

P.E.R.C. NO. 93-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF STONE HARBOR,

Respondent,

-and-

Docket No. CO-H-90-246

CAPE MAY PBA LOCAL 59,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Borough of Stone Harbor violated subsection 5.4(a)(1) when it suspended police officer Edward Beck for violating department rules requiring officers to secure approval from the police chief and a subpoena before testifying in any civil actions; when it removed Beck from his teaching position at the Cape May County Police Academy; and when it reprimanded Beck for his comments at the Academy. The Commission, however, dismisses all allegations that the police chief was motivated by anti-union animus or that Beck was illegally removed as a senior shift officer and assigned back-to-back midnight shifts.

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In the Matter of

BOROUGH OF STONE HARBOR,

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-and-

Docket No. CO-H-90-246

CAPE MAY PBA LOCAL 59,

Charging Party.

Appearances:

For the Respondent, Gruccio, Pepper, Giovinazzi, DeSanto, & Farnoly, P.A., attorneys (Cosmo A. Giovinazzi, III, of counsel)

For the Charging Party, Schneider, Cohen, Solomon, Leder & Montalbano, attorneys (David S. Solomon, of counsel)

DECISION AND ORDER

On March 2 and 22, 1990, Cape May PBA Local 59 filed an unfair practice charge against the Borough of Stone Harbor. The charge, as amended, alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (4),^{1/} when it

^{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

Footnote Continued on Next Page

discriminated against police officer Edward Beck because he engaged in conduct protected by the Act and interfered with his statutorily protected rights.

On June 20, 1990, a Complaint and Notice of Hearing issued. On July 19, the Borough filed an Answer denying it had violated the Act and raising affirmative defenses. Hearing Examiner Charles A. Tadduni denied the Borough's motion to limit our jurisdiction and to dismiss the Complaint. H.E. No. 91-12, 17 NJPER 13 (¶22009 1990). A plenary hearing was conducted on November 26, 27, 28 and 29, 1990. Post-hearing briefs were filed by March 6, 1991.

On April 13, 1992, the Hearing Examiner issued his report and recommendations. H.E. No. 92-24, 18 NJPER 236 (¶23105 1992). He found that the Borough had discriminated against Beck because he engaged in protected activity when it: suspended him from duty without pay for 10 days, removed him from his position as an instructor at the Cape May County Police Academy, reprimanded him concerning his teaching a police academy class, removed him as a senior shift officer, and assigned him back-to-back weeks of

1/ Footnote Continued From Previous Page

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."

midnight shifts in January and February 1990. Beck's protected activity included his conduct as the Stone Harbor Police Department PBA Representative, his testimony at a disciplinary hearing of a Wildwood police officer who was a PBA member, and his actions concerning the soda machine in the Stone Harbor Police Department. The Hearing Examiner further concluded that the Borough had failed to prove that it disciplined Beck for its asserted legitimate reasons, and that several of the reasons were pretextual and/or illegal.

We have reviewed the record. We incorporate the Hearing Examiner's detailed findings of fact (H.E. at 6-56) with these modifications and additions.

In finding no. 21 at footnote no. 11, the Hearing Examiner found that Wildwood Police Chief Davenport was hostile to Beck, in part, because Beck was in the PBA and Davenport was in the FOP. The record does not support a finding that Davenport's hostility was predicated on Beck's PBA membership rather than Beck's testifying.

We add to finding no. 32 that the prosecutor felt that he could have presented the allegations that Beck gave false testimony in the Wildwood disciplinary proceeding to the grand jury. Since there was no citizen victim involved and he did not want Beck to face an indictment and loss of his job, he referred the matter back to Stone Harbor Police Chief Sweitzer. The prosecutor felt Sweitzer would take some type of disciplinary action against Beck (3T10-3T11).

In finding no. 31 at footnote no. 15, the Hearing Examiner surmises that Sweitzer was "churning" his evidence against Beck. In particular, he finds that Sweitzer framed a question to Sergeant Dull in a way calculated to elicit a certain response. The record does not support finding that as a fact or an inference.

In finding no. 34 at footnote no. 17, the Hearing Examiner finds Sweitzer's testimony about commencing an investigation "troubling" and his answers "inconsistent, evasive and illogical." Upon reviewing the record, we have a different reaction. Sweitzer had conducted an informal investigation and believed he had enough evidence to formulate disciplinary charges (2T165). After the prosecutor informed him that he was not sending the Beck case to a grand jury, Sweitzer believed that he had to officially commence an internal investigation. Sweitzer ultimately relied on materials collected before the beginning of the official investigation. But that does not undercut his belief that his official investigation needed to wait until the prosecutor had completed his investigation. He notified Beck of the "official" investigation because he wanted to put Beck on notice that he was intending to take some kind of action (2T164).

We add to finding no. 38 that the Borough's hearing officer dismissed the internal charges alleging perjury because he found that Beck had not made any false statements that violated the manual or the statute against perjury. He believed that Beck was giving strictly truthful answers; but he also thought that Beck puffed and

was glib and was trying to create an impression. He thought Beck was wrong (R-1b). The hearing officer upheld the charges alleging that Beck had testified without securing the chief's consent on receiving a subpoena and assessed a ten day suspension without pay. The chief let Beck take his ten day suspension over five pay periods to minimize the financial impact.

We modify finding no. 45 to downplay any PBA-FOP rivalry as motivation for the Wildwood officers to fabricate their testimony. The cited testimony does not focus on that rivalry.

We add to finding no. 47 that Police Academy Director Halton told Beck it was "not very professional" to talk about other municipal police departments in class. Halton contacted Wildwood police chief Davenport and told him about Beck's comments (3T87).

In finding no. 51, the Hearing Examiner found that, contrary to his testimony, Sweitzer did not speak to Wildwood Officer McShaffrey about Beck's remark at the Academy. The Hearing Examiner concludes that with only the signed police reports from the Wildwood officers who attended the class and Academy Director Halton's letter noting the objections to Beck's remarks by several officers, the case for removing Beck from his position as instructor at the Academy was weak and Sweitzer's motivations suspect. We have no doubt that Sweitzer believed that Beck told his class that he was not permitted to help officers from Wildwood and that Sweitzer was troubled by these comments.

We add to finding no. 55 that Beck did not recall who told him that the "profits" from the soda machine went to benefit department employees (1T54). In finding no. 59, the Hearing Examiner found that although Sweitzer testified that there were no profits from the soda machine, he conceded that there was enough "overage" to purchase a microwave oven. We clarify this finding. Sweitzer testified that the microwave was purchased by dipping into the stock fund: the money used to restock the machine. That \$91 or \$92 purchase was the only one made from the stock fund. The funds remaining in the stock fund when the machine went full-service were used as start-up funds for a Lance Cracker machine (2T87-2T91).

We add to finding no. 61 that Judith Davies had been junior officer in squad four. As a result of the shift reorganization, an officer with less seniority was designated senior officer in her squad. She complained to the chief. He indicated that he would talk to the captain and Davies was then designated senior officer (4T37-4T40). Officer Michelle Gorski was removed from senior officer status even though she was the senior officer on her squad. She was on an extended maternity leave and the chief thought she needed more time (4T12-4T13; 4T21).

We preface our analysis with this comment. The Hearing Examiner found, in a number of instances, that Sweitzer's testimony was troubling either because it was contradicted by another witness or because it was illogical. Perhaps the chief was trying to bolster his testimony, or perhaps he simply did not remember all the

peripheral details. In any event, the essential facts are not in dispute. The Borough acted, through its chief, and we must determine if those actions were taken for reasons illegal under our Act.

To make that determination, we first apply the standards set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No finding of anti-union discrimination will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a

whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The PBA claims that the employer discriminated against Beck when it disciplined him for testifying on behalf of a fellow PBA member, removed him as instructor at the police academy, reprimanded him, removed him as senior shift officer and gave him an undesirable work schedule. The Hearing Examiner began his analysis with an examination of the soda machine incident because he believed that it showed direct evidence that Beck's protected activities were a motivating factor in the employer's adverse actions. We will instead proceed chronologically. We think it offers the best opportunity to understand how Sweitzer's view of Beck changed over a period of approximately six months.

In August 1989, Beck was involved in a high-speed chase. Captain Solis reported to Sweitzer that Beck had violated the County chase policy and he recommended that Beck be disciplined. Sweitzer delayed dealing with the matter because the department was busy and he was not eager to discipline Beck because he had never had any sort of employment problem. Sweitzer also felt uncomfortable meting out discipline.

In September, Beck testified at a disciplinary hearing on behalf of a Wildwood police officer. Beck's decision to testify on behalf of another PBA member was protected by section 5.3 of the Act which guarantees public employees the right to assist any employee

organization without fear of penalty or reprisal. We need not, at this point, decide what restrictions, if any, an employer may legitimately place on an employee's right to testify. We need only declare that Beck's decision to testify was protected.

Beck's expert testimony angered Davenport, Wildwood's police chief. It contradicted his expert officer's testimony. Beck telephoned Sweitzer to warn him that Davenport was angry. Sweitzer told Beck not to worry, he would take care of it.

Davenport also questioned the truthfulness of some of Beck's testimony about how he assisted other police departments and the Cape May County Prosecutor in accident investigations. Davenport filed a complaint against Beck with the prosecutor's office. On October 2, Sweitzer was informed by the prosecutor's office that the complaint had been filed. When Sweitzer met with the prosecutor, he told Sweitzer that he was unsure whether he would present the complaint against Beck to the grand jury. Sweitzer's greatest concern at that point was the effect of an indictment on the department.

Also on October 2, 1989, Beck taught an accident investigation class at the Cape May County Police Academy. After welcoming the students, Beck told them that he would assist them in accident investigations, but that he could no longer help Wildwood officers. This was an oblique reference to Davenport's statement to Beck after he testified in Wildwood that Beck was not authorized to do investigations in Wildwood. Several Wildwood officers attending

Beck's class reported his comment to Davenport. Some criticized the remarks in their class critiques. The academy's director told Beck about the critiques and added that his remarks were unprofessional.

Beck's remarks at the academy were protected by the Act. They were integrally linked to his right to testify in Wildwood on behalf of another PBA member. Wildwood Chief Davenport was upset that Beck testified and told Beck that he was not authorized to do accident investigations in Wildwood. Beck had traditionally offered his assistance in accident investigations to all his students at the academy. But because of his protected activity in Wildwood, Beck was forced to qualify his offer and explain that he could no longer help out officers from Wildwood. His remarks were temperate, accurate, and limited to the restriction imposed by Davenport. Beck's explanation was so closely linked to his right to testify in Wildwood that it too was protected activity.

Sweitzer interviewed Beck about his testimony in Wildwood. During that meeting, Sweitzer also criticized Beck for engaging in the August high-speed chase. Sweitzer's investigation included reviewing the transcript of the Wildwood proceeding and getting reports to determine the truthfulness of Beck's testimony. During the investigation, Sweitzer learned of Beck's academy remarks and the students' critiques. He then spoke to the academy director and received reports submitted by the Wildwood officers and sent to him by Davenport.

In December 1989, without consulting Sweitzer who was on vacation, Beck contacted the Coca Cola Company and arranged to have the department's soda machine changed from full-service to self-service. Under self-service status, Beck would be responsible for filling and servicing the machine. Earlier that year, Sweitzer had converted the machine away from self-service status. The Hearing Examiner found that Beck engaged in protected activity by changing the status of the machine on his own. He concluded that Beck was acting as a union representative in changing the status of the machine and during the confrontation with Sweitzer that ensued. We view these events differently.

Having a soda machine available to unit employees may well be mandatorily negotiable. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977). But no evidence suggests that the parties ever negotiated over that issue. When the machine was first installed, then Lieutenant Sweitzer set it up as a non-profit operation. The officer responsible for servicing the machine soon left and Sweitzer stocked and maintained the machine until he got fed up with being custodian. He arranged with Coca-Cola to switch the operation to full-service. We need not decide whether the issue of how to operate a soda machine is mandatorily negotiable. It suffices to conclude that Beck overstepped his bounds as employee or union representative in taking it upon himself to undo the chief's decision to make the machine full-service.

On January 12, 1990, Sweitzer told Beck that he was upset that Beck changed the machine's status, Beck had no authority to do so, the building was under Sweitzer's control, Beck violated the chain of command, and Beck should act in accord with his rank. He ordered Beck to return the machine to full-service status. Beck agreed, but then questioned the chief about any profits that had accumulated. When the chief explained that there were no profits, Beck said there should be. An angry exchange ensued. Although Beck did not directly accuse the chief of stealing any money, he told the chief there should be an investigation. Beck even requested that Captain Solis investigate where the money went and he wrote a letter to the Borough administrator to advise him of the situation. Beck was angry during the confrontation and the chief was badly shaken.

The chief's response to Beck's unilateral action did not violate Beck's right to engage in protected activity and is not evidence of hostility to the exercise of protected rights. While Beck had a right to ask about the funding arrangements for the soda machine, see NLRB v. Thor Power Tool Co., 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965), the protection afforded him by the Act does not insulate him from the consequences of his countermanding the chief's decision to change the soda machine to full-service status.

In addition, we do not find that the chief ordered unlawful surveillance of Beck just after Beck violated the chain of command. The chief called in Beck's supervisor and told him to supervise Beck more closely. The supervisor responded that Beck should have used

better judgment. There is no indication that the chief's directive was intended or tended to interfere with Beck's right to engage in protected activity. The chief was simply responding to Beck taking this matter into his own hands and failing to follow the chain of command.

On January 18, 1990, Sweitzer informed Beck that he would no longer be appointed to instruct at the police academy. The Hearing Examiner found that Beck's removal from his teaching position was harsh given that the only hint of a problem which Beck ever had in his academy teaching career was one ungraceful remark. He also noted that Sweitzer conducted a less than full investigation of the incident and had not even interviewed Beck. He concluded that the removal violated subsection 5.4(a)(3) because it was discriminatorily motivated by Beck's Wildwood testimony, the soda machine confrontation, and Beck's PBA representative status. We disagree. Several Wildwood officers informed Davenport about Beck's remarks and some mentioned the remarks in their class critiques. Davenport directed each officer to file a report and he sent the reports and spoke about them to Sweitzer, the prosecutor's office and Academy Director Halton. Sweitzer spoke to Halton and then removed Beck from his teaching position. Sweitzer was simply responding to the friction generated by Beck's remarks. We see no evidence suggesting that Sweitzer was punishing Beck for supporting the PBA.

Nevertheless, we find that the Borough independently violated subsection 5.4(a)(1). In New Jersey Sports and Exposition Auth., P.E.R.C No. 80-73, 5 NJPER 550, 551 no.1 (¶10285 1979), we held that it shall be an unfair practice for an employer to engage in activities which, regardless of the absence of proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. By punishing Beck for explaining why he could not assist the Wildwood officers, Sweitzer was reinforcing Davenport's hostility to Beck's protected activity and interfering with Beck's underlying right to testify on behalf of another PBA member. Ordinarily, management has a prerogative to determine who teaches and who does not; but here, where Beck is indisputably a good teacher, the interference with Beck's protected rights outweighs management's prerogative. Accordingly, we order the Borough to restore Beck to his teaching position at the academy.

Also on January 18, 1990, Sweitzer detailed personnel changes in the police department's four squads. Beck was removed from his senior squad officer position because Sweitzer seriously questioned his judgment. Beck had engaged in an improper high speed chase; he was under investigation by the prosecutor's office for possible perjury; he had changed the status of the soda machine without authorization; and he had upset the chief by implying that the chief might have mishandled the soda machine funds. The Hearing

Examiner noted the department's past practice of placing the four senior non-superior officers in the senior shift officer positions. But Officer Davies was also deprived of a senior shift officer position as a result of the reorganization. Only after meeting with the chief and pleading her case was she made senior officer. In addition, Officer Gorski had the most seniority in her squad, but was not made senior officer because of an extended maternity leave. We note also that Sergeant Gorski, not Chief Sweitzer, developed the schedule that caused Beck to be assigned back-to-back midnight shifts in going from one squad to another. Sweitzer had simply told Gorski to minimize overtime. Even if we assume that Beck had a protected right to inquire about the soda machine profits, we believe that Sweitzer had increasing doubts about Beck's judgment and would have removed Beck from his senior officer position even absent Beck's protect activity.

On January 23, 1990, the prosecutor informed Sweitzer that he would not present Beck's case to the grand jury. On January 31, Sweitzer informed Beck of that decision, and also told him that the department was conducting a formal investigation of his testimony at the Wildwood hearing. On February 12, Sweitzer completed his report and forwarded it to the Borough's labor attorney.

On February 27, Sweitzer issued a formal reprimand concerning the academy remark. We have already determined that the Borough violated subsection 5.4(a)(1) when it removed Beck from his academy position. In considering whether the reprimand violated the

Act, we incorporate our earlier analysis. Accordingly, we order the reprimand rescinded.^{2/}

On March 2, the PBA filed an unfair practice charge. On March 6, Beck was served with disciplinary charges. Beck was accused of giving false testimony in the Wildwood hearing; not securing the chief's permission to testify in a civil matter in violation of departmental rules; and testifying in a civil matter without first being subpoenaed in violation of departmental rules. The department sought a 30 day suspension.

The Borough conducted an internal disciplinary hearing. As for the allegation of giving false testimony, the hearing officer found that Beck was very glib, had puffed, and was wrong. He concluded, however, that Beck had not "deliberately prevaricated" and thus should not be suspended on this charge. As for the remaining charges, the hearing officer found that Beck violated departmental regulations by testifying without the chief's consent and without having been subpoenaed. He assessed a ten day suspension without pay. The chief let Beck take the suspension over five pay periods to minimize the financial impact.

We have already determined that Beck had a statutory right to testify in the Wildwood hearing. But he did not have a protected right to falsify his qualifications as an expert. We find that the

^{2/} We note, however, that Sweitzer can legitimately tell Beck not to offer his assistance in accident investigations to any students or to refer inquiries from Wildwood officers to him. That would not be a punishment for past protected activity.

chief had sufficient grounds to bring Beck up on charges of giving false testimony. The departmental hearing officer found that Beck did not lie and no discipline was meted out for that allegation. We need not address that issue further.

