vacancy must be posted within five (5) days. Permanent employees may exercise their rights of shift and/or job assignment for a period of ten (10) days after said vacancy is posted.

4.4 Any permanent employee who loses his bid job assignment due to the abolishment of his job (post) assignment shall have the right to move to any other job (post) assignment within the institution in which he is working on the basis of his seniority. All officers so displaced as the result of this initial move shall have the right to exercise their seniority with respect to another job assignment within the institution. Any reassignments that are sought as the result of this contractual provision shall be approved in advance by the County. It is further understood that the County shall have the right to deny any officer the exercise of his seniority rights to a specific job (post) assignment under the provisions of Article 4.4, however, such denial shall not be made without just cause.

4.5 The work shift for all employees covered by the terms of this Agreement shall be for a period of eight (8) hours ten (10) minutes.

Based on this clause, Van Lieu believed that he had the right to abolish the third position in the receiving and discharge area and he so advised Morgano at the December 6, 1984 meeting, making specific reference to the contract. (T81-82) He believed that there was no need for a third permanent position at this area

and had previously advised Morgano of this. (T80-82) However, he also believed that he had the right to reassign Morgano even in the event the PBA prevailed at arbitration. (T104-105)

DISCUSSION AND ANALYSIS

The issue in this case is whether Warden Van Lieu's statements of the December 6, 1984 meeting violated subsection (a)(1) of the Act.[6/] The standard to determine whether an (a)(1) violation has been committed is set forth in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1]

The sole issue before me is whether Warden Van Lieu's statements at the December 6, 1984 meeting violated the above standard. In making this determination, I first recognize that a public employer has the right under our Act to express opinions concerning unionism as long as such statements are noncoercive. Thus, in Black Horse Pike Regional Board of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), the Commission said:

> A public employer is within its rights to comment upon those activities or attitudes of an employee

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6/ The complaint also alleges an (a)(3) and (a)(5) violation. The record, however, fails to support either claim and therefore I recommend dismissing these aspects.

> representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

Thus, the issue in this case is whether Van Lieu's comments constituted an "illegal threat" or an acceptable statement of opinion and "prediction." Leading commentators have noted that distinguishing between the two is "most troublesome", "most vexing" and "difficult." Gorman, Basic Text on Labor Law (1976) at 151; Morris, The Developing Labor Law (2d ed. 1983) at 82. The difficulty arises because these cases must balance two equally important, but conflicting rights: the employer's right of free speech and the rights of employees to be free from coercion, restraint or interference in their exercise of protected activities. Although the Commission has not issued any decisions involving this exact issue, certain decisions are worthy of note. In Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984) the Mayor wrote the President of the Local Union a letter which read in part, "It might be well if you attended more to your duties in the Assessor's office, rather than meddling in business that the Township Committee has every right to conduct concerning the Township's operation." The Commission, applying Black Horse Pike, held that:

> ...the letter in question contained a statement making an impermissible connection betweem [her] job status and her role as an employee representative. We cannot sanction such a

> statement emanating from the Mayor nor dismiss it as isolated or de minimis.
> [Id. at 174]

In Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982) the Superintendent sent the union president a letter threatening her "job status primarily because of her performance as an Association representative engaging in protected activity and not as a school aide." In finding an unfair practice, the Commission, in pertinent part, stated:

> The right to deny...a grievance does not carry with it the right to threaten to dismiss an employee for attempting to reprocess the grievance. As Black Horse Pike establishes, the employer must leave an employee's job status out of a dispute over protected activity that has nothing to do with that employee's job performance....
>
> The Board next contends that the First Amendment of the United States Constitution and Article I, paragraph six of the New Jersey Constitution preclude finding unfair practices on the basis of the personal opinions of its superintendent and president. Neither the superintendent or the president, however, merely registered his personal opinion of Collingwood; both threatened to use their official power against Collingwood unless her participation in statutorily protected conduct subsided. We completely agree with the Hearing Examiner...and hold that threats made by employer representatives or agents in their official capacities to dismiss an employee in retaliation for statutorily protected activity are not constitutionally immune. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); International Brotherhood of Teamsters Local 695, AFL v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Zurn Industries v. NLRB, ___ F.2d ___ 110 LRRM 2944 (9th Cir. 1982).
> [Id. at 551]

The Appellate Division affirmed, (Docket No. A-2642-82T2, decided December 8, 1983) stating in pertinent part:

> The board contends the statements of its president and the superintendent are mere expressions of personal opinion, an assertion which ignores the clear threat made in each instance and the circumstances in which they were made, circumstances where the power of the employer to discharge was sharply brought to Collingwood's attention, while she was attempting to perform her duties as the representative of the board's employees. "Neither the Constitution nor the Act are meant to shield employers from unlawfully threatening discharge." Zurn Industries, Inc. v. NLRB, 680 F.2d 683, 694 (9th Cir. 1982)." [I]t has never been deemed an abridgement of freedom of speech...to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). The right to speak freely is not an unrestricted right. "It is certain that the guarantee is dependent on the circumstances of each particular instance." Gish v. Bd. of Educ. of Paramus, 145 N.J. Super. 96, 104 (App. Div.1976) cert. den. 74 N.J. 251 (1976). There was no subtlety in the threats made and in this case it requires no delicate balancing of facts and constitutional rights for us to conclude, as did PERC, that N.J.S.A. 34:13A:5.4(a)(1) and (3) were violated and that in the circumstances the conduct of the Board's president and of the superintendent were not of the chracter to which the protection of either constitution applies. Thus, it also follows that the protection afforded by N.J.S.A. 34:13A-12 was not violated.
> [Slip opinion at 3-4].

In Ridgefield Park Board of Education, P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984) the Commission dismissed a Complaint alleging that principal's statements to the union vice-president suggesting that she should resign from an Advisory Council position because of a conflict of interest with her role as grievance chairperson. Focusing upon the circumstances of the case, the Commission said:

> Under all the circumstances of this case, we agree with the Hearing Examiner that the principal's comments at the Advisory Council meeting did not violate subsections 5.4(a)(1), (2), or (3) of the Act. The principal's comments were within the sphere of permissible criticism and discussion under Black Horse Pike. The principal did not threaten any employees, change any terms and conditions of employment, or seek to undermine the exclusive representative status of the Association. His exchange with the vice-president/grievance chairperson was brief, non-coercive, and a match between equals which ended as soon as she parried his comment; since then, these two individuals and the Advisory Council have worked together smoothly and effectively. Under all these circumstances, we dismiss the Complaint.
> [Id. at 438]

These are the only applicable Commission decisions on this case. Given this, it is appropriate to resort to relevant cases decided under the Labor Management Relations Act, our federal counterpart. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 9 (1978). The leading federal case concerning this issue is NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969). There, the Supreme Court, in setting forth the balance required in these cases, said:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in §8(a)(1) and the proviso to §8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another

way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. Compare New York Times Co. v. Sullivan, 376 U.S. 254 (1964)...Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization...If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d, at 160, 68 LRRM 27200. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own vvolition." NLRB v. River Togs, Inc., 382 F.2d 198, 202, 65 LRRM 2987 (C.A. 2d Cir. 1967)...an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known

> without engaging in "'brinkmanship'" when it becomes all too easy to "overstep and tumble into the brink," Wassau Steel Corp. v. NLRB, 377 F.2d 369, 372, 65 LRRM 2001 (C.A. 7th Cir.1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees. (emphasis added) (71 LRRM at 2497-2498)

From the foregoing, it is clear that the determination as to whether the Warden's statements were illegal must focus on the particular circumstances of the case. In determining whether a statement is a coercive threat, the NLRB considers the "total context" of the situation and is justified in determining the question from the standpoint of employees over whom the employer has a measure of economic power. e.g. NLRB v. E.I. DuPont de Nemours, ___ F.2d ___, 118 LRRM 2014, 2016 (6th Cir. 1984). Thus, I must determine whether his comments were (1) a threat of reprisal or force or (2) information concerning the result of a grievance arbitration which an "enlighted employee" ought to know. See Gorman at 151. As Gorman further notes.

> Each case requires a fine assessment of the record, with no case serving as much of a precedent for others because of different combinations of facts, such as...the identity of the speaker, the subject matter of the communication [and] the exact language employed. [Id.]

The County has asserted that the Warden's comments did nothing more than advise the employee of certain rights it possessed under the contract. Under the circumstances of this case, I cannot agree. There can be little question but that the Warden's

statement, on its face, could well have devastating consequences to employees' exercise of protected activity.[7/] He threatened to abolish that employee's job and reassign that employee "wherever [he] wanted" if that employee were successful in a pending grievance arbitration. In effect, this statement could mean only one thing to employees: the contractually agreed to grievance procedure is ineffective; binding arbitration is an illusory right under the contract; the employer will do whatever it wants notwithstanding the protections offered by the Act and the parties' negotiated agreement; and the exercise of protected activity will lead to punishment. The manner in which the statement was made graphically conveyed this message. it was said in an angry manner in front of other employees at a grievance meeting concerning other unrelated grievances. I believe, therefore, that his statements violated the Act. One NLRB decision, although not directly on point, lends support to this recommendation. In Triangle Appliance, 265 N.L.R.B. No. 187, 112 LRRM 1353 (1982) the employer stated that employees would be terminated if they pursued wage increases provided for in the contract. The employer's defense was that it "merely explained a financial situation." The Board rejected this, stating:

> By this, Respondent Triangle appears to imply that its statements were not intended to be threatening or coercive. Such is no defense to

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7/ It is beyond cavil that the filing of grievances is protected. e.g., City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (¶15017 1984).

> the above allegations inasmuch as threats of reprisal are unlawful if their reasonable tendency is coercive in effect.

The difficulty posed by this case is that the employer did have the right to abolish positions and to reassign employees to other positions. Moreover, according to Van Lieu, the employer had no need for another permanent position at the receiving and discharge area of the jail. If this were all that were involved, one might conclude that Van Lieu's comments were merely a non-coercive statement of opinion to inform employees of rights it had under the contract.[8/] However, given the instant circumstances, I have little hesitancy in finding that his response violated the Act. Indeed, according to his own testimony, his staffing needs could be met even if the grievance was sustained without abolishing the position.[9/] Thus, he said:

> Regardless of whether that grievance was won or lost it has nothing to do with Morgano being temporary pulled from that job because in fact as was just cited in paragraph three of section four point two, regardless of whether a person is in an assignment, based on that they would not consider a pool post and believe me a pool post is a totally different subject that's been misrepresented but regardless of what that

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8/ Although this would pose a closer question, I would still find a violation given the inherently coercive comments made by Van Lieu. See discussion, infra.

9/ Further, he overstated his position when he said that he would reassign Morgano to "whatever position he wanted." It appears from Article IV that even if the position were legally abolished, Morgano could use his seniority to bid on other positions.

> status was, that would not change my ability to pool Mr. Morgano out.
> (T104-105)

Thus, the employer had no managerial need to abolish the position to accomplish his managerial goals in the event the grievance was successful.[10/] Given this, it seems clear to me that Van Lieu's response constituted "overkill" which certainly had the tendency of unlawfully coercing employees. I reiterate what was said in Gissell: an employer is free only to tell what he reasonably believes will be the likely economic consequences of unionization that are outside his control." This is not the case here. Rather, it was a "threat of...reprisal to be taken solely on his own volition." Id. In reaching this result, I have recognized that an employer has the right to aggressively state its position on matters concerning unionism. It can, however, make its views known without making conscious overstatements that have the tendency to coerce employees from engaging in protected activities.

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

CONCLUSIONS OF LAW

10/ It is, of course, no defense that an employer has the right under the contract to abolish the position. As the New York PERB said in assessing an identical claim, "It is beyond debate that action that might otherwise be legal by sanction of statute or contract, may become illegal if it is designed to coerce and discriminate against public employees because of their exercise of protected rights. County of Nassau, Case No. U-5772, 16 NYPERB 3009 (¶3006 1983). Cf. In re Bridgewater Tp., PERC No. 82-3, 7 NJPER 434 (¶12193 1981) aff'd 95 N.J. 236 (1984).

1. The County of Mercer violated N.J.S.A. 34:13A-5.4(a)(1) by the comments made by Warden Van Lieu at the December 6, 1984 meeting;

2. Warden Van Lieu's comments did not violate N.J.S.A. 34:13A-5.4(a)(3) or (a)(5).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Respondent:

A. Cease and desist from interfering with, restraining or coercing members of the PBA Local #167 negotiations unit in the exercise of the rights guaranteed to them by the Act by threatening to abolish Raymond Morgano's position and assign him to a new position in the event he were successful in a pending grievance arbitration.

B. Take the following affirmative action deemed necessary to effectuate the purposes of this Act.

1. Post the following notice marked as Appendix "A" in all locations where the Respondent normally posts notices to employees represented by it. Copies of said notice on forms to be provided by the Commission, shall, after being signed by the Respondent's representative, immediately upon receipt thereof, be posted and maintained by it for a period of sixty (60) days thereafter in conspicuous places at the aforementioned locations. Reasonable steps shall be taken by the Respondent to ensure that

such notices are not altered, defaced or covered by any other materials.

2. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of this order what steps have been taken to comply herewith.

David F. Corrigan
Hearing Examiner

DATED: May 22, 1985
Trenton, New Jersey