The departmental hearing officer found Beck guilty of not getting the chief's consent to testify and testifying without a subpoena. The Borough imposed a ten-day suspension for those infractions. That suspension violated our Act if it tended to interfere with the exercise of protected rights and lacked a legitimate and substantial business justification. New Jersey Sports and Exposition Auth. Requiring consent and a subpoena tends to interfere with an employee's right to testify on behalf of another union member. These requirements also lack a substantial business justification. A public employer has an interest in being informed before one of its police officers testifies on behalf of another union member in a disciplinary proceeding. But requiring that an employee have the employer's consent and be subpoenaed unduly interferes with the employee's protected right to assist an employee organization.^{3/} Since the Borough suspended Beck because he violated illegal restrictions on his right to testify, we order

^{3/} We are not saying that the employer's rule is per se invalid. The rule may be applied to require prior notice of an intent to testify. But the rule may not be applied to require prior consent in every instance, regardless of the employer's legitimate governmental policy needs.

the Borough to reverse the suspension and make Beck whole for monies lost plus interest.

The remaining allegations in the Complaint are dismissed.

ORDER

The Borough of Stone Harbor is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by disciplining Police Officer Edward Beck for violating department rules requiring Beck to secure approval from the police chief and a subpoena before testifying in a disciplinary proceeding on behalf of Cape May PBA Local 59; by removing Beck from his teaching position at the Cape May County Police Academy; and by reprimanding him for his comments at the Academy.

B. Take this action:

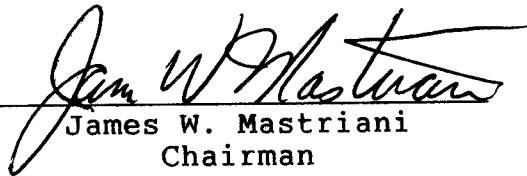
1. Reverse Beck's ten-day suspension and make him whole for all monies and benefits lost with interest in accordance with the rates in R. 4:42-11.
2. Restore Beck to his teaching position at the Academy and rescind the reprimand concerning his comments at the Academy.
3. Post in all places where notices 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 with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
September 24, 1992
ISSUED: September 25, 1992



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 disciplining Police Officer Edward Beck for violating department rules requiring Beck to secure approval from the police chief and a subpoena before testifying in a disciplinary proceeding on behalf of Cape May PBA Local 59; by removing Beck from his teaching position at the Cape May County Police Academy; and by reprimanding him for his comments at the Academy.

WE WILL reverse Beck's ten-day suspension and make him whole for all monies and benefits lost with interest in accordance with the rates in R. 4:42-11.

WE WILL restore Beck to his teaching position at the Academy and rescind the reprimand concerning his comments at the Academy.

Docket No. CO-H-90-246

STONE HARBOR BOROUGH

(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

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

In the Matter of

BOROUGH OF STONE HARBOR,

Respondent,

-and-

Docket No. CO-H-90-246

CAPE MAY PBA LOCAL 59,

Charging Party.

SYNOPSIS

In an unfair practice hearing, the Charging Party PBA alleged that the Respondent Borough had discriminated against and interfered with statutorily protected rights of a PBA member (Beck) because he engaged in protected activities. The Borough contended it disciplined Beck based upon legitimate business motives -- specifically, Beck's violation of the county police pursuit policy, his untruthful testimony at another PBA member's disciplinary hearing, his violation of departmental rules requiring employees to secure the Chief's approval and a subpoena before testifying at such proceedings and an indiscreet comment Beck made to his October 1989 police academy class.

The Hearing Examiner concluded that the Respondent discriminated against Beck in violation of subsection 5.4(a)(3) of the Act, and derivatively violated subsection 5.4(a)(1) of the Act when it: disciplined Beck by suspending him from duty without pay for 10 days, removed Beck from his position as an instructor at the Cape May County Police Academy, issued Beck a written reprimand in connection with his teaching a police academy class, removed Beck as a senior shift officer and assigned Beck back-to-back weeks of midnight shift duty tours in January and February 1990 because Beck engaged in protected activities -- specifically, Beck's conduct as the Stone Harbor Police Department PBA Representative, Beck's testimony at the disciplinary hearing of a Wildwood Police Officer-PBA member and Beck's actions concerning the soda machine in the Stone Harbor Police Department.

The Hearing Examiner further concluded that the Respondent had failed to prove that it disciplined Beck for the asserted legitimate reasons, and that several of the reasons were pretextual and/or illegal.

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

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

In the Matter of

BOROUGH OF STONE HARBOR,

Respondent,

-and-

Docket No. CO-H-90-246

CAPE MAY PBA LOCAL 59,

Charging Party.

Appearances:

For the Respondent

Gruccio, Pepper, Giovinazzi & DeSanto, attorneys
(Cosmo A. Giovinazzi, III, of counsel)

For the Charging Party

Schneider, Cohen, Solomon, Leder & Montalbano, attorneys
(David S. Solomon, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An unfair practice charge was filed with the Public Employment Relations Commission ("Commission") on March 2, 1990, and an amendment to the charge was filed on March 22, 1990, by the Cape May PBA Local 59 ("PBA") alleging that the Borough of Stone Harbor ("Borough") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). In its amended charge, the PBA alleges that the Borough violated subsections 5.4(a)(1), (3) and (4)^{1/} of the Act when it discriminated against and interfered

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

with the statutorily protected rights of Stone Harbor Police Officer Edward Beck because he engaged in conduct protected by the Act.

A Complaint and Notice of Hearing (C-1) was issued in this matter on June 20, 1990; the Borough filed an Answer (C-2) on July 19, 1990, denying it violated the Act and raising affirmative defenses. After conducting two prehearing conferences, I issued a prehearing order on October 9, 1990, noting the issues for resolution in the hearing. The Borough submitted a Motion to Limit PERC Jurisdiction/Motion to Dismiss Complaint on October 16, 1990. After the PBA responded, I denied the Borough's motion. Bor. of Stone Harbor, H.E. No. 91-12, 17 NJPER 13 (¶22009 1990) (C-11).^{2/}

^{2/} In its motion, the Borough argued that pursuant to N.J.S.A. 40A:14-150, a police officer in a non-civil service jurisdiction who has been found guilty of disciplinary infractions after an internal disciplinary hearing may have his conviction reviewed by the Superior Court; that the subsection 150 procedures cannot be modified or supplanted and that the Commission lacks jurisdiction to modify or reverse the disciplinary finding or to alter the penalty imposed.

The PBA argued that the Commission has jurisdiction over the issue in this matter -- that is, whether the Borough's acts against Beck, including the 10-day disciplinary suspension, were illegal retaliation for his protected activity.

I denied the Borough's motion, finding that the Commission has primary and exclusive jurisdiction over unfair practice charges; that this case is not an appeal of the disciplinary proceeding in contravention of section 150; rather, it is an unfair practice charge addressing different and broader issues than did the disciplinary hearing. I concluded that the Commission has jurisdiction over these unfair practice allegations implicating employer actions -- including disciplinary matters and managerial prerogatives -- governed by other statutory schemes.

Hearings were conducted on November 26, 27, 28 and 29, 1990.^{3/} I received all briefs and reply briefs by March 6, 1991. All witnesses who testified at this unfair practice hearing were sequestered except Stone Harbor Police Officer Edward Beck and Chief James Sweitzer. Other than the parties' counsel, on each day of hearing, Beck attended for the PBA and Sweitzer attended for the Borough.

2/ Footnote Continued From Previous Page

I now add these observations, based upon the colloquy between counsel and the hearing officer at the opening of Beck's disciplinary hearing on April 4, 1990 (R-1a). PBA counsel argued that the disciplinary hearing should be adjourned pending the litigation of this unfair practice, inasmuch as Commission determination could obviate the need for a disciplinary hearing. The Board's counsel stated: "...this...disciplinary hearing is independent of any PERC proceeding...our going forward with this hearing...and presenting...this disciplinary case today won't have any bearing or impact in any way upon Mr. Beck's right to proceed...with whatever allegations he wants to make to the Public Employment Relations Commission...." (R-1a at 9-10).

In ruling against the PBA, the disciplinary hearing officer stated: "...I have no quarrel with you proceeding before PERC, but the timing is such that in my opinion, this proceeding must go first; and...I intend to proceed unless you get a Superior Court Judge to restrain me;..." (R-1a at 13).

Because the PBA made a timely argument to adjourn the disciplinary hearing pending its prosecution of the unfair practice charge, and because the Borough argued that the two proceedings were wholly independent, I find that the Borough should be estopped from arguing either that this Commission's jurisdiction is removed by operation of subsection 150 or that the Beck disciplinary proceeding should act as a collateral estoppel against the PBA's unfair practice claims.

3/ The transcripts will be referred to as follows: November 26, 1990 is 1T; November 27, 1990 is 2T; November 28, 1990 is 3T and November 29, 1990 is 4T. An Appendix of exhibits is attached to this decision for ease of reference.

In its charge, the PBA alleges that in September 1989, Beck, at the request of the PBA and its attorney, testified at a disciplinary hearing on behalf of another police officer and member of Cape May PBA Local 59 who was employed in a neighboring jurisdiction. In January 1990, Beck, on behalf of the PBA, asked the Stone Harbor Police Chief about funds from a soda machine which previously had inured to members of the Stone Harbor Police Department. Subsequently, in January 1990, the Stone Harbor Police Chief reprimanded Beck, removed him as an instructor at the Cape May County Police Academy, removed him as a senior shift officer and gave him an undesirable work schedule. In February 1990, the PBA served the Borough with this unfair practice charge alleging that it had violated subsections (a)(1) and (a)(3) of the Act by discriminating against Beck in retaliation for his protected activities. In March 1990, the Borough filed disciplinary charges against Beck involving incidents dating back to September 1989, including his testimony at the disciplinary hearing. In March 1990, the PBA amended its charge to allege that the Borough had further discriminated against Beck because the PBA and Beck had filed an unfair practice charge against the Borough in February 1990.

The PBA contends that Chief Sweitzer acted against Beck because of Beck's protected activities. The PBA asserts that Beck's testimony on behalf of a brother PBA member and Beck's interaction with the Chief concerning the soda machine were protected activities. The PBA argues that the timing of the Chief's actions against Beck, his inconsistent actions and his inconsistent and

vague testimony all demonstrate that Beck was punished not for legitimate business reasons but for his protected activities. The PBA argues that "the justifications posited by Sweitzer are merely pretextual and a thinly veiled attempt to mask his animus against Beck for having aggressively engaged in protected activities" (PBA's post-hearing brief at 29).

The PBA does not contest the right of the Stone Harbor Police Department to promulgate regulations nor does it generally contest the legitimacy of the specific regulations involved in this case. Rather, the PBA attacks more narrowly the application of the cited departmental regulations to the specific events in this matter: their application here interferes with statutorily protected rights.

The Borough admits that the PBA is the majority representative of the unit of police officers employed by the Borough of Stone Harbor and that the parties signed a collective negotiations agreement covering from January 1989 to December 1990. The Borough denies all other allegations in the charge and asserts these affirmative defenses: the charge fails to state a cause of action upon which relief may be granted by the Commission; that Beck was removed as a Cape May County Police Academy instructor due to certain comments he made during a class which offended certain participants; and that the PBA filed the unfair practice charge to intimidate the Borough.

The Borough contends that its actions against Beck were based on legitimate business reasons and not on anti-union animus. The Borough asserts that it acted against Beck because he violated County chase policy; gave untruthful testimony; violated two departmental rules of testifying in a civil matter without first being subpoenaed and without first securing the Chief's permission; and while teaching a class at the Cape May County Police Academy, made an "embarassing" statement. The Borough also argues that Beck's testimony at Wildwood Officer Ortiz's disciplinary hearing was not protected conduct.

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

FINDINGS OF FACT

1. Cape May PBA Local 59 is the statutory majority representative of a unit of police officers employed by the Borough of Stone Harbor. On August 3, 1989, the PBA and the Borough executed a collective negotiations agreement covering the period from January 1989 through December 1990.

2. Edward Beck had been employed as a police officer for 9 1/2 years at the time of this hearing -- 4 1/2 years in the Borough of Stone Harbor and 5 years before that in the Township of Hamilton (Atlantic County). Beck was hired as a police officer by the Borough of Stone Harbor after being interviewed and recommended by Stone Harbor Police Chief James Sweitzer (2T9).

3. Prior to the various actions taken by Sweitzer against Beck between October 1989 and March 1990, Sweitzer said he had never doubted Beck's abilities or integrity (2T11). Beck was never disciplined by the Department or the Borough before October 1989. Beck was a senior squad officer in the Stone Harbor Police Department for approximately 1 1/2 years prior to February 1, 1990, when he was removed from that position. Beck had received favorable evaluations as a senior squad officer (1T48-1T50).

4. Beck is a police instructor, certified by the State of New Jersey. He has taken more than 25 police training courses, including a course in police instructor training and several advanced courses in accident investigation and accident reconstruction. One of these courses was a four-week accident reconstruction school given by Northwestern University (1T47-1T50).^{4/} Beck taught more than 30 courses at the Cape May County Police Academy between November 1986 and January 1990 in firearms training, traffic management and accident investigation (1T62-1T64).

5. Cape May PBA Local 59 is an umbrella local covering 13 municipal departments in Cape May County, the Cape May County Sheriff's Department and the Cape May County Prosecutor's Office (1T51). Beck is a member of the PBA and has been the PBA

^{4/} Although Sweitzer stated he was generally in favor of sending his officers to police courses and associated training, he noted particularly that requests for training from well-regarded officers were favorably received (2T9-2T12).

representative for the Stone Harbor Police Department for two years. Beck is also an executive board member and the Financial Secretary of Cape May PBA Local 59.

As the PBA representative for Stone Harbor, Beck is responsible for informally resolving police officers' job complaints, filing and processing formal grievances and organizing "...activities beneficial to the union or the community" (1T51-1T53). Beck has been involved in processing several grievances against the Borough, the most recent of which was filed in September 1988, concerning the Borough's sick leave policy. A related suit filed by the PBA against the Borough in April 1989 is pending in Federal District Court. Chief Sweitzer is aware of Beck's status as the department PBA representative and of Beck's PBA grievance activities (1T51-1T53; 2T131, 2T166).

Sweitzer was once a PBA member, but withdrew his membership several years ago after a disagreement with the organization concerning his entitlement to a past president's ring (2T113-2T114).

Chronological Summary of Pertinent Events --

A. August 12, 1989 (2:40 a.m.) -- Beck involved in high-speed chase of a motorcycle which sped through a stop sign.

B. August 16, 1989 -- Stone Harbor Police Chief Sweitzer asks Captain Solis to investigate chase.

C. August 25, 1989 -- Solis submits written report about chase to Sweitzer; report notes County chase policy was violated. Solis orally recommends that Beck be disciplined. However, Sweitzer does nothing more about chase.

D. September 8, 1989 -- Beck testifies at a disciplinary hearing on behalf of Wildwood Police Officer/PBA member Carlos Ortiz. Beck's testimony angers, among others, Wildwood Police Chief Davenport, who tells Beck he will never again reconstruct accidents in Wildwood. Beck immediately telephones Sweitzer about testifying and Davenport's anger. Davenport files a complaint against Beck (regarding the Ortiz testimony) with the Cape May County Prosecutor's Office.

E. October 2, 1989 -- Sweitzer is informed that Davenport filed a complaint against Beck with the Prosecutor's office.

F. October 11, 1989 -- Sweitzer meets with Prosecutor regarding complaint against Beck.

G. October 2, 1989 -- Beck teaches an accident investigation class at the Cape May County Police Academy. After giving his standard opening remarks -- "if you ever need help with an accident investigation, please call me" -- Beck states he can no longer help Wildwood officers. Three or four Wildwood officers (out of approximately 50 students) complain about the remark on their class critiques. Subsequently, Davenport orders the Wildwood officers to file police reports about Beck's remark.

H. October 30, 1989 -- Sweitzer meets with Beck re the Davenport complaint filed with the County Prosecutor and asks Beck about his Ortiz testimony. Sweitzer also criticizes Beck about the August 12, 1989 chase incident.

I. January 12, 1990 -- Sweitzer and Beck have a confrontation regarding the status of the Coke machine in Stone Harbor police headquarters: i.e., why it was changed from full-service status (in which the Coca Cola Company keeps all machine profits) to self-service status (in which there might be some minimal profits which would inure to the members of the Stone Harbor Police Department).

J. January 18, 1990 -- Sweitzer informs Beck via memo that he would no longer be appointed to instruct at the Cape May County Police Academy.

K. January 18, 1990 -- Sweitzer issues memo to department detailing personnel changes in the four squads of the Stone Harbor department. The net effect of these changes is that Beck was removed from his senior squad officer position and was the only officer assigned to work back-to-back midnight shifts during the changeover week.

L. January 23, 1990 -- Cape May County Prosecutor Corino informs Sweitzer that he will not take the complaint about Beck to the Grand Jury and will close file.

M. January 31, 1990 -- Sweitzer advises Beck that Prosecutor would not take the complaint against him to the Grand Jury.

N. February 12, 1990 -- Sweitzer completes his report about the Beck-Ortiz matter and forwards it to Stone Harbor's labor attorney.

O. February 27, 1990 -- Sweitzer issues written reprimand to Beck concerning the October 2, 1989 academy remark.

P. March 2, 1990 -- PBA files an unfair practice charge against the Borough and Chief Sweitzer for harassing Beck for his protected activities, based upon Beck's removal as senior shift officer and police academy instructor.

Q. March 6, 1990 -- Beck is served with disciplinary charges for: (a) giving untruthful testimony in a civil matter; (b) not securing Chief's permission before testifying in a civil matter in violation of department rules and regulations; and (c) testifying in a civil matter without first being subpoenaed, in violation of department rules and regulations (penalty sought: 30-day suspension without pay).

R. March 22, 1990 -- PBA amends unfair practice charge to include the disciplinary charges which it claims were filed against Beck because of the previously filed harassment charge.

S. April 4, 1990 -- The Borough conducts an internal disciplinary hearing on the Beck disciplinary charges. The hearing officer finds (a) Beck did not give untruthful testimony; (b) Beck did violate department regulations regarding giving testimony in a civil case without securing the Chief's prior approval and (c) testified without first having been subpoenaed. (penalty assessed: 10-day suspension without pay).

Beck's removal from the senior shift officer and academy instructor positions was unaffected by the disciplinary hearing.

The Chase Incident --

6. On or about August 14, 1989, at approximately 2:30 a.m., Beck was in his patrol car and pursued a motorcycle which had sped through a stop sign. Beck pursued the motorcycle at high speed for 3-4 miles, but was unable to catch it. At one point, the motorcycle entered the Garden State Parkway travelling northbound in the southbound lanes. Beck pursued him, travelling on the southbound shoulder with his dome lights activated, but his siren was not activated. The motorcycle then crossed over to the northbound lanes and exited the Parkway. Beck then lost the motorcycle and ended the chase somewhere outside Stone Harbor (1T82-1T83, 1T146-1T151).

7. Sweitzer noted the chase in the shift log and on August 16, 1989, asked Captain Solis to investigate the matter (3T93). Solis read the log account and the reports filed by Beck and his supervisor. He also questioned Beck and his shift supervisor. Solis submitted a written report to Sweitzer on August 25, 1989, concluding that Beck had violated County chase policy guidelines -- specifically those governing when to initiate and stop a chase and exercising proper caution for the safety of other motorists. Although no one was hurt in the chase, Solis orally recommended to Sweitzer that Beck be disciplined. Solis did not include that recommendation in his written report to Sweitzer (3T98-3T106).

8. Sweitzer delayed dealing with this matter because the department was very busy and he was not eager to discipline Beck because he had never had any sort of employment problem. Sweitzer also said he is not comfortable meting out discipline. Beck was not formally charged or otherwise disciplined for this matter (2T11-2T16). On October 30, 1989, during his meeting with Beck regarding his testimony at the Ortiz disciplinary hearing, Sweitzer told Beck he thought this pursuit conduct was unwise and to not let it happen again (2T11-2T16; 3T126, 3T153-3T155; Exhibit J-4). The next time Beck heard about the chase incident was in April 1990, when the Chief stated it was one of the bases upon which Beck was removed as Senior Shift Officer (1T80; 2T133-2T134).

The Ortiz Incident --

(Events leading to the Ortiz hearing)

9. In October 1989, about 10-12 officers in the Wildwood Police Department were members of the PBA. Most Wildwood officers belong to the FOP; it is the majority representative of the unit of police officers employed by the City of Wildwood.

The PBA-FOP relationship in Wildwood was strained, inasmuch as the two unions are rival labor organizations engaged in an ongoing competition about which organization will represent the Wildwood unit. There was little contact between executive board members of the two organizations (1T68-1T69).

10. In 1989, Carlos Ortiz was a police officer employed by the City of Wildwood. Beck knew Ortiz as a PBA member and had instructed him at the Cape May County Police Academy (1T67).

11. In May 1989, Ortiz was involved in an on-duty auto accident and was charged with, among other things, neglect of duty. Ortiz was initially charged by his supervisor, Wildwood Sergeant Deaton, who is a member of the FOP. Ortiz then asked the PBA for assistance and financial support with his disciplinary case (1T68-1T69).

12. John Kirwin had been president of PBA Local 59 for approximately 6 years when Ortiz asked for help. Kirwin followed the standard procedure in such cases and told Ortiz to come to the monthly PBA meeting and put his request to the membership. After the meeting, Kirwin appointed an investigative committee to gather facts and prepare a report about the situation so that the PBA could determine whether the matter was worth pursuing. Kirwin appointed Officers Beck (because of his expertise in motor vehicle accident investigations) and Kennedy (an executive board member) to the committee (1T157-1T162).

13. Beck led the investigation due to his accident investigation expertise. Beck read the accident and traffic reports, surveyed and took measurements at the accident scene, took and reviewed photographs of the vehicles involved in the accident, spoke to Ortiz and the driver of the other car and called the National Weather Service to determine the weather on the day of the

accident. After completing this investigation, Beck determined that the conclusions reached by the City of Wildwood Police Department's accident investigator concerning (a) the speed that Ortiz was travelling at the time of the accident and (b) his degree of neglectfulness, were not accurate. Beck then wrote a report, dated June 19, 1989, concerning the Ortiz accident investigation on behalf of the PBA investigative committee (signed by both Beck and Kennedy) and submitted it to PBA President Kirwin (CP-4; 1T69-1T71, 1T114-1T115). Kirwin and Beck subsequently discussed the report and Beck told Kirwin that while he wasn't sure that Ortiz could win his case, Beck felt if the PBA assisted Ortiz, they could substantially reduce the penalty which the City of Wildwood was seeking to impose upon Ortiz. The PBA determined to support Ortiz. Ortiz's PBA attorney then asked Beck to testify at the Ortiz disciplinary hearing. Kirwin then told Beck "to go ahead and follow through with assisting Ortiz." (1T69-1T72, 1T118-1T121, 1T178-1T180).

* * * *

(The Ortiz hearing and Beck's Ortiz testimony)

14. On September 8, 1989, Beck testified without compensation and while off duty on behalf of Ortiz at the disciplinary hearing in Wildwood City Hall. He gave expert testimony on the investigation/reconstruction of the Ortiz accident. On cross-examination in the Ortiz hearing, Beck stated that he had once written a letter to the Prosecutor recommending that the Mayor of the City of Wildwood be criminally charged. The

Ortiz disciplinary case hearing officer was Fred Coldren, Manager of the City of Cape May. Others attending the hearing were Ortiz, the PBA attorney, the City of Wildwood labor attorney, Wildwood Police Chief Davenport, Wildwood Business Administrator Blubaugh and Wildwood Police Officer Smith, who investigated the Ortiz on-duty motor vehicle accident for the Wildwood Police Department (1T70-1T74; R-2).

15. Exhibit R-2 is a portion of the typed transcription of the tape-recorded proceedings of the Ortiz disciplinary hearing. It was prepared by Wildwood Police Department Principal Clerk Transcriber Rose Mattera. R-2 is not a certified transcript of the Ortiz proceedings, such as the one produced by a licensed stenographic reporter for the hearing in this case. The typed transcript is replete with "....." and "(inaudible)" and nonsequiturs. Nothing in the record herein suggests whether R-2 was edited and if so, by whom or when it was done. Cape May County Prosecutor Corino obtained R-2 in the course of his investigation of Beck's Ortiz hearing testimony. Sweitzer obtained R-2 on October 6, 1989 (J-4). R-2 was also given to the Beck disciplinary hearing officer on April 4, 1990 (R-1a). In the oral argument at conclusion of the Ortiz hearing, both counsel acknowledged that the keystone of the case was the accident reconstruction expert testimony (R-2 at 16-17).

16. Beck's testimony regarding the technical determinations which he made about the Ortiz accident differed from

those reached by Smith. Beck's testimony was favorable to Ortiz's case. In testifying about his background in the field of accident investigation and accident reconstruction, Beck noted the extensive course work which he had taken in that field, that he teaches accident investigation and traffic courses at the Police Academy and that he had been called concerning accident investigations in several municipalities. He also said that, if the need arises, he may be called by the Prosecutor's office to review accident reports in fatalities. It was principally this last statement which led to Chief Davenport filing a complaint against Beck with the Prosecutor's office -- and ultimately led to the Beck disciplinary charges and the unfair practice charge (R-2, R-4, J-1 and C-1).

17. Beck said in this hearing that he had assisted with accident investigations in other jurisdictions as follows: in Avalon at the request of Officer George Vogeli; in North Wildwood at the request of Sergeant Matteucci; in Wildwood (Officer Nanos investigated an accident. A person involved in the accident [former Wildwood Officer Hinfey] asked Beck to reinvestigate. Beck called Nanos and asked if he could see the investigative report. Beck's investigative report was later attached to Nanos' report); and in

Middletown Township by Officer John Kirwin (1T121-1T125). None of this testimony was contradicted.^{5/}

18. In response to a question about his Ortiz hearing statement regarding working with the Prosecutor, Beck stated here that he had said he was called by the Prosecutor's office for his opinion on a case. He had been contacted by Prosecutor's Investigator Caleo.^{6/} Beck told them they could call upon him anytime to review accident cases involving fatalities (1T121-1T127).^{7/}

Although Cape May County Prosecutor John Corino testified that to the best of his knowledge Beck had not been requested to investigate accidents for his office and that he "did not know why"

^{5/} In R-2, the uncertified, typed transcription of a portion of the tape of the Ortiz hearing, the question/answer exchange with Beck on this subject is as follows:

PBA Atty: Officer Beck...in the course of your expertise...as an accident reconstruction specialist...have you had occasion to be called into investigate cases involving other municipalities...other than..the..municipality for which you work?

Beck: Yes, I have.

^{6/} Caleo no longer worked for the Cape May County Prosecutor's Office at the time of this hearing.

^{7/} In R-2, the question/answer exchange with Beck on this subject is as follows:

PBA Atty: In fact...ah...you've...worked quite frequently, I believe...for the prosecutor's department...is that correct?

Beck: I have ah..I'm...I'm...called by the prosecutor's office...if the need arises to review accident reports concerning..fatalities...yes.

Investigator Caleo would have called upon Beck to reconstruct an accident, Beck's testimony about Caleo was not directly refuted (3T7-3T11).^{8/} In this regard, Corino also testified that he never called upon Sergeant Curtis Dull to do accident reconstructions nor was he aware that Dull had ever been called by his office to do accident reconstructions (3T18-3T21). However, when read portions of Sweitzer's interview of Dull (obtained during Sweitzer's investigation) wherein Dull indicated he was called by the Prosecutor's office to investigate and reconstruct fatal accidents, Corino conceded that although he had not called him (Dull), someone else from his office might have (3T24, 3T26, 3T28-3T29).

Finally, after Corino asked Chief Paterson to look into whether anyone in the Prosecutor's office had used Beck in any accident investigation, Paterson told Corino that Beck had been involved in a discussion in the Prosecutor's office of an accident case which had been assigned to one of the assistant prosecutors. However, Paterson noted to Corino that Beck was not specifically asked to reconstruct the accident (3T22-3T25).^{9/}

^{8/} When Corino asked his staff about having consulted with Beck on an accident reconstruction case, he states he turned the matter over to Chief Paterson (Chief of the Prosecutor's Detectives and Investigators) and told him to ascertain whether anyone had used Beck. In making this inquiry, no staff meeting was called; the staff "there at the time" this came to their attention was asked the question (3T7-3T9, 3T22-3T24).

^{9/} At the time of that discussion, Beck was assigned to the County Crime Task Force which operated out of the Prosecutor's office.

19. The last aspect of his involvement in the Ortiz hearing for which Beck was disciplined derived from a conversation which he had with Wildwood Officer Davis just prior to his (Beck's) testifying and certain testimony given at the Ortiz hearing. Just before testifying at the Ortiz hearing in Wildwood City Hall, Beck had a conversation with Wildwood Officer Davis. Sweitzer was provided with a signed, unsworn statement from Davis about that conversation and placed an excerpt from Davis' statement in his "Beck/Ortiz Investigation Report" (R-4). That statement reads, in part, as follows:

He then said (he referring to Officer Beck) that basically speaking, there are only two officers in Cape May County who reconstruct accidents -- Curt Dull of Ocean City Police Department does the northern part of the county and I (Officer Beck) do the lower part. I told him that I was somewhat upset that the driver was not indicted over death by auto. He then said that he had previously written a letter the Cape May County Prosecutor's office regarding his skills. I asked him if he had the opportunity to look at the report. There was a very good diagram attached and clearly showed what happened. I asked him, if he had the time down the road would he like to take a look at it. He asked me if coming into the police department would get him into any trouble and I told him yes, only if I was to give him the report.

R-4 at 13-14; emphasis added.^{10/}

^{10/} R-4 is titled "Beck/Ortiz Internal Investigation" and was prepared by Sweitzer during his Beck-Ortiz investigation. It contained (at pages 13-14) an excerpt from a signed, unsworn statement from Wildwood Officer Davis. Davis' statement is hearsay. Davis also testified at Beck's disciplinary hearing

At the Ortiz hearing, the question/answer exchange with Beck on this matter was:

PBA attorney: ...did you receive any referrals from the City of Wildwood today?

Beck: Ah...yes...as a matter of fact...I did.

PBA attorney: Have you made a determination as to whether you are going to accept that referral?

Beck: I will, if I'm asked to....

PBA attorney: And you have been asked? Is that correct?

Beck: Yes.

(R-2 at 5).

The charges Sweitzer lodged against Beck which derived principally from these statements are as follows:

...Prior to your testifying under oath at the hearing, you had a conversation with Patrolman John T. Davis of the Wildwood Police Department at which time you told him that there are only

10/ Footnote Continued From Previous Page

(R-1a; also hearsay in this unfair practice hearing), where his direct factual testimony deviated somewhat from the prior written factual statement (R-1a at 59, 62-64); however, under cross-examination in the Beck disciplinary hearing, Davis "reconfirmed" his testimony so that it was consistent with his prior written statement (R-1a at 64-68).

While R-2 and quoted material from other documents in R-4 are hearsay in this unfair practice hearing and while it may be appropriate to use parts of those documents evidentially under the residuum rule, (N.J.A.C. 1:1-15.5(b); Weston v. State, 60 N.J. 36 (1972)) their primary importance here (and that of several other similar documents) is not so much as proof of "the truth of the matter asserted" but as an indicator of what was "known" to Sweitzer when he took the various alleged discriminatory actions against Beck (3T137-142).

two officers in Cape May County who reconstruct accidents. You further told him that Curt Dull of the Ocean City Police Department does the northern part of the county and that you do the lower part of Cape May County, implying that you and Curt Dull were assigned to do accident reconstruction for the Cape May County Prosecutor's Office....You further testified that you received a referral on September 8, 1989 from the City of Wildwood and that you were asked to investigate a fatality in that city....you...were never authorized to do accident reconstruction by the Prosecutor in the southern part of Cape May County, and were not officially asked on September 8, 1989 to investigate a fatality...in Wildwood.

(J-1 at 2, emphasis added).

In the cross-examination of Beck at the Ortiz hearing about the Davis referral, there was this question/answer exchange:

Wildwood labor atty: ...what authority does Mr. Davis have...in asking you to investigate an accident?

Beck: Ah...I don't know what authority...he has...and...and...I don't know...if he had checked with anybody before hand...but like I testified...if an officer asks me to investigate an accident...I'll investigate it for them.

(R-2 at 7).

20. Just after Beck took the Northwestern University accident reconstruction course, Cape May County Police Academy Director Eugene Halton had a conversation with Beck about his doing accident reconstruction on a county-wide basis. Halton told Beck that with his new expertise, perhaps he (Beck) could be used on a county-wide basis to investigate and reconstruct serious motor vehicle accidents (3T89-3T93). Sweitzer was aware of this conversation by at least January 26, 1990 (J-4), if not by October

30, 1989 (4T31-4T35). After Beck's discussion with Halton, and while he had been assigned to the County Crime Task Force, Beck personally offered Prosecutor Corino his services in the reconstruction of accidents (R-3). In that conversation, they discussed forming a two-man unit from which Beck would cover the south end of the County and someone else the north; Sweitzer was aware of this conversation as well (4T34). Sweitzer was also aware that prior to these events (September 1989 - April 1990), Beck was going to write to Corino offering his accident reconstruction services to the Prosecutor's office (2T153-2T155).

* * * *

(Events immediately following the Ortiz hearing)

21. After the Ortiz hearing ended, Wildwood Chief Davenport and City of Wildwood Business Administrator Blubaugh approached Beck. Davenport sternly told Beck he (Beck) was not authorized and never would be authorized to do accident investigations in his (Davenport's) town and "he (Beck) was not to be in his town." Davenport was "very loud" and spoke harshly to Beck. Blubaugh reiterated the same thoughts as did Davenport (1T73-1T75).

Davenport admits that he and Blubaugh told Beck he (Beck) was not authorized to do accident investigations in Wildwood -- "...I wanted it to be very clear that Mr. Beck would not represent

us doing reconstruction of accidents in the future." (3T38).

However, Davenport denies he told Beck to stay out of Wildwood.^{11/}

22. Immediately after his confrontation with Davenport (September 8, 1989), Beck called Sweitzer and told him he had just finished testifying at a disciplinary hearing, that Davenport was very upset and that Davenport would probably call Sweitzer about it. Beck called so that Sweitzer would have some idea of what had happened in case he got a call from Davenport (1T80-1T81). Sweitzer's reaction did not suggest he was gravely concerned -- Sweitzer told Beck, "Don't worry about it", that he appreciated Beck's call (inasmuch as Beck was on his own time) and that if

^{11/} Whether or not Davenport used those specific words, I credit Beck's testimony about the Beck-Davenport interaction after the Ortiz hearing. Davenport began his testimony inconsistently with regard to how he viewed Beck at the Ortiz hearing -- first admitting he knew Beck was there representing the PBA and Ortiz (3T30) and later denying such knowledge (3T39). Davenport was hostile to Beck because Beck was an outsider (to Wildwood) from an outside union (Beck is PBA; the Wildwood police are represented by the FOP and Davenport then belonged to the FOP (1T77)) who had just given testimony that was clearly damaging to the City's case against Ortiz. The post-hearing interaction began with Davenport and Blubaugh questioning Beck about his testimony (when were you called? who called you? etc. (3T32)) and ended with their making clear to Beck -- emphatically so -- that he was not to reconstruct accidents in Wildwood ever again. The interaction was unpleasant, confrontational, hostile. Compelling evidence of the nature of this Beck/Davenport interaction is provided by Beck's immediate reaction to it: Beck called his own Chief -- Sweitzer -- because he sensed from Davenport's anger that there could be some serious repercussions from his appearance at the Ortiz hearing (see paragraph 22, see also paragraph 25 and 1T163). I find that Davenport made it unpleasantly clear to Beck that he should stay out of Wildwood, at least on a professional basis, if not altogether.

anything developed, he would deal with it when it came to his attention (1T81-1T82; 2T18-2T20, 2T134-2T135). Beck heard nothing more about the Ortiz matter until he received Sweitzer's memo on October 12, 1989 directing him to meet with Sweitzer on October 19, 1989 (later rescheduled to October 30, 1989) to discuss Beck's Ortiz hearing testimony (J-4; 2T22-2T25).

23. After the Ortiz hearing ended, Davenport did not believe Beck's statement that he was twice called to do accident reconstructions in Wildwood by Officers Nanos and Davis. Davenport testified that Beck implied in his testimony that he had reconstructed accidents on behalf of the City of Wildwood.^{12/} Davenport said he was upset that any of his officers would presume to go outside the department for assistance with an investigation without first notifying him. He said he had an "unwritten policy" about not permitting anyone to go outside the department for investigation assistance without first getting his okay (3T31-3T35).

24. After questioning Beck at the end of the Ortiz hearing (paragraph 21), Davenport next called Nanos ("I had Patrolman Nanos in my office within the day" (3T35)) and then Davis into his office

^{12/} In none of Beck's statements about being consulted regarding accident investigations/reconstructions did he state he was "officially" called or retained by any governing body. In his only specific statement on this issue, Beck stated in his Ortiz testimony regarding Officer Davis' request that he wasn't sure if Davis had the "authority" to request that Beck do an accident reconstruction, but if an officer asks him for help in reconstructing an accident, Beck said he would help them (R-2 at 7; see paragraph 20; see also Davis's statement from R-4, quoted at page 23 herein).

for questioning. Davenport asked Nanos a series of questions about whether Nanos had authorized Beck to do an accident reconstruction in Wildwood (3T35, 3T42-3T44). Davenport admitted that when he questioned Nanos about allegedly having asked Beck to do an accident reconstruction, Nanos might have known that if he (Nanos) had asked Beck to do an accident reconstruction without first clearing it with Davenport, that action might have violated Davenport's "unwritten policy". Nanos's and Davis's reports were appended to the copy of the Ortiz transcript sent to Sweitzer (R-4 at 13).

In January 1990, Davenport became the President of the Cape May County Association of Chiefs of Police (2T135).

* * * *

(Events between the Ortiz hearing and the filing of disciplinary charges against Beck; Sweitzer's investigation)

25. On September 8, 1989, Sweitzer first became aware that Beck had testified at the Ortiz hearing and that Davenport was upset about it (1T80-1T81). On October 2, 1989, Sweitzer was informed by the Prosecutor's office that a complaint had been filed by Davenport concerning Beck's allegedly untruthful testimony at the Ortiz hearing (2T15-2T17; 3T36-3T38). Sweitzer received the Ortiz hearing transcript on October 6, 1989, and met with Prosecutor Corino about this matter on October 11, 1989. Corino then told Sweitzer he was unsure about whether or not he would present the complaint against Beck to the Grand Jury (2T20-2T22). Sweitzer said his greatest concern at that point was over the effect an indictment of Beck would have on the members of his department (2T17-2T22).

26. After meeting with Corino, Sweitzer said that the part of Beck's Ortiz testimony which he felt was untruthful, "...was where Officer Beck said that, 'Yes. I work quite frequently to the -- with the Prosecutor's office in reconstructing accidents.'" (2T25). Beck never said those words and Sweitzer had no evidence showing that Beck had said them (R-2 at 4; 1T121-1T127; 2T171-2T180).

27. Sweitzer sent Beck a memo (October 12, 1989) directing him to attend a meeting in Sweitzer's office, initially on October 19, but adjourned to October 30, 1989 (J-4). Present at the October 30, 1989 meeting in Sweitzer's office were Sweitzer, Beck, Captain Solis, Detective Sergeant Boserise and Officer Judith Davies, all from the Stone Harbor Police Department (4T30-4T33). Sweitzer conducted the questioning from a paper with typed questions and spaces between the questions for recording Beck's answers (3T109-3T110). Sweitzer wanted to meet with Beck to have him clarify what he meant in his Ortiz testimony (2T22-2T25). Sweitzer told Beck of the allegations made to the Prosecutor, read him the suspect statements from the Ortiz transcript (R-2 at 4-5) and began asking Beck about the statements. Beck then asked if this proceeding was a hearing or part of a criminal proceeding; if so, Beck said he wanted his attorney to be present. Sweitzer apparently gave Beck some reassurances, as Beck did eventually answer Sweitzer's questions (2T25-2T28; 4T32-4T34).

28. Sweitzer questioned Beck about an investigation Beck said he did in Wildwood. Beck told Sweitzer that former Wildwood

Officer Hinfey requested that Beck reinvestigate a Wildwood accident originally investigated by Nanos (2T26-2T30). Beck also told Sweitzer that he was requested to investigate accidents in North Wildwood (by Matteucci) and Avalon (by Vogeli).

29. Sweitzer questioned Beck about his statement at the Ortiz hearing concerning the Prosecutor's office. Sweitzer said Beck's response was that Police Academy Director Halton requested that Beck reconstruct an accident in the course of his classwork. (Beck's alleged response seems unresponsive.) Sweitzer said: "I'm a little unclear about what he said to any great extent, other than it was the involvement in the accident investigation course." (2T31, 2T137-2T143).^{13/} On cross-examination, Sweitzer reiterated he was unsure about what Beck replied about this issue (2T135-2T145). There is nothing in R-4 about Sweitzer questioning Beck on this issue nor about Beck's reply (R-4 at 5-6). Further, Solis's testimony on this point is equally unenlightening. While Solis remembered that Sweitzer asked Beck about whether he ever did any accident investigation work for the Prosecutor's office, Solis could not recall Beck's response; nor did Solis have anything in his notes on this point. However, I note that Solis was able to testify quite clearly from his notes about the municipalities and police officers that Beck told them had consulted him about accident reconstructions

^{13/} This is a vague reference to a conversation between Beck and Halton about accident reconstruction (incorrectly recalled here) and was later clarified by Halton (3T89-3T92; see paragraph 20).

-- Vogeli--North Wildwood; Porch; Nanos and Hinfey--Wildwood; and Davis--Wildwood (3T110-3T115).

When Beck was asked about interaction with the Prosecutor's office, Davies stated that Beck related a conversation which he had with Corino while assigned to the County Crime Task Force. She said Beck indicated they discussed the notion of setting up a two-officer unit to operate out of the Prosecutor's office, with Beck volunteering to cover the south end of the County and presumably, the other officer covering the north end (4T33-4T35).

Thus, on the subject about which Sweitzer was most concerned -- Beck's statement at the Ortiz hearing about the Prosecutor's office (2T23, 2T25 & 2T30) -- he asked Beck one question at the October 30, 1989 interview in his office. Sweitzer could not clearly remember Beck's response and what he did recall Beck said would seem unresponsive to the question. There, apparently, Sweitzer dropped the line of inquiry. Solis remembered the question but not the answer. Davies remembered the question and a different answer than the one Sweitzer remembered -- the answer she related concerned a conversation between Beck and Prosecutor Corino about setting up a two-officer unit to investigate fatalities. And finally, when Beck was cross-examined in this hearing and asked about any accident investigation/reconstruction interaction he had with the Prosecutor's office, Beck stated that he said he had been consulted by Prosecutor's Investigator Caleo about an accident investigation.

30. On direct-examination here, Sweitzer was asked whether he questioned Beck at the October 30, 1989 meeting about the Davis accident investigation referral on September 8, 1989. Initially, and at several later points in his testimony on this issue, Sweitzer said he did not recall Beck's response (2T34, 2T35, 2T135-2T145). Later in his testimony, Sweitzer said Beck told him Davis had "asked him to do something" (2T35). Whatever Beck's response had been, Sweitzer apparently thought it was important enough for him to then contact the Wildwood Police Department. Sweitzer said:

I then contacted Wildwood Police Department (sic) and requested a formal report from Officer Davis to substantiate any conversation he had with Officer Beck prior to the Ortiz matter. Officer Davis did supply me with a typewritten report with respect to his conversation with Officer Beck (2T34-2T35).

Finally, at this meeting (October 30, 1989) Sweitzer criticized Beck about the August 1989 chase incident and told Beck not to let that happen again (2T12-2T15; 3T125-3T126).^{14/}

^{14/} There are two problems with this part of Sweitzer's testimony. First, on another issue for which he eventually disciplined Beck (the Davis interaction), he is unable to recall Beck's response to his own questions posed on October 30, 1989; none of the information which may have been gleaned on this issue from the October 30, 1989 interview of Beck appears in R-4 or any other document. Second, there appears to be a discrepancy in when and how Sweitzer obtained Davis's statement. Sweitzer testified that after interviewing Beck about his Ortiz transcript statements on October 30, 1989, Sweitzer then solicited and obtained a statement from Davis on this issue. Sweitzer had obtained the Ortiz transcript on October 6, 1989 from the Prosecutor (J-4; 2T17-2T19). R-4, a document prepared by Sweitzer, states at 13 that the Davis and Nanos signed statements had been appended to the Ortiz transcript.

31. Sweitzer admitted that Davis's statement was the only evidence which he had collected regarding the charge that Beck said he was part of a Prosecutor's office unit for reconstructing accidents (2T143).

On January 24, 1990, Sweitzer interviewed Sgt. Curtis Dull of the Ocean City Police Department. Sweitzer asked Dull:

...directly if he had any knowledge of a specific task force set up by the Prosecutor's office whereas you are charged with the responsibility to reconstruct fatal accidents in the northern end of the county and Officer Edward Beck is responsible for the southern end of the county. Sergeant Curtis Dull advised us that he has no knowledge of any such task force....^{15/}

(R-4 at 15).

32. On January 23, 1990, Sweitzer received Corino's letter (R-3) stating that Corino knew of no special county-wide unit designated to reconstruct serious accidents and that he was then unaware of any incident in which Beck was called upon to reconstruct an accident for the Prosecutor's office. However, Corino also noted that when Beck was assigned to the County Task Force, he personally offered Corino his services in the reconstruction of accidents in Cape May County. Corino further stated:

Without going into specifics concerning his testimony, I have decided that my office will not

^{15/} This is a demonstration of Sweitzer's "churning" his evidence against Beck. The Davis statement was weak support (see paragraph 19) for the charge of "lying to a brother officer." In framing the question to Dull in this way, it was calculated to elicit the response given and was then unfairly characterized.

present the matter to the grand jury and I am referring the matter for your ultimate disposition.

(R-3 at 1).

In testimony, Corino could not specifically recall if he suggested to Sweitzer that the matter should be handled disciplinarily (3T21-3T23). However, in discussing with Sweitzer how the matter might be handled, he remembered he offered to come to Stone Harbor to talk with Beck. Sweitzer declined the offer and said he would handle the matter himself (3T22-3T23).

In his letter, Corino stated he was then closing the file in this matter. Finally, he concluded with:

I might suggest your asking Officer Beck whether he was called upon or ever testified as aforesaid. (i.e., for the Prosecutor's office). I will recheck our records and advise you accordingly.

(R-3 at 2).

33. Sweitzer testified that Corino never got back to him about "rechecking" his records regarding whether Beck had ever been consulted by the Prosecutor's office on an accident investigation. However, Sweitzer testified that when he was at Corino's office subsequent to January 23, 1990, Corino told him he had polled his people and found nothing (2T145-2T149). Sweitzer never reinterviewed Beck about this matter.

Corino testified that subsequent to sending R-3, he did not recall speaking to Sweitzer about rechecking his records regarding whether Beck had ever consulted with the Prosecutor's office on an accident investigation (3T14-3T16).

I credit Corino's testimony and do not credit Sweitzer's testimony on this issue. Sweitzer stated he did not know when the "recheck" meeting occurred, why he was at the Prosecutor's office and did not record that seemingly important information on J-4, in R-4 or any other document. On cross-examination about this issue, Sweitzer became defensive and his responses were evasive and illogical. Sweitzer stated he didn't think this information was important and he had already decided (by January 23, 1990) that Beck had given untruthful testimony and was proceeding accordingly (2T145-2T150). Had Corino rechecked his records and discovered that a Prosecutor's investigator had consulted Beck on an accident investigation, or alternately, had Sweitzer requested Beck and obtained the identity of the Prosecutor's investigator who consulted Beck regarding an accident investigation, that information would seem important.

Sweitzer had good reason to testify about a post-January 23, 1990 discussion with the Prosecutor concerning the Prosecutor's rechecking his people -- without it, there is a clear flaw in Sweitzer's investigation of the Beck-Ortiz incident.^{16/}

^{16/} Solis testified that the Prosecutor met with Sweitzer and himself sometime in late January 1990, and that the meeting was basically about a timeliness requirement for bringing disciplinary actions against police officers. Solis further stated, "and also the Prosecutor mentioned that he polled several other people concerning a previous question about him ever being employed by the Prosecutor's office to investigate accidents." (3T122).

Finally, Corino was not a party at interest in this case, he generally testified in a straightforward manner and his answers on this issue were not evasive or illogical in their context. (see fn. 20).

16/ Footnote Continued From Previous Page

However, Solis had just testified that he was unsure whether this meeting had occurred before or after Sweitzer had received the Prosecutor's January 23, 1990 letter (R-3). If he was unsure about whether the meeting was before or after the January 23, 1990 letter, what was it that his "previous question" statement was alluding to?

I further question why Sweitzer and Solis would have been asking the Prosecutor about the timeliness of filing a disciplinary action. This is an issue which seems most appropriately directed to the Borough's labor attorney. However, if this meeting had occurred before the Prosecutor issued the January 23, 1990 letter, Sweitzer might then have been inquiring about when the Prosecutor would decide whether or not to seek an indictment, in light of the time-for-filing-discipline requirements.

Much of Solis's testimony was imprecise. On cross-examination, there were a significant number of times that he responded "I don't know" or "I'm not sure." I have earlier raised a question about why he (and Sweitzer) was unable to recall Beck's response about a Prosecutor's office connection during the October 30, 1989 meeting in Sweitzer's office (paragraph 29), but was clear about Beck's municipal accident investigation consultations. While his memory may have been fuzzy about some things, I believe he was also being evasive about some things which appear selectively remembered or forgotten(3T125-3T135). His testimony about the "Prosecutor mentioned he polled several people", seemed to be unconnected and to come out of nowhere.

Further, Solis also had good reason to give this testimony about a January 1990 meeting with the Prosecutor -- he was second in command to Sweitzer and he had an interest in seeing Beck disciplined. I do not credit his testimony about the Prosecutor's statement concerning polling people about a previous question.

34. On January 31, 1990, Sweitzer sent Beck a memo informing him that the Prosecutor had decided not to present the matter of Beck's Ortiz testimony to the Grand Jury and had referred the matter to the Chief for disposition. The memo also stated that the Chief was then commencing an investigation of this matter. Sweitzer testified that all of the materials he had collected up to that point (January 31, 1990) were not part of his official investigation (2T160-2T165). Sweitzer cannot recall why he delayed eight days in notifying Beck that the Prosecutor would not take the matter to the Grand Jury (2T147-2T150). Sweitzer admits that by this time, he had already decided to charge Beck, but had not yet told Beck.^{17/}

35. Sweitzer states that by mid-January 1990 (before he knew the Prosecutor would not take the matter to the Grand Jury), he felt he had enough evidence to proceed with the disciplinary charges. Sweitzer said his investigation was completed on February 12, 1990, and at that point, he was convinced that Beck's Ortiz testimony was untruthful (2T149-2T152, 2T50-2T52). Sweitzer then

^{17/} Sweitzer's testimony on cross-examination about the January 31, 1990 memo is troubling. His answers were inconsistent, evasive and illogical. He says he wrote that he was about to "officially commence an internal investigation" to let Beck know he (Sweitzer) was now going to look into the matter. However, Sweitzer further testified that the materials he had collected up to that point (January 31, 1990), were not part of his official investigation. This was not true. In fact, Sweitzer collected virtually nothing of consequence after January 31, 1990. (see J-4). The materials included in R-4 and the exhibits used in the Beck disciplinary hearing were all procured before January 31, 1990 (2T162-2T166).

went through the Stone Harbor Police Department's Rules and Regulations to determine what rules Beck had violated (2T51). On February 12, 1990, Sweitzer gave his report to the Borough labor counsel and requested that formal charges be drafted. Sweitzer said his judgment that Beck had testified falsely was based on the Ortiz transcript, Corino's letter, Beck's initial indication at the start of the October 30, 1989 interview in Sweitzer's office that he wanted his attorney present and his finding some of Beck's answers to be (on October 30, 1989) evasive (2T174-2T179, 2T182). Sweitzer said he charged Beck and removed him as senior officer because his truthfulness had been challenged (2T171-2T180). Sweitzer's reservation about Beck's integrity was based upon this one instance of Beck "bragging" about his expertise in the Ortiz matter. Sweitzer admitted that Beck never said anything to him that was not the whole truth nor did Beck ever submit a police report that was not the whole truth (2T172-2T174).

36. Sweitzer claimed that if Beck had asked permission to testify before the Ortiz hearing without having been subpoenaed, Sweitzer would not have given his permission. However, if Beck had been subpoenaed (assuming it was a "valid" subpoena), Sweitzer said he would have given Beck permission to testify, despite the fact that Beck might have given testimony which conflicted with that given by another police officer (2T156-2T158).

Beck was aware of the departmental rule requiring officers to first secure the Chief's permission before testifying in a civil

proceeding. However, he did not secure permission before his Ortiz testimony because he did not think the rule applied to testimony in a civil case unconnected with his employment as a police officer. He further stated that he did not think the rule applied to him while testifying in a labor relations matter on behalf of his union (1T81-1T83). The Stone Harbor Police Department Manual (J-3) does not define the term "civil proceeding." When Beck testified at the Ortiz hearing, there were no policies or guidelines in place concerning police officers testifying as expert witnesses in civil proceedings (R-5, R-6).

37. On March 2, 1990, the PBA filed its initial unfair practice charge against the Borough and Chief Sweitzer for harassment -- based upon Beck's removal as senior shift officer and police academy instructor -- due to his protected activities (2T54). Formal disciplinary charges were served on Beck on March 6, 1990 (2T53). On March 21, 1990, the PBA served the Borough with an amended unfair practice charge alleging that disciplinary charges were filed against Beck due to the previous filing of a harassment charge against the Borough (J-4; C-1).

38. On April 4, 1990, an internal disciplinary hearing was conducted on the charges which the Borough brought against Beck (J-1; R-1a and R-1b). The Borough selected and retained the disciplinary hearing officer and paid his fee. The hearing officer determined that Beck did not testify falsely at the Ortiz hearing and that at worst he had engaged in "puffing"; however, the hearing

officer found that Beck violated departmental rules when he testified at the Ortiz hearing without first securing the Chief's approval and without being subpoenaed. The hearing officer also reduced the suspension-without-pay penalty sought by the Borough from 30 days to 10 days. The Borough subsequently imposed the 10-days-without-pay penalty upon Beck.

The Academy Incident --

(see paragraph 4)

39. Whenever Beck taught any of the accident investigation courses at the Police Academy, he began the lecture by introducing himself and writing his name and phone numbers on the blackboard. He would then tell the class that if they ever had any questions or needed help with a difficult accident investigation, they should feel free to call him at work or at home at any time and he would come out and help them (1T74-1T75).

40. From October 2-5, 1989, Beck taught an accident investigation course at the Cape May County Police Academy (R-4 at 7). After giving his usual opening remarks -- "if you ever need help with an accident investigation, feel free to call me" -- he added, "...except you guys from Wildwood because I was told I cannot help you. I can't do anything in your town anymore" (1T74-1T76). Beck said this because of what Davenport told him at the end of the Ortiz hearing (paragraph 21). Beck added the Wildwood statement because he didn't want to have Wildwood officers calling him and creating problems (1T76).

Kirwin attended that class and testified that, after Beck invited the students to call him with any accident investigation problems, he added, "...except for the guys in Wildwood; I'm not...allowed in your town" (1T163).

41. Approximately five Wildwood officers attended Beck's October 1989 accident investigation class. Three of those officers (Fisher, D'Amico and McShaffrey) testified in this hearing about the academy event.

Sergeant Joseph Fisher, the brother of Wildwood FOP President William Fisher, testified that Beck added to his call-me-for-help remark, "except for you guys from Wildwood" (3T50-3T52). Fisher testified he felt embarrassed by Beck's remark at being singled out in what he felt was a negative way. At the class break, he testified that the Wildwood officers discussed Beck's remark. In the class critique which Fisher completed on this course, he stated he thought the remark inappropriate and that he was embarrassed by it.

Initially, Fisher said none of the Wildwood officers knew why Beck made the remark (3T51-3T52). However, on cross-examination, Fisher admitted that Beck mentioned, for some reason, he could not help Wildwood officers (3T54). Fisher also conceded that although Beck did not state who told him not to help Wildwood officers, he understood Beck to mean that Wildwood Chief Davenport had told Beck not to assist with accident investigations in Wildwood (3T54). Fisher was then also aware that Beck had

testified as an expert witness at the Ortiz disciplinary hearing (3T57). At the direction of Chief Davenport, Fisher, D'Amico, McShaffrey and the other Wildwood officers who attended Beck's class each prepared an official police report on Beck's remark (3T53, 3T43-3T45).

42. Wildwood officer D'Amico testified that he attended Beck's October 1989 course and that Beck made "numerous comments" about the Wildwood Police Department, that Beck said he was having problems with the City administration and that he would need an escort to come to Wildwood. D'Amico testified he discussed this with the other Wildwood officers at the class break. D'Amico noted his dissatisfaction on his class critique (3T60-3T62).

D'Amico was aware that Beck had testified at the Ortiz hearing on behalf of Ortiz about Ortiz's on-duty accident (3T62-3T63). When asked if he knew that Chief Davenport was less than happy with Beck, D'Amico replied that "...the whole department was less than happy with the whole situation..." (3T66).

Initially, D'Amico testified he could not recall how he found out Chief Davenport wanted him to submit a report on Beck's remark. Later he indicated all the Wildwood officers in the class subsequently got together and spontaneously decided to do police reports on the Beck remark. He again testified he could not recall how this came about. Finally, he said after talking with his sergeant, he filed the report. D'Amico's testimony on this point was inconsistent and evasive (3T64-3T66). I do not credit it.

43. Wildwood Officer McShaffrey testified that after making his call-me-for-help statement, Beck added, "except for Wildwood officers due to the problems he...[had] with the...administration", and that "...he needed a visa to drive through Wildwood." (3T71). McShaffrey testified he was upset with the remarks; he mentioned that on the class critique (3T71-3T72). At the time he took the class, McShaffrey was aware that Beck was having problems with both the management in the Wildwood Police Department and the City administration (3T72-3T73).

44. With regard to the statement Beck made to his October 1989 accident investigation class, the testimony of Beck, Kirwin and Fisher was consistent. McShaffrey's testimony on this point was largely consistent with the three above-referenced witnesses, except for his "visa" comment; D'Amico's testimony on this point varied considerably from that of the other witnesses and I do not credit it; nor do I credit McShaffrey's testimony regarding the "visa". (see paragraph 45). I credit the testimony of Beck, Kirwin and Fisher on this point.

45. I do not credit the testimony of Fisher, D'Amico or McShaffrey with regard to the claim of their being embarrassed or upset by Beck's remark.

Their testimony must be viewed in the context of several problematic overlays: the PBA-FOP rivalry -- these are directly competitive labor organizations. Beck is a PBA member; the Wildwood witnesses belong to the FOP, as does most of the Wildwood

Department. Having the PBA and Beck come into Wildwood to defend Ortiz was a political and emotional no-win situation for the FOP (3T66). Further, Beck once wrote a letter to a supervisor in the Wildwood department complaining about an incident involving D'Amico allegedly driving his police cruiser unsafely (1T152). These officers understood that Davenport was hostile toward Beck (3T53-3T54, 3T63, 3T66). These witnesses had reasons to be unfavorably inclined towards Beck; they had motivation to fabricate. Next, I find Beck's remark (paragraph 40), on its face, is informational, not pejorative. If the remark suggests any deficiency, it would more appear to imply a problem with Beck than the Wildwood Department. No one in the class laughed when Beck made the remark or later asked the Wildwood officers about it (3T68-3T69). It simply went by most Wildwood outsiders (1T163-1T164). Kirwin said he was with the Wildwood officers at the class break; no one said anything to Kirwin nor did he hear any discussion about the remark (1T164). Further, when Beck made this remark, the three attending Wildwood officers who testified knew and understood why Beck could not assist them with accident investigations. Thus, their allegedly feeling slighted or embarrassed appears all the more feigned. Finally, in answering questions about how they learned of Chief Davenport's order to file police reports on the Beck remark, the testimonies of D'Amico and McShaffrey were evasive and/or inconsistent. Particularly given this overall context, I find it difficult to fathom or believe that these witnesses would become "embarrassed" or "upset" with the

remark Beck made. I believe their "reaction" to Beck's remark was prompted by their knowledge and general understanding of the Beck-Ortiz situation.

46. After the October 1989 academy class, several of the Wildwood officers who attended the class informed Davenport of Beck's remark. Davenport directed all the Wildwood officers who attended this class to each submit a report about the incident to him. Davenport both sent those reports and spoke about them to Sweitzer, the Prosecutor's office and Academy Director Halton (3T44-3T48).

47. Academy Director Halton reviews the class critiques from students who attend academy courses. In October 1989, Halton reviewed the critiques from Beck's accident investigation class and found two or three of the 50 student critiques were critical of Beck's Wildwood remark (3T83-3T86). At the next class Beck taught, Halton took him aside and spoke to him about the critiques. He asked Beck what happened. Beck then told Halton what happened at the class and told him about the Ortiz hearing and its aftermath. Halton told Beck he should not talk about any municipality during a course and not to do it again (1T78-1T80; 3T87-3T89).

48. Sweitzer first learned about the academy incident from Davenport in early December 1989 during Sweitzer's Ortiz investigation (2T101, 2T161). Sweitzer then called Halton who confirmed that two or three of the 50 students' critiques from Beck's class contained comments critical of Beck's Wildwood remark

(2T100-2T102; 3T83-3T86). Sweitzer never saw the critiques (3T119). Wildwood Chief Davenport sent Sweitzer five or six police reports submitted by the Wildwood officers who attended Beck's October 1989 course (2T102-2T104; 3T44-3T48). Sweitzer said one of these reports (from McShaffrey (2T121-2T123)) claimed Beck said something about needing a "visa" and fearing receiving a summons (2T119-2T120).^{18/} Sweitzer never asked Beck whether he made the statements alleged in the Wildwood police reports nor did he discuss any aspect of the academy incident with Beck.

Sweitzer claims he also spoke to one of the Wildwood officers who attended the October 1989 course -- McShaffrey -- about the academy incident when he chanced to see him at the academy (2T100-2T104).

49. On January 18, 1990, Sweitzer issued a memo (CP-1) to Beck informing him that he was removed as an instructor at the academy because the Wildwood remark had embarrassed the Wildwood officers in the class. In the memo, Sweitzer states that the remark was "uncalled for" and he would not tolerate same from an officer

^{18/} Halton's testimony indicates that only two or three class critiques from Beck's October 2, 1989 class mentioned the Wildwood remark; however, Davenport sent Sweitzer five or six police reports, one from each of the Wildwood officers who attended Beck's class.

This suggests that two or three of the Wildwood officers who attended the class were not sufficiently impressed with Beck's Wildwood remark to bother including it on their critiques. It also highlights Davenport's pivotal role in the subsequent issuance of the police reports.

assigned as an academy instructor. Sweitzer concluded the memo with "There will be no further discussion on this matter." Sweitzer said he took this action based upon the Wildwood officers' statements, his discussion with Halton and his discussion with Wildwood Officer McShaffrey. Sweitzer added that the chase incident was also a reason for Beck's removal as an instructor (2T121-2T124, 2T150). When he removed Beck, Sweitzer understood that Beck's academy remarks were related to Beck's Ortiz testimony and his confrontation with Chief Davenport (2T116-2T117).

50. On February 27, 1990, Sweitzer issued another memo (R-9) to Beck reprimanding him for the Wildwood remark made at the October 2, 1989 academy class.^{19/} Sweitzer said he reprimanded Beck because he felt the Wildwood remark had created an "unhealthy atmosphere with relationships of the two departments..." (2T107). In deciding to issue Beck a disciplinary reprimand, Sweitzer relied on: his conversation with McShaffrey, Halton's letter (R-4 at 6-7; received by Sweitzer on January 26, 1990) and the police reports from the Wildwood officers who attended the class (2T110-2T112). Sweitzer said he waited until February 27, 1990 to reprimand Beck instead of doing it when he removed Beck from instructor status because the Ortiz matter was then still being investigated (2T116-2T119).

^{19/} Sweitzer cites the date of the class as October 17, 1989. However, in R-4 at 7, where Sweitzer quotes from Halton's letter to Sweitzer regarding Beck's Wildwood remarks to his academy class, the specified dates of the class were October 2 - October 5, 1989.

51. Wildwood Officer McShaffrey denied having spoken to Sweitzer about the Academy incident (3T76). This testimony directly conflicts with Sweitzer's (2T100-2T104). Earlier I did not credit Sweitzer's testimony about a purported conversation with Corino, the occurrence of which is important in assessing Sweitzer's motivations in bringing disciplinary charges against Beck. Here, whether or not there was a Sweitzer-McShaffrey conversation is similarly positioned vis-a-vis Sweitzer's removal of Beck as an instructor and his reprimand of Beck for the academy remark. Sweitzer said in taking those actions, he relied upon his conversation with McShaffrey, Halton's letter and the signed police reports from the Wildwood officers who attended the class. Sweitzer did not speak to Beck about the academy incident. Without the McShaffrey conversation, Sweitzer's reasons and evidence are reduced to a letter from Halton (R-4 at 6-8) -- whose overall description and tone are low-key and would not seem to be consistent with Sweitzer's harsh actions -- and the signed, unsworn reports of the Wildwood officers that were solicited by Davenport. Unsworn reports are less than hearsay. Further, at the time he viewed and assessed those reports, Sweitzer was aware of and understood the dynamic between the Ortiz-Beck situation and the academy incident. Without the McShaffrey conversation, Sweitzer had no first-hand evidence about Beck's Wildwood statement. Considering that Sweitzer chose not to speak to Beck about this matter before disciplining him and the questionable value of the unsworn reports, I believe the case for Sweitzer's action is weak and the motivations suspect.

On the other hand, in the context of McShaffrey's testimony, the question about whether or not he had a conversation with Sweitzer is posed in a "neutral" setting (*i.e.*, there are no "lead-in" questions). McShaffrey's answer was direct and unhesitating. Further, to the extent that I did not accept the three Wildwood officers' testimony about being "embarrassed" at Beck's Wildwood comment, McShaffrey's answer here cuts the other way -- against the "embarrassment" testimony. McShaffrey would have no reason to fabricate this answer (*see* paragraphs 44 and 45). Accordingly, I credit McShaffrey's testimony and do not credit Sweitzer's testimony on this point.^{20/}

^{20/} On two important points in this matter, Sweitzer's testimony was contradicted by two other witnesses' testimony: by Corino, on whether a conversation occurred after Corino's January 23, 1990 letter about rechecking the Prosecutor's records (paragraph 33); and by McShaffrey, on whether a conversation occurred about the academy incident (paragraph 51): I resolved those credibility determinations against Sweitzer.

At several other points, Sweitzer's testimony was troubling in that it was either inconsistent with his own or other witnesses' testimony or record evidence, or was illogical in context. He was at times evasive and obstinate on cross-examination.

In his paragraph 34 testimony, he indicated what he meant when he told Beck on January 31, 1990 that he was then commencing an internal investigation of the Ortiz matter -- he said he meant to let Beck know that he was now looking into the Ortiz situation and further said that the materials he had collected to that point were not part of his "official investigation." However, that was untrue. *See* fn. 17 in paragraph 34.

52. Beck taught approximately 30 courses at the Academy in a three-year, three-month period. He taught five courses after the October 2, 1989 course. Other than the two or three critiques from the Wildwood officers concerning his October 2, 1989 class, Beck never received any unfavorable comments in any of the critiques on his classes (1T64-1T67).

20/ Footnote Continued From Previous Page

His paragraph 30 testimony about how and when he obtained Davis's statement is inconsistent with other record evidence -- in this instance, a document which Sweitzer had prepared.

At several other points, Sweitzer's testimony was either inconsistent and/or his witness demeanor uncooperative or otherwise difficult. For example, Sweitzer initially would not admit that Beck had testified at the Ortiz hearing as an expert witness; however, when confronted with his own correspondence to the Attorney General's office about seeking advice on when police officers may render expert testimony, he admitted that this correspondence was prompted by Beck's Ortiz testimony and conceded that Beck had there testified as an expert (2T156-2T160). Sweitzer would not initially concede that he had based his decision about the truthfulness of Beck's Ortiz testimony on the uncertified transcript of the Ortiz hearing. He would not agree that the Ortiz transcript was uncertified (2T174-2T176). Sweitzer maintained that Prosecutor Corino's recheck of his records on whether his staff had consulted Beck on an accident investigation was unimportant (2T145-2T150). While maintaining that the soda machine did not generate a "profit," he admitted that the department had purchased a microwave and paid the start-up costs for a self-service cracker machine with "extra monies" from the soda machine (2T86-2T91). And finally, Sweitzer explained that he decided to change the soda machine from self-service to full-service status because it was too much trouble for him (and the department) to operate on a self-service basis. However, Sweitzer then applied the monies left over from the self-service operation of the soda machine to procure and pay for the start-up costs of a self-service cracker vending machine (2T86-2T97; see paragraph 59).

53. In his position as Director of the Cape May County Police Academy, Halton observes and evaluates all academy instructors. Halton rated Beck as an excellent instructor and never asked Sweitzer to remove Beck as an academy instructor (3T83-3T87).

The Soda Machine Incident --

54. The Stone Harbor Police Department has had a soda machine since approximately 1983. The soda machine was acquired for the convenience of police department employees. The machine was operated on a self-service basis -- i.e., the machine renter was responsible for the bulk purchase of cans of soda, loading the machine, setting the price, removing money from the machine, repurchasing, reloading, etc. Sweitzer, who was a lieutenant when the machine was first acquired, took responsibility for operating the machine (2T76-2T83).

55. Before Beck was employed by Stone Harbor, he worked for the Township of Hamilton Police Department. The profits from their soda machine were used to partially pay for the cost of their Christmas party, purchase a coffeemaker and coffee supplies, flower arrangements for certain events for department members and their families, etc. (1T130-1T132).

When he first began working in the Stone Harbor Police Department, Beck was told that any "profits" from the soda machine were to go to benefit police department employees. He learned that the soda machine proceeds had been used to purchase a department

coffeemaker and a microwave oven (1T52-1T54; 2T86-2T88). Beck thus assumed that a similar arrangement existed regarding this soda machine as existed in Hamilton (1T131-1T133).

In approximately October 1989, the Chief told Beck that the status of the soda machine had been changed and that he had turned it over to the Coca Cola Company because operating the machine had become too much of a burden.^{21/} At that point, Beck was unaware of how this changed status affected the direction of profit flows (1T121-1T131).

56. In December 1989, Beck wondered why proceeds from the soda machine had never been used to defray the costs of a Christmas party; in fact, no benefits from the machine seemed to be accruing to department members (1T53-1T55; 1T129-1T132). Beck spoke with the Coke delivery man who told him the machine was on full-service status. Beck, not completely sure what "full-service" meant, called a Coke manager. In December 1989, Beck changed the status of the soda machine from full-service to self-service and resolved to assume responsibility for operating the machine. He purchased the initial bulk amount of soda with his own money. Beck switched the status of the soda machine because he realized department members had previously benefited from the machine and that now (December 1989), Coca Cola was taking all the machine's profits. Beck wanted

^{21/} In fact, Sweitzer had placed the machine on full-service status (i.e., where the machine lessor assumes full responsibility for operating the machine and keeps all profits) in January 1989 (3T76-3T80).

some benefit from the soda machine to accrue to department members (1T133-1T136; 3T76-3T81; 4T48).

57. Sweitzer and Solis were then on vacation (1T131-1T138). Some time after Sweitzer returned from vacation (approximately January 8, 1990 (J-4)), he discovered that in December 1989, Beck had changed the soda machine from full-service to self-service status. While Sweitzer was somewhat upset that Beck did this on his own, he did not rush out and order Beck to come in to talk to him (2T90-2T93). Rather, on January 12, 1990, when Beck was near his office, Sweitzer invited Beck to come in and speak about the soda machine. Sweitzer told Beck he was upset that Beck had changed the machine's status, that Beck had no authority to do so, that the building was under his (Sweitzer's) control, that Beck violated the chain of command, that Beck should act in accord with his rank and ordered Beck to return the machine to full-service status (2T91-2T94; 3T118-3T119).

Beck said he did not see any harm in changing who serviced the machine (Beck or the Coca Cola Company) and apologized if the changeover had troubled him (1T56-1T57). Beck then asked Sweitzer how much money there was in the soda machine account at that point in time. Sweitzer became very upset with the question. There was a heated, angry exchange between them. Sweitzer asked Beck why he asked the question; Beck said because there had to be some money in the account for all the years when it was operated on self-service status. Sweitzer replied there was no money. Beck said there has

to be money, that prior to now (i.e., most recently, when the machine was on full-service status) the machine "...was being serviced by us...and there should be a profit." Beck said he told Sweitzer that the Coke delivery man told him that when the machine was self-service, a profit was being made and that a profit was still coming to the department (1T137-1T140). Sweitzer said he didn't know if there were any monies going to the Borough (2T95).^{22/} Sweitzer said "how dare you ask me that", "you don't run this department" and "you'd better watch yourself" (1T57-1T58, 1T138-1T139; 2T93-2T94).

Beck said if there were no monies, he wanted Solis to investigate and he would (and did) write to the Borough Administrator to advise him of this situation (1T139-1T140; 2T94-2T95).

58. Beck denies ever accusing Sweitzer of stealing money or taking money from the machine (1T137-1T140; 3T121). Sweitzer never said Beck said he had stolen the soda machine funds (2T167-2T169). Beck was angry, borderline yelling and Sweitzer said he had an accusatory tone. Sweitzer was upset and badly shaken by this confrontation. He was unhappy with the way Beck spoke to him

^{22/} Although Beck realized that no profits had been accruing to the department once the soda machine was placed on full-service status (1T136-1T138), he was under the impression that the machine had been on full-service status for only a few months and was concerned with an accounting for the time when the machine was on self-service status (1T121-1T131).

(1T137-1T140; 2T95, 2T127-2T129, 2T169). Beck was never reprimanded in writing for this confrontation or changing the soda machine's status (2T169).

However, immediately after the confrontation with Beck, Sweitzer called Sergeant O'Connor, Beck's supervisor, into his office. Sweitzer told O'Connor what had just happened with Beck and that he (Sweitzer) wanted O'Connor to "...closely check and supervise Beck." (3T124-3T125).

59. In the testimony about the soda machine confrontation, the witnesses referred to "soda machine profits", "soda machine commission checks", "proceeds from the soda machine" and "money in the soda machine account". Presumably, all of these terms refer to whatever net monies accrued to the Coca Cola Company "client" who placed the soda machine on their premises.

When the soda machine was on self-service status, it was run as a "non-profit venture" (2T77). However, as Beck stated, there apparently were soda machine profits from time-to-time. Although Sweitzer insisted there was no "profit" from the machine, he did concede there was enough "overage" to purchase a department microwave (1T53-1T55; 2T84-2T88). Sweitzer states, however, that no other "profit" was ever generated (2T87). However, when Sweitzer converted the soda machine from self-service to full-service status, there were residual monies in the soda machine account. Sweitzer stated he "...incorporated it (the residual soda machine monies) into another project that I elected to do for...the officers"

(2T89). Sweitzer contacted a cracker company and had them install a cracker machine on self-service status. He then used the monies leftover in the soda machine account to pay for the start-up costs of the self-service cracker machine. He eventually (sometime between January 1989 and November 1990) converted the cracker machine to full-service status (2T89-2T92).

The Senior Shift Officer Removal Incident --

60. There is a senior shift officer on each of the four squads in the Stone Harbor Police Department. The senior shift officer is the most senior non-superior officer on each shift. The senior shift officer takes responsibility for running the shift in the absence of the shift sergeant. The practice in Stone Harbor has been that the four officers with the greatest seniority in the department have been designated as the senior shift officers (1T48-1T50).

61. Beck had been a senior shift officer for 1 1/2 years, from approximately August 1988 through February 1990, and had received very good evaluations (1T49-1T51).

62. On January 18, 1990, Sweitzer issued a memo to the department (CP-2) changing the personnel makeup of the four squads, effective February 1, 1990. Beck was moved from squad two, where he was the senior shift officer, to squad three, where he was not the senior shift officer (1T60-1T64; 2T97-2T99; 4T6-4T9).

At that time, there were 12 officers in the Stone Harbor Police Department; Beck was then number two in seniority among non-superior officers; Officer Stanford was number one in seniority. Beck and Stanford were assigned to the same squad. Because Beck was assigned to a squad with Stanford who had greater seniority than did Beck, Beck was no longer a senior shift officer (1T60-1T64).

63. Victor Gorski is the administrative sergeant for the Stone Harbor Police Department among whose responsibilities is the yearly creation of a department work schedule. Gorski first creates a schedule for the four squads and then writes the names of squad personnel into the schedule (4T6-4T13). Gorski completed the 1990 shift schedule for the squads in October 1989 and gave it to Sweitzer in December 1989 (4T22-4T26). Part of the the 1990 shift schedule showed that squad two would work the midnight tour for the last week of January 1990; and that squad three would work midnights for the first week of February 1990 (4T7-4T12, 4T20-4T26).

Thus, another effect of moving Beck from squad two to squad three and making the effective date of the squad changes February 1, 1990, was that Beck had to work double midnight tours in the last week of January and the first week of February 1990. Beck was the only officer in the department who had to work such a difficult schedule during the squad-change transition (1T144).

64. Gorski said that Sweitzer initially told him there would be squad personnel changes some time in October 1989, but did

not then indicate what the changes would be. In early January 1990, Sweitzer informed Gorski of the changes in the makeup of squad personnel (4T7-4T12, 4T19-4T21).

65. The Borough asserts that Beck was removed as senior shift officer based upon: (1) Beck's involvement in the August 1989 chase incident (2T99); (2) Beck's testimony in the Ortiz hearing and (3) Beck's actions regarding the soda machine (1T35-1T37, 1T41).

ANALYSIS

In In re Bridgewater Tp., 95 N.J. 235 (1984), the Supreme Court affirmed the test which the Commission applies in unfair practice discrimination cases. Under Bridgewater Tp., no violation will be found unless the Charging Party has proved, by a preponderance of evidence in the entire record, that protected activity was a substantial or motivating factor in the employer's adverse action. Initially, Charging Party must make a showing sufficient to support the inference that protected activity was a motivating or substantial reason for the employer's contested conduct. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of protected rights. Once the Charging Party establishes that protected activity was a substantial or motivating factor in the employer's decision, the Commission will find a violation unless the employer can prove, by a preponderance of the evidence in the entire record, that it had a second, legitimate

motive for taking the adverse action and that the adverse action would have been taken even absent the protected conduct.

Bridgewater at 242. The employer's burden exceeds merely proving that the contested action could have been taken for legitimate reasons; the employer's burden is to prove that on the day it took the adverse action, that same action would have been taken irrespective of the employee's protected conduct. Boston Mutual Life Insurance Co. v NLRB, 692 F.2d 169 (1st Cir. 1982).

In In re Bridgewater Tp., P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), recon. den. P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981), aff'd App. Div. Dkt. No. A-859-81T2 (6/21/82), aff'd 95 N.J. 235 (1984), the Commission found and the Supreme Court agreed that the employer violated subsections 5.4(a)(1) and (a)(3) of the Act when it transferred and demoted an employee ("Longo") in reprisal for his exercise of protected rights. The Commission determined that the Charging Party had demonstrated -- through circumstantial evidence -- that the employer transferred Longo due to his protected activity, based upon: (1) the timing of Longo's transfer soon after his protected activity; (2) Longo's recent promotion; (3) the absence of any written complaints about Longo's employment; and (4) the employer's failure to follow standard procedures by not giving the employee thirty days written notice of the elimination of his position and his transfer. The burden then shifted to the employer to prove that it had a second, legitimate motive for its adverse actions and that it would have taken these actions regardless of the

protected conduct. The Township contended that it transferred and demoted Longo because (a) it already had too many supervisors in his department and (b) Longo could not get along with his supervisors. The Commission determined that these reasons were pretextual because they were "decisively contradicted" by other evidence and did not constitute a legitimate basis for its actions. Bridgewater at 436-437.

* * * * *

The events in this case evolved over a period of seven months, from September 1989 through April 1990. The case involves not a set of separate and discrete events, but a set of interactive events. I will first examine whether the Charging Party has made a prima facie showing that Beck's protected activity was a substantial or motivating factor in the Borough's bringing disciplinary action against Beck, removing him as an academy instructor and then reprimanding him, and finally, removing Beck from the senior shift officer position and giving him an onerous work schedule.

There is some direct evidence here that Beck's protected activity was a motivating factor in the employer's adverse actions. That evidence is appropriately considered at this juncture as it also suggests a posture or mindset in Sweitzer which is further borne out by circumstantial evidence.

Sometime after Sweitzer returned from vacation in January 1990, he called Beck into his office and spoke to him about Beck's having changed the status of the soda machine. He told Beck he was

unhappy about the change, that Beck had intruded upon Sweitzer's prerogatives and he ordered Beck to change the soda machine back to full-service status. Beck acceded, but then asked Sweitzer how much money was in the soda machine account. After telling Beck there was none, Sweitzer became defensive; when Beck pressed the issue further, Sweitzer became very upset and ended the confrontation by admonishing Beck that, "how dare you ask me that," "you don't run this department" and "you'd better watch yourself." Immediately after this confrontation, Sweitzer summoned Beck's supervisor to his office, told him what had just happened with Beck and ordered him to keep a close watch on Beck.

In this circumstance, Beck was acting in his union representative capacity (for a discussion of Beck's actions concerning the soda machine as protected conduct, see pages 61-65 infra.); Sweitzer essentially disregarded that representative status and threatened him. Further, Sweitzer ordered Beck's supervisor to "closely watch and supervise" Beck -- i.e., to put him under surveillance -- ostensibly for the purpose of collecting information for Sweitzer to use later to retaliate against (discipline) Beck. The NLRB has held consistently that an employer's surveillance of employees violates Section 8(a)(1) of the National Labor Relations Act, regardless of whether the employees have knowledge of the surveillance. Morris, Developing Labor Law, (2nd ed. 1983) at 127.

Similarly, this Commission has held that placing an employee representative under watch or surveillance in order to

build up information to justify or camouflage an adverse action is violative of subsection 5.4(a)(1). Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990); Gloucester Cty. Voc. Tech. Schl. Dist. Bd. of Ed., P.E.R.C. No. 89-125, 15 NJPER 333 (¶20148 1989); see also Belvidere Bd. of Ed., P.E.R.C. No. 81-13, 6 NJPER 381 (¶11197 1980), aff'd App. Div. Dkt. No. A-4981-79 (10/14/81).

I find that Sweitzer's threat to Beck while he was engaged in protected conduct and his placing Beck under surveillance immediately after Beck engaged in protected conduct are strongly indicative that Beck's protected conduct was a substantial factor in Sweitzer's actions against Beck. It further indicates Sweitzer's hostility toward the exercise of protected rights.

* * * *

In this matter, Beck engaged in various protected activities and the Borough and Sweitzer were aware of them. Beck was the Stone Harbor Police Department's PBA representative. In that capacity, he dealt with unit employees' workplace complaints and filed and prosecuted grievances and related litigations. Beck's testifying at the Ortiz hearing was protected activity -- he was assisting an employee organization, PBA Local 59, in its defense of Beck's brother PBA member, Ortiz. Beck acted at the behest of PBA

Local 59, its president and the PBA's attorney in the Ortiz matter.
See N.J.S.A. 34:13A-5.3.^{23/}

Beck's several activities concerning the department soda machine were protected because he was acting in his role as union representative: Beck's changing of the soda machine from full-service to self-service status; the initial part of Beck's discussion with Sweitzer on January 12, 1990; and the final, hostile part of Beck's argument with Sweitzer on January 12, 1990.

A majority representative may seek to negotiate with a public employer over facilities and equipment for use by and the convenience of the employees of the employer. Such items as a wash-up area; soap and towels; lockers or a secure area for personal belongings; coffee pot; refrigerator; exercise equipment; adequate

^{23/} The U.S. Supreme Court ... [has] recognized that Congress intended in the "mutual aid and protection" clause to extend and broaden the ambit of protected employee activity beyond concerted activities associated with grievance settlement, collective bargaining, and self-organization. The reach of Section 7 encompasses concerted activities of employees "in support of employees of employers other than their own."

Morris, Developing Labor Law (2nd ed. 1983) at 142.

See Fort Wayne Corrugated Paper Co. v. NLRB, 111 F.2d 869 (CA 7 1940) (right to assist in organizing another employer's employees). However, an employee who in the course of protected activity engages in patently illegal conduct may lose the protections of the Act. Cf. City of Camden, P.E.R.C. No. 83-163, 9 NJPER 395 (¶14180 1983). However, that is not an issue in this case. See paragraph 38 herein and R-1a and R-1b.

lighting in restrooms and the parking lot; access to a pay phone; and work clothing are mandatory subjects of negotiations. See Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977); Tp. of Hillside, P.E.R.C. No. 78-59, 4 NJPER 159 (¶4076 1978); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

The department soda machine had been unilaterally procured by the Borough for the convenience of department employees and was operated on a self-service basis for the first six years after its procurement. The small amount of excess monies which accrued from the operation of the soda machine -- profit -- had been periodically used to purchase equipment for the convenience of employees. (coffeemaker, microwave). This was the existing state of affairs -- a practice of sorts -- vis-a-vis the soda machine.

In January 1989, Sweitzer unilaterally changed this state of affairs when he placed the soda machine on full-service status. Beck thought that the soda machine could be -- and should be -- operated in such a way so as to accrue a benefit to department employees, as it had been in the past. Beck went ahead and changed the operational status of the soda machine to self-service status and assumed responsibility for its operation.

How the soda machine would be operated had not been a topic of collective negotiations between the PBA and the Borough. However, given the fact that it was operated for six years on a

self-service basis to generate a small profit that had been periodically used to advance employee welfare, that mode of operation could have become a past practice between these parties. The Borough conceded that the mode of operating the soda machine was negotiable (1T41). Thus, when Beck asked Sweitzer about the status of monies in the soda machine account, he was inquiring about what he believed -- and what the facts in the record suggest -- was a fund which had been dedicated to the purpose of benefiting employees. While Beck may have overreached somewhat in unilaterally changing the status of the soda machine, Sweitzer may also have acted inappropriately when he unilaterally determined to change the mode of operating the soda machine and how the soda machine kitty would be used for employee interests. See Barnegat Tp. Bd. of Ed. and Barnegat Federation of Teachers, P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd App. Div. Dkt. No. A-550-90T5 (4/2/92). When Beck was ordered to return the machine to full-service status, he did not disobey the order; rather, he said he didn't see why the issue of whether the machine was operated by Coke or by him on the department's behalf was of any consequence and he apologized for upsetting Sweitzer. He resolved to use up the purchased soda supply and then return the soda machine to full-service status. (At the end of that time, the machine had turned a small profit).

Whether or not (a) the mode of operating the soda machine, (b) who would operate it and (c) how the small profit from the

machine would be used, are mandatory (or permissive) subjects for negotiations, the important issue is that Beck was here acting in his role as a union representative in changing the machine's status and inquiring about the fund and is protected when acting in that capacity. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

The Commission has held that an employee's conduct -- complaints, arguments, objections, letters or other similar activity -- undertaken to enforce a collective negotiations agreement or existing working conditions of unit employees constitutes protected activity. No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd App. Div. Dkt. No. A-698-78 (4/11/79).

Whether or not it was a mandatory subject for negotiations, it was a fact of employment life at Stone Harbor Police Headquarters that, over the years, the soda machine had been operated on a self-service basis and had accumulated a small profit which had been used from time-to-time to benefit employees. Sweitzer changed that situation. The PBA and Beck, as its departmental representative, had a right -- a protected right -- to inquire about the soda machine funds. The New Jersey Constitution gives all public employees the right to organize, present to and make known to their employer their grievances and proposals through their chosen representatives. In inquiring about the soda machine fund, Beck was exercising this right -- to tell his employer of this grievance. While the Borough may or may not have been obligated to adjust that

grievance (depending on whether the grievance concerned a mandatory subject for negotiations), Beck had the right to present it and in doing so, to be protected from employer reprisals. N.J. Const. Art. I, para. 19; N.J.S.A. 34:13A-5.3 and 5.4(a)(1). In Trenton Bd. of Ed., P.E.R.C. No. 80-130, 6 NJPER 216 (¶11108 1980), the Commission stated:

...an employee does not absolutely lose all protections of the Act because an action does not relate to a term and condition of employment. The fact that negotiations cannot occur concerning a particular subject does not mean that the employer is free to retaliate against a representative of the employee organization for seeking some other appropriate forum for making known the employees' legitimate position. Cf. Article I, Paragraph 19 of the New Jersey Constitution and Bd. of Ed. of Bernards v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979).

Trenton Bd. of Ed. at 217. Accord., City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987).

* * * *

Prior to Sweitzer taking action against Beck, Beck had a good work record: he had never before been disciplined, he had received excellent evaluations, and Sweitzer approved and the Borough paid for Beck's taking many police training courses. There was nothing in Beck's employment history to suggest that he was untrustworthy. Sweitzer had also recommended Beck for appointment as an instructor at the Cape May County Police Training Academy where Beck taught for approximately 3 1/3 years and was rated as an excellent instructor.

When Sweitzer took the adverse actions against Beck, he was aware that Beck had testified as a PBA witness on behalf of Wildwood Officer Ortiz in a disciplinary hearing, that Beck's expert accident reconstruction testimony was an important part of the case and that Davenport and Blubaugh were very angry about Beck having testified on Ortiz's behalf -- so angry that Davenport eventually filed a complaint against Beck with the Prosecutor's office. When Beck initially informed Sweitzer that he had testified at the Ortiz disciplinary hearing and that Davenport was angry and would probably call Sweitzer about it, Sweitzer's reaction did not indicate great concern.^{24/}

Thereafter, Sweitzer was informed of Davenport's complaint to the Prosecutor (October 2, 1989), he met with the Prosecutor (October 11, 1989), questioned Beck about his Ortiz testimony and admonished him about his chase of a motorcycle on August 12, 1989 (October 30, 1989). On January 12, 1990, Sweitzer and Beck had a confrontation regarding the department's soda machine; Sweitzer threatened Beck and immediately thereafter ordered Beck's supervisor to "closely watch and supervise" Beck. Six days later, on January 18, 1990, Sweitzer removed Beck as an academy instructor, removed

^{24/} While Sweitzer was not fully appraised of the circumstances of Beck's Ortiz testimony at that point, he was at least tacitly aware that Beck had testified without first requesting or receiving Sweitzer's approval and without having been subpoenaed to testify. Sweitzer was not upset and clearly gave no indication that he was considering instituting disciplinary action.

Beck as senior shift officer and gave Beck an onerous work schedule. On January 23, 1990, Sweitzer learned from Prosecutor Corino that he had dropped the charges against Beck and closed the complaint file. Sweitzer did not inform Beck of the Prosecutor's action for eight more days (January 31, 1990). On February 12, 1990, Sweitzer completed his report on the Beck-Ortiz matter and forwarded it to the Borough's labor attorney. On March 2, 1990, the PBA filed an unfair practice charge against the Borough for harassment of Beck (removal as academy instructor and senior shift officer) due to his protected conduct. On March 6, 1990, the Borough filed disciplinary charges against Beck for giving untruthful testimony at the Ortiz hearing, testifying without the Chief's permission and without a subpoena. On March 22, 1990, the PBA amended its charge claiming that the disciplinary charges were filed in retaliation for the original unfair practice charge filing.

Beck's removal as an academy instructor came six days after his confrontation with Sweitzer over the soda machine. However, Sweitzer had been aware of Beck's academy remark (the proffered reason for Beck's removal as an instructor) from at least early December 1989, some six weeks prior to his removing Beck as an instructor. The written reprimand for the academy remark came even later -- on February 27, 1990 -- some three months after Sweitzer became aware of Beck's academy remarks. Finally, Sweitzer also told Beck that he was being removed from instructor status because of the

August 1989 chase incident, an event which occurred over five months before Beck's removal.

Other than the two or three critiques containing complaints about the academy remark, Beck had never received a negative critique for any of the academy courses which he taught during his 3 1/3 years as an instructor. Further, Halton rated Beck as an excellent instructor and never suggested to Sweitzer that Beck be removed.

Finally, Sweitzer removed Beck from instructor status without ever questioning him or speaking to him about the allegations. Not giving Beck a chance to respond to the accusations about the academy remark in non-exigent circumstances suggests a discriminatory mindset towards Beck. Accord, University of Medicine and Dentistry of N.J., P.E.R.C. No. 85-5, 11 NJPER 447, at 449 (¶16156 1985); and Gloucester Cty. Voc. & Tech. Schl. Bd. of Ed., P.E.R.C. No. 89-125, 15 NJPER 333 (¶20148 1989).

Beck received good evaluations as senior shift officer. He was removed as senior shift officer six days after his confrontation with Sweitzer and was given no reason for his removal at that time. An employer's failure to give an employee reasons for adverse action at the time it is effected may constitute proof of a discriminatory motivation. Cf. Humes Electric Inc. v. NLRB, 114 LRRM 2445 (9th Cir. 1983); Forrest Park Ambulance Serv., 206 NLRB 550, 84 LRRM 1506 (1973). Beck's removal as senior shift officer was a departure from the past practice of having the four most senior non-superior

officers in the department each serve as a senior shift officer. Also, Beck was the only officer in the department who, during the period when the squad personnel changes were implemented, was assigned to work back-to-back weeks on the midnight shift. Sweitzer said he removed Beck as senior shift officer based upon his Ortiz testimony and the August 1989 chase. The chase occurred some five months before Beck was removed as senior shift officer and appears to have been a closed issue. Further, when Sweitzer removed Beck from the senior shift officer position, he had known about Beck's Ortiz testimony for 4 1/2 months; presumably, he did not act during those four months because (a) the Prosecutor's office was still investigating the false testimony complaint which Davenport filed and (b) Sweitzer had still not completed his own Ortiz incident investigation. However, Sweitzer acted to remove Beck as senior shift officer prior to the conclusion of both the Prosecutor's investigation and his own investigation.

Based upon the foregoing, I am convinced that Sweitzer was hostile toward Beck's protected conduct and it was this conduct -- the Ortiz hearing testimony, the soda machine confrontation and his PBA representative status -- which motivated or was a substantial reason for Sweitzer's adverse actions -- the disciplinary charges for false testimony and testifying without permission or a subpoena, Beck's removal from his academy instructor position and the senior shift officer position and Beck's adverse temporary work schedule. The chronology of events shows close proximity between protected

conduct and adverse actions and a substantial hiatus between proffered employer reasons for the adverse actions and the adverse actions themselves. This suggests hostility toward Beck's protected conduct. The timing of events combined with Beck's excellent work and teaching records, Sweitzer's awareness of the circumstances surrounding Beck's Ortiz hearing testimony (including Davenport's anger and hostility toward Beck because of his Ortiz testimony), Sweitzer's failure to give Beck reasons when he was removed from the senior shift officer position, Sweitzer's not providing Beck an opportunity to respond to the academy allegations before removing him from his instructor's position, and Sweitzer's threat to Beck during the soda machine confrontation and his order that Beck be watched thereafter all demonstrate that Beck's protected conduct was a substantial or motivating factor in Sweitzer's adverse actions concerning Beck. See Bridgewater; Gloucester Cty.; University of Medicine and Dentistry, 11 NJPER at 448-449; State of N.J. (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117, 118 (¶18051 1987); and Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985); but cf. North Caldwell Bd. of Ed., P.E.R.C. No. 90-26, 15 NJPER 602 (¶20248 1989) (Association activist was transferred not due to his Association representative activities, but because of philosophical differences with his principal and actions as a teacher).

* * * *

Having concluded that Charging Party's protected activities motivated Respondent's adverse actions, I will next consider whether Respondent has proved, by a preponderance of the evidence, that it would have taken the same adverse actions even absent the protected activity. I find that the Respondent has not met this burden.

Sweitzer is a career police professional -- 5 years as the Stone Harbor Police Chief and a total of over 22 years as a police officer. From this, I make the assumption that Sweitzer understood how to conduct investigations, was experienced in conducting them and had a police professional's understanding of evidence and how to marshal evidence appropriately. Early in his career, he was also an officer of PBA Local 59 for several years. Combined with his five years as Chief, I make the further assumption that he had at least a rudimentary understanding of labor-management relations.

Initially, Sweitzer stated that prior to the events herein, he never doubted Beck's ability or integrity nor had Beck ever submitted a report to Sweitzer which was untrue. Beck had a good work record. When Beck informed Sweitzer that he testified at Ortiz's hearing (September 8, 1989), and that Davenport was upset by his testimony, Sweitzer was not upset. He told Beck not to worry and gave no indication that he was concerned Beck had testified without securing his approval or without a subpoena.

At the Ortiz hearing, Beck gave testimony about his investigation/reconstruction of the Ortiz accident which was damaging to the City of Wildwood's case against Ortiz. The

technical accident reconstruction testimony was the key element of the Ortiz disciplinary case. Sweitzer understood that.

At the Ortiz hearing, Beck indicated he had been called by the Prosecutor's office about accident investigations. This was the statement about which Davenport filed a complaint with the Prosecutor's office. Cape May County Prosecutor Corino testified that to the best of his knowledge, Beck had not been requested to investigate accidents for his office. Corino made a similar statement about Sergeant Curtis Dull -- that to his knowledge, Dull had not been called by his office to investigate accidents. However, when portions of Sweitzer's interview with Dull were read to him, wherein Dull said he had been consulted by the Prosecutor's office, Corino acknowledged that others in his office might have conferred with Dull. Corino also noted that when his staff was queried about having conferred with Beck on accident investigations, the inquiry was neither systematic nor comprehensive.

Just prior to testifying at the Ortiz hearing, Beck had a conversation in the municipal building with Wildwood Officer Davis. Davis produced a signed statement about this conversation which was forwarded to Sweitzer. In that conversation, Davis told Beck about an accident fatality which Davis had recently investigated, that he was upset because the driver had not been indicted and he asked Beck to look the case over when he had the time. Beck asked Davis if his (Beck's) coming into the Wildwood department to look the case over would create any trouble; Davis told him yes it would, but not if

Davis were to give him the file to look at. In the Ortiz hearing, when Beck was questioned about being consulted on accident investigations by municipal departments, he related, among others, the Davis request.

In their conversation, Beck noted to Davis that, in Cape May County, there were only two officers who reconstruct accidents: Curtis Dull of the Ocean City Police Department did the northern part of the County and he (Beck) did the southern part. Later in their conversation, Beck told Davis that he had written a letter to Prosecutor Corino about his accident reconstruction skills.

Sweitzer filed disciplinary charges against Beck for: (1) giving false testimony at the Ortiz hearing (regarding (a) interaction with the Prosecutor's office and (b) receiving an official request to investigate an accident fatality in Wildwood on the day of the hearing); (2) giving misleading information to another officer (Davis; when Beck allegedly implied that he and Dull were assigned to do accident investigations for the Cape May County Prosecutor's Office); and (3) testifying without (a) first securing the approval of the Chief and (b) being subpoenaed.

The evidence upon which Sweitzer based these disciplinary charges was Beck's statements at the Ortiz hearing (R-2), Prosecutor Corino's letter (R-3) telling Sweitzer he was unaware of Beck's being called by his office to reconstruct accidents, Davis's unsworn statement about his conversation with Beck on September 8, 1989 (R-4

at 13-14) and his (Sweitzer's) questioning of Beck on October 30, 1989.^{25/}

The Wildwood managers were very unhappy with Beck's testimony, with his appearance at the hearing and with Beck generally. Beck is an outsider to Wildwood; he is a PBA member -- the majority of the Wildwood department (including Chief Davenport) is FOP. At the Ortiz hearing, Beck testified that he had once written to the Prosecutor recommending that the Mayor of Wildwood be criminally charged. He once wrote to the Wildwood department complaining about Wildwood Officer D'Amico's driving. Immediately after the Ortiz hearing ended, the Wildwood Police Chief (Davenport) and the Wildwood Business Administrator confronted Beck and aggressively questioned him about his testimony. They told him loudly and forcefully that he was not ever to do accident

^{25/} Sweitzer said the fact that Beck asked for his attorney at the outset of the October 30, 1989 interview (Beck subsequently relented and answered Sweitzer's questions) and was evasive in answering certain questions contributed to his belief that Beck had given false testimony.

While a determination of being "evasive" in answering questions is subjective in nature, several factors should be considered now and should have been considered by Sweitzer then, in evaluating Beck's responses, both subjectively and objectively.

First, during that interview, Beck faced the Chief, Captain Solis, Detective Sergeant Boserise and Officer Davies. Beck was alone -- he had neither a PBA representative nor an attorney there with him. Next, this was Beck's first information that a criminal charge could possibly result from his Ortiz testimony.

Under these circumstances, that he asked for an attorney and was somewhat unclear in his answers does not seem extraordinary.

investigations in Wildwood again -- Davenport told him he was not to be in his (Davenport's) town. This was clearly a hostile encounter. These Wildwood managers supervised the production of R-2. Davenport filed the complaint against Beck with the Prosecutor's office. Davenport spoke to Sweitzer at least twice during Sweitzer's Beck-Ortiz investigation. The Wildwood unhappiness with Beck was palpable and was clear to Sweitzer.

Thus, Sweitzer was aware of the circumstances which led to Davenport filing the complaint with the Prosecutor. He was further aware of the depth of Davenport's (and presumptively Wildwood's) hostility toward Beck for testifying on Ortiz's behalf -- hostility that was well-demonstrated by Davenport's confronting and questioning Beck immediately after the Ortiz hearing, his immediate questioning of Nanos and Davis regarding their consulting Beck concerning accident investigations, his filing charges with the Prosecutor's office regarding Beck's testimony soon after, and later, by his ordering five or six Wildwood police officers who had attended Beck's October 2, 1989 academy class to submit official police reports about Beck's academy remark. It is indicative of Davenport's anger with Beck that he ordered his officers to submit police reports about something which -- to give it the worst possible cast -- was an indiscretion and which in fact was brought about by Davenport's own threats to Beck about not ever doing accident investigations in Davenport's town again. Davenport also discussed those statements with the Prosecutor's office and with

Sweitzer and sent the statements to them. While Beck's testimony did not interfere with any of Sweitzer's own managerial decisions, Sweitzer understood the reasons underlying Davenport's anger with Beck. Sweitzer was concerned about this: that Beck's Ortiz testimony had created considerable commotion and annoyance in Wildwood generally and with Davenport in particular -- the police chief in a large neighboring municipality. Much of Sweitzer's anger with Beck and his decision to discipline him flowed from this connection -- that Beck's Ortiz testimony created problems, directly for Davenport and indirectly for Sweitzer. Nevertheless, Sweitzer's adverse actions toward Beck were rooted in Beck's protected activities.

Prior to any of the events in this matter, Beck spoke with Sweitzer about writing a letter to the Prosecutor's office offering his accident reconstruction skills to them. When he filed the disciplinary charges, Sweitzer also knew of Halton's conversation with Beck in which Halton suggested that Beck try to become involved in a county-wide program so that his accident reconstruction expertise could be used on a county level in reconstructing serious motor vehicle accidents; that Beck had written the Prosecutor a letter offering his accident reconstruction services to the Prosecutor's office; of Beck's conversation with Prosecutor Corino in which Beck offered the Prosecutor his accident reconstruction skills; and of Beck's discussion of a fatal accident investigation with an Assistant County Prosecutor while he was assigned to the

County Crime Task Force. And finally, Sweitzer should have known that Beck had been consulted by Prosecutor's Investigator Caleo on an accident investigation.

In conducting his investigation of the Beck-Ortiz matter, Sweitzer failed to take certain steps and ask certain questions which were crucial to making a reasonably accurate determination on whether to discipline on the false testimony allegations.

When Sweitzer questioned Beck on October 30, 1989, he did not pursue the central issue of his concern -- Beck's interaction with the Prosecutor's office. Sweitzer also had little recollection of Beck's response to the question he asked on that issue.

By Corino's own submission, (R-3), he thought his information should be rechecked. Corino also suggested that Sweitzer requestion Beck. Requestioning Beck at that point (January 23, 1990) would seem to have been especially helpful, given the generally inadequate questioning which was done in October 1989 on the Prosecutor's office connection.

In Gloucester Cty. Voc. Tech. Bd. of Ed., the Commission noted that where an employer failed to properly investigate allegations against a union activist employee before taking action against that employee, it was indicative of a discriminatory intent.

Sweitzer also charged Beck, based on Davis's statement, with falsely testifying that he had received an "official referral" to investigate a fatality in Wildwood. Beck never said he was

"officially" asked to investigate a fatality. Beck was aware that internal department politics and policy should be considered before getting involved in a consultation on an accident investigation; Beck's caution in that regard is reflected in Davis's statement. However, Davis essentially told Beck "don't worry, if I give you the file, there won't be a problem." Under those circumstances, Beck indicated both in his Ortiz testimony and in this unfair practice hearing that he would help any officer with an accident investigation problem. Davis's statement simply provides no support for that part of the disciplinary charge and there was no other evidence to support this point.

Sweitzer also charged Beck with misleading an officer (Davis) by implying that he was part of a Prosecutor's office accident reconstruction unit whereby Curtis Dull did reconstructions in northern Cape May County and he (Beck) did reconstructions in southern Cape May County. Again, Davis's statement is the only evidence on this issue and again it comes up short. Beck did write to the Prosecutor and did offer his accident reconstruction skills to that office. His other statement -- that there are only two people doing reconstruction in the County -- implies that there are only two people with these certain qualifications who are doing accident reconstruction work in Cape May County: Dull up north and me down here. The leap from these statements to the conclusion in the disciplinary charge -- that Beck implied he was part of a special Prosecutor's office unit -- is simply too great to make without more evidence, of which there is none.

What was before Sweitzer when he decided to charge Beck? Beck's good work record; an employment history which gave Sweitzer no reason to doubt Beck's truthfulness or integrity; the questionable motivation of the complaintant, Davenport; Corino's statement to Sweitzer at the outset of the Ortiz investigation (October 2, 1989) that he was not sure whether he was going to present the matter to the Grand Jury; the sundry conversations between Beck and Sweitzer, Beck and Halton and Beck and Corino regarding Beck doing accident investigation consultation for the Prosecutor's office; Beck's conversation with an Assistant Prosecutor regarding an accident investigation; Beck's accident investigation/consultations in several municipalities; Davis's statement; Corino's statement that he was unaware of Beck having done accident reconstruction for his staff, but that he wanted to recheck; Corino's decision not to go forward with the complaint against Beck; Corino's suggestion that Sweitzer request Beck; and after deciding not to proceed on the complaint and during a discussion with Sweitzer about how to handle the Beck-Ortiz matter, Corino's offer to come to Stone Harbor to speak to Beck about the Ortiz situation.

The evidence before Sweitzer supported a conclusion that Beck had not testified falsely.^{26/} Given that evidence, the lapses in Sweitzer's investigation are troublesome: Sweitzer's initial failure to carefully question Beck at the October 30, 1989 meeting;^{27/} Sweitzer (and Solis) having no clear recollection of what Beck said at the October 1989 meeting about his interaction with the Prosecutor's office concerning accident investigations; Sweitzer's failure to requestion Beck as Prosecutor Corino suggested; Sweitzer's failure to speak to Corino after Corino had

26/ In Dover Municipal Util. Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984), the Authority contended it discharged an employee ("Crespy", who had engaged in protected conduct) because he lied about performing certain job responsibilities. The Commission disagreed, finding that it did not "perceive the same degree of untruthfulness" in the employee's statements as did the Authority. The Commission stated:

Instead, it appears to us that Crespy's union activity may have generated the inspections in the first place and that his superiors were planning to fire him for his union activities before the inspections. Further, we are not persuaded by a preponderance of the evidence that Broome believed in good faith that Crespy's alleged "lying" or poor attitude about the inspections warranted discharge.

Dover at 339.

27/ While one may presume that Sweitzer's reluctance to question Beck about his Prosecutor's office interaction was due to caution about the pending criminal complaint then before the Prosecutor, that was not proven or argued. However, that need for caution was ultimately removed on January 23, 1990, when the Prosecutor informed Sweitzer that he was not proceeding on the complaint.

rechecked his records regarding Beck's interaction with his office; and Sweitzer's failure to question Davis directly all suggest that Sweitzer's investigation was done to get evidence together for the purpose of "getting Beck" rather than to see whether there were grounds for discipline. That is, Sweitzer went into the investigation with the intent of charging Beck and Sweitzer's intent to charge Beck derived from his protected activity.

Given what Sweitzer knew and the lapses in his investigation of the Beck-Ortiz matter, I find that the Borough has not demonstrated by a preponderance of evidence that it would have disciplined Beck absent his protected conduct.

* * * *

Sweitzer's alleged concerns about Beck testifying without first securing his approval and without a subpoena go to the unseemly appearance and conflict of interest in having two police officers testifying against each other and to the Borough having potential liability for Beck's testimony. Sweitzer said he would not have given Beck permission to testify without him being subpoenaed; however, with a "proper" subpoena, he would have given Beck his approval to testify.

Beck's Ortiz testimony was not factual; it was technical, expert testimony about accident reconstruction. Thus, there was no prospect in the Ortiz hearing of having two officers sully each other's credibility; their professional disagreement might suggest

only that accident reconstruction experts can view the same set of facts and reach different conclusions.

Beck testified on his own time. He did not testify as a Stone Harbor police officer; he did not testify in uniform; and his testimony was unconnected with the Stone Harbor Police Department.

Sweitzer's initial reaction to learning that Beck had testified suggests that absent the protected activity aspect of Beck's Ortiz testimony, he would never have been charged with testifying without the Chief's permission or without a subpoena. Sweitzer only discovered these grounds for charging Beck just before he gave his material to the Borough's labor attorney in February 1990, when he directed him to draft disciplinary charges. Further, Sweitzer explained he was concerned about Beck's testimony because of the unseemly appearance and potential liability to the Borough. But Sweitzer said he would have approved Beck's request to testify had he been subpoenaed. While a subpoena, presumably, would diminish liability problems, how would it help the conflict-appearance problem? Accordingly, I find that Beck would not have been charged with violating these rules absent the protected activity aspect of his Ortiz testimony.

Finally, these rules, as applied to Beck under the circumstances of this case, are overly restrictive. While there appear to be some constitutional issues implicated here (freedom of speech and association), they were not argued and I will not address them. However, as applied to Beck in this case where he was acting

as a union representative, these rules interfered with his and the PBA's statutory rights. The rules place a significant condition precedent upon the section 5.3 right to assist an employee organization without reprisal or fear of reprisal and violate subsection 5.4(a)(1) in that they interfere with, restrain and coerce employees in their exercise of rights guaranteed by the Act -- seeking the Chief's permission to testify under the circumstances of this case could be daunting; one might simply decline a union's request to testify.

Were Beck testifying in different circumstances -- either outside the scope of his role as a union representative (for example, testifying on behalf of a friend in a property damage suit) or in circumstances which were connected with his employment as a Stone Harbor police officer (for example, testifying in a civil suit by a motorist involved in an accident which Beck investigated), the existing rules could be validly applied to him under the Act. Further, a rule which was less broad might be generally valid. For example, a rule requiring only prior notice to the Chief of testifying may be valid and justifiable on the grounds that the Chief needs to be aware of when and in what circumstances or proceedings his officers are testifying because a police undercover operation could be inadvertently jeopardized by such testimony; at the same time, the requirement of only notice would not rise to the level of an interference with protected rights. However, none of these circumstances are applicable herein. Accordingly, I conclude that the application of these rules to Beck, under the circumstances

of this case, tends to interfere with Beck's exercise of protected rights and the employer has not demonstrated that it has a legitimate and substantial business justification for applying them to him in this case. See 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) and Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552-553 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

The PBA contends Beck was removed from the academy due to his protected activities; the Borough argues he was removed for the academy remark and the chase incident. I find the Borough's asserted reasons for removal are pretextual.

The chase incident was far-removed from Beck's removal as an academy instructor. The chase incident occurred in August 1989; it was then investigated and not acted upon. It was not an on-going matter. The chase incident was also not objectively related to Beck's teaching position. Its late revival in this unrelated context is an attempt to create diversionary reasons for the academy removal. Further, the even later addition of a written reprimand (February 27, 1990) for the academy remark is another try at buttressing the reasons for the removal.

The penalty assessed -- removal from his teaching position -- was disproportionately harsh in relation to the only hint of a problem which Beck ever had in his academy teaching career -- an ungraceful remark.

Particularly since Sweitzer knew about the animus which the Ortiz testimony had generated against Beck in Wildwood, Sweitzer's investigation of this situation indicates he was not interested in getting to the bottom of the matter; rather, it suggests he was interested only in using this circumstance as an opportunity to retaliate against Beck. Sweitzer never spoke about the incident to anyone who attended the class; rather, he relied on statements from Wildwood officers solicited by Davenport some time after the class. Even more important, Sweitzer made a deliberate decision not to speak to Beck about this incident either before or after he disciplined him. Sweitzer issued the disciplinary memo and told Beck the matter was closed. The decision not to provide a disciplined employee the opportunity to deny the alleged offense or to otherwise explain or justify his actions to the employer suggests that the employer had an ulterior reason for the adverse action -- here, protected conduct. In University of Medicine and Dentistry of N.J., P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985), the Commission found that the employer violated subsection 5.4(a)(3) when it failed to renew union activist Mitkus just after her union activity level increased. The Commission stated:

While it appears that a rift had developed among certain faculty members, it strains credulity to suggest that this is a reason to not renew an employee's employment contract who has consistently been given excellent evaluations. It is equally perplexing that Martin never put Miktus on notice that she was not to be renewed because of the "rift." This is strong support that these proffered reasons by Martin were a pretext. It strains credulity that Martin would

rely entirely on the statements of certain faculty members and not offer Miktus a chance to respond.

UMDNJ at 10.

Beck had an excellent record as an academy instructor both before and after the October 1989 class. Despite the October 1989 remark, Halton regarded Beck as an excellent instructor; his letter to Sweitzer and testimony do not suggest that he was greatly concerned about the matter. Whatever Halton's concern was, it certainly was not enough to cause him to seek Beck's removal; he neither sought nor suggested that Beck be removed as an instructor.

Given the foregoing, I conclude that the academy remark and chase incident were pretextual reasons for Beck's removal as an instructor.

The PBA asserts Beck was removed as a senior shift officer and given back-to-back midnight duty tours in retaliation for protected activities; the Borough contends he was removed because of the August 1989 chase incident, his Ortiz testimony and his actions regarding the soda machine. I find that the Borough's asserted reasons for Beck's removal as senior shift officer are pretextual and/or illegal.

Beck received good evaluations as senior shift officer. The removal occurred six days after Beck's soda machine confrontation with Sweitzer. Beck was given no reason for the removal when it was effected. The department's past practice had been always to place the four most senior non-superior officers in

the senior shift officer positions. When Sweitzer removed Beck from the senior shift officer position, he also gave him a double midnight shift duty tour; no one else in the department received such an onerous schedule. Finally, on the one hand, to explain the delay in issuing this discipline, Sweitzer noted he did not act sooner because the Ortiz investigation was still pending. On the other hand, Sweitzer's removal of Beck as senior shift officer nevertheless occurred before the Prosecutor had completed his investigation and before Sweitzer had completed his investigation of the Ortiz situation. This inconsistent testimony about his reasons for removing Beck as senior shift officer suggests that the reasons being proffered for Beck's removal are pretextual and are an attempt to divert attention from Sweitzer's actual motivation.

As discussed above (see pages 85-87), I find that the chase incident is far removed from Beck's demotion as senior shift officer. Accordingly, I conclude that it is a pretextual reason for his removal as senior shift officer. Inasmuch as I have determined that (a) Beck's Ortiz testimony was protected conduct; and (b) that the reason Beck was disciplined was not because the testimony was or appeared to be untruthful, but because it interfered with a disciplinary prosecution of a PBA member in Wildwood and thus created a disturbance which angered Sweitzer -- I find that in removing Beck as senior shift officer for his Ortiz testimony, the Borough was again retaliating against him for protected activity. Finally, the Borough admits that it removed Beck as senior shift

officer for his actions regarding the soda machine -- actions which I earlier concluded were protected (see pages 61-65). Accordingly, I conclude that Beck was removed as senior shift officer and given a double midnight tour of duty in retaliation for his protected conduct. Further, absent his protected activity, I conclude that the Borough would not have removed Beck as senior shift officer or given him an onerous duty tour.

At the outset of this analysis, I suggested that these were a set of interactive events and for that reason, each one should not be viewed in isolation. Initially, Sweitzer was unconcerned about Beck's having testified at the Ortiz hearing. As the problems that Beck's Ortiz testimony generated in Wildwood became more apparent, Sweitzer's hostility toward that conduct grew. The academy incident, taken by itself, is an event of relatively small consequence. However, Sweitzer's reaction to the academy incident was harsh and disproportionate because it occurred with the Beck-Ortiz hearing as prologue. The soda machine incident occurred in part because of Sweitzer's growing hostility toward Beck's protected conduct. The Beck-Ortiz situation and the academy incident had created fertile ground for a confrontation. Once the soda machine confrontation occurred, Sweitzer's reaction was swift: he took a succession of retaliatory actions beginning that very day (January 12, 1990) and ultimately culminating with the filing of disciplinary charges on March 6, 1990.

To justify these actions, Sweitzer seized upon whatever was remotely available as a reason: things that were stale; complex events which required some investigation were accepted at face value; other events were inexplicably inadequately investigated; and through all of this, Sweitzer afforded Beck all unfavorable inferences from the allegations made against him.

Taken together, these events -- beginning with Beck's Ortiz testimony (September 8, 1989) and culminating with the disciplinary charges (March 6, 1990) -- demonstrate that Beck engaged in a series of protected activities about which his employer became increasingly hostile. Initially, it was uncertain how that growing hostility might be expressed. However, as time went on and events developed, Sweitzer's focus became clearer -- he decided to file disciplinary charges against Beck, probably some time before Sweitzer and Solis met with Corino (approximately early January 1990) to inquire about when Corino would decide whether or not to proceed on Davenport's complaint about Beck. Earlier and later events added fuel to this fire until at last Sweitzer had taken a series of retaliatory actions rooted in and inextricably bound to Beck's protected conduct.

Finally, I conclude that Respondent Borough did not violate subsection 5.4(a)(4) of the Act when it filed disciplinary charges against Beck after he had filed the initial unfair practice charge because Respondent had already taken several adverse actions against Beck and had been planning to file the disciplinary charges before

it received the unfair practice charge. (Sweitzer had given the Borough labor attorney J-4 on February 12, 1992 with instructions to draft disciplinary charges against Beck).

CONCLUSIONS OF LAW

Based upon the entire record, I conclude as follows:

1. The Respondent Borough discriminated against Beck in violation of subsection 5.4(a)(3) of the Act, and derivatively violated subsection 5.4(a)(1) of the Act when Respondent: disciplined Beck by suspending him from duty without pay for 10 days, removed Beck from his position as an instructor at the Cape May County Police Academy, issued Beck a written reprimand in connection with his teaching a police academy class, removed Beck as a senior shift officer and assigned Beck back-to-back weeks of midnight shift duty tours in January and February 1990 because Beck engaged in protected activities -- specifically, Beck's conduct as the Stone Harbor Police Department PBA Representative, Beck's testimony at the disciplinary hearing of a Wildwood Police Officer-PBA member and Beck's actions concerning the soda machine in the Stone Harbor Police Department.

The Borough did not take these adverse actions due to Beck's August 1989 pursuit of a speeding motorist, his alleged untruthful testimony at a disciplinary hearing, his violation of departmental rules requiring him to secure the Chief's approval and a subpoena before testifying at such proceedings or the comment Beck made to his October 1989 police academy class.

2. Respondent interfered with, restrained and coerced Beck in the exercise of rights guaranteed to him by the Act in independent violation of subsection 5.4(a)(1) when it applied to Beck, under the circumstances of this case, certain rules and regulations of the Stone Harbor Police Department requiring Beck to secure prior approval of the Chief of Police and a subpoena before testifying in a disciplinary hearing on behalf of the PBA.

3. Respondent did not violate subsection 5.4(a)(4) of the Act.

RECOMMENDED ORDER

I recommend that the Commission Order:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining and coercing employees in the exercise of rights guaranteed to them by the Act, specifically, by disciplining Beck, under the circumstances of this case, for violating certain Stone Harbor Police Department rules requiring Beck to secure prior approval from the Chief and a subpoena before testifying in a disciplinary proceeding on behalf of the Charging Party PBA; suspending Beck from duty without pay, removing Beck from his position as an instructor at the Cape May County Police Academy, issuing Beck a written reprimand in connection with his academy teaching position, removing Beck as a senior shift officer and assigning Beck back-to-back weeks of midnight shift duty tours.

2. Discriminating in regard to terms and conditions of employment to discourage employees in the exercise of rights guaranteed to them by the Act, specifically by: suspending Beck from duty without pay, removing Beck from his position as an instructor at the Cape May County Police Academy, issuing Beck a written reprimand in connection with his academy teaching position, removing Beck as a senior shift officer and assigning Beck back-to-back weeks of midnight shift duty tours.

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

1. Reverse the 10-day suspension without pay imposed upon Beck and make him whole by paying him all monies and fringe benefits which he lost and to which he would have otherwise been entitled but for his suspension. With regard to monies due, interest shall be included at the rates authorized by R.4:42-11 for years 1990, 1991 and 1992.

2. Reappoint Beck to be an instructor at the Cape May County Police Academy.

3. Reappoint Beck as a senior shift officer in the Stone Harbor Police Department.

4. Remove from Beck's personnel file the written reprimand issued in connection with his academy teaching position.

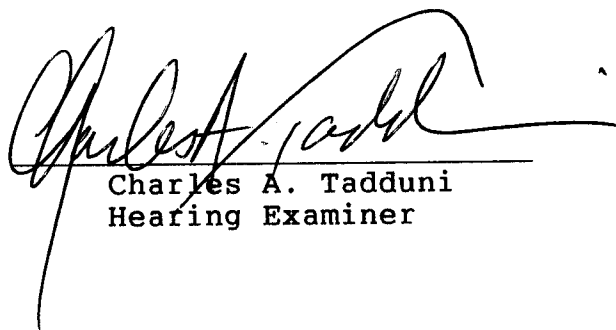
5. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the

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.

6. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the allegations that the Respondent Borough violated subsection 5.4(a)(4) of the Act be dismissed.



Charles A. Tadduni
Hearing Examiner

DATED: April 13, 1992
Trenton, New Jersey

ExhibitsCommission Exhibits --

- C-1 Complaint and Notice of Hearing
- C-2 Respondent's Answer
- C-3 Prehearing Order
- C-4 Respondent's Motion to Limit PERC Jurisdiction/Motion to Dismiss with Attachments
- C-5 Statement of Service of Motion
- C-6 Charging Party's Answer to Motion to Limit PERC Jurisdiction/Motion to Dismiss
- C-7 Collective Negotiations Agreement between Borough of Stone Harbor and PBA Local 59 covering 1/1/89 to 12/31/90
- C-8 Hearing Examiner's letter to parties, dated 11/1/90, re Motion
- C-9 Borough Counsel Giovinazzi's letter to Hearing Examiner, dated 11/13/90, re Motion
- C-10 PBA Counsel Solomon's letter to Hearing Examiner, dated 11/14/90, re Motion
- C-11 H.E. No. 91-12, Hearing Examiner's Decision denying Motion to Limit PERC Jurisdiction/Motion to Dismiss

Joint Exhibits --

- J-1 Notice of Disciplinary Action against Beck, 3/6/90
- J-2 Final Notice of Disciplinary Action & Suspension of Beck, 4/13/90
- J-3 Stone Harbor Police Department Manual
- J-4 Calendar of events regarding Beck discipline, prepared by Chief Sweitzer

Charging Party's (PBA) Exhibits --

- CP-1 Letter dated 1/18/90 from Chief to Beck re Beck's removal as an instructor at the Cape May County Police Academy
- CP-2 Memo dated 1/18/90 from Chief to department re squad charges
- CP-3 Memo dated 1/19/90 amending CP-2
- CP-4 Copy of PBA Investigative Committee Report dated 6/19/89 issued by Beck to PBA President Kirwin re Ortiz auto accident

Respondent's (Borough) Exhibits --

- R-1a &
- R-1b Complete transcript of Beck disciplinary hearing, 4/4/90
- R-2 Transcript of Ortiz disciplinary hearing, 9/8/89
- R-3 Letter dated 1/22/90 from Prosecutor Corino to Chief Sweitzer
- R-4 Chief Sweitzer's Internal Investigation Report on Beck/Ortiz matter
- R-5 Letter dated 11/6/89 from Sweitzer to State Attorney General
- R-6 Letter dated 2/20/90 from Attorney General to Prosecutor's office in response to Sweitzer's letter
- R-9 Memo dated 2/27/90, from Chief Sweitzer to Beck reprimanding Beck for academy incident
- R-10 Memo dated 4/9/90, from Chief Sweitzer to Beck outlining execution of discipline

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 employees in the exercise of rights guaranteed to them by the Act, particularly by: applying to Edward Beck, under the circumstances of this case, certain rules and regulations of the Stone Harbor Police Department requiring Beck to secure prior approval of the Police Chief and a subpoena before testifying in a disciplinary hearing on behalf of the PBA; suspending Beck without pay for 10 days; removing Beck from his position as an instructor at the Cape May County Police Academy; issuing Beck a written reprimand in connection with his teaching a police academy class; removing Beck as a senior shift officer and giving Beck a shift assignment which is more difficult than that given to other officers because he engaged in protected activities.

WE WILL NOT discriminate in regard to terms and conditions of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by: suspending Edward Beck without pay for 10 days, removing Beck from his position as an instructor at the Cape May County Police Academy, issuing Beck a written reprimand in connection with his teaching a police academy class, removing Beck as a senior shift officer and giving Beck a shift assignment which is more difficult than that given to other officers because he engaged in protected activities -- specifically, his conduct as the Stone Harbor Police Department PBA Representative, his testimony at the disciplinary hearing of a Wildwood Police Officer-PBA member and his actions concerning the soda machine in the Stone Harbor Police Department.

WE WILL reverse the 10-day suspension without pay imposed upon Edward Beck and make him whole by paying him all monies and fringe benefits which he lost and to which he would have otherwise been entitled but for his suspension; reappoint Beck to be an instructor at the Cape May County Police Academy; reappoint Beck as a senior shift officer in the Stone Harbor Police Department; and remove from Beck's personnel file the written reprimand issued in connection with his academy teaching position.

Docket No. CO-H-90-246

Borough of Stone Harbor
(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.