P.E.R.C. NO. 2003-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and- Docket No. CO-H-2001-10

PROBATION ASSOCIATION OF NEW JERSEY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey Judiciary. The Complaint was based on an unfair practice charge filed by the Probation Association of New Jersey. The charge alleges that the Judiciary violated the New Jersey Employer-Employee Relations Act by reassigning nine senior probation officers in the Mercer vicinage in retaliation for the protected activity of current or former PANJ officials. The Commission concludes that PANJ did not meet its burden of proof on its allegations concerning the reassignments and therefore dismisses the Complaint.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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In the Matter of

STATE OF NEW JERSEY JUDICIARY,

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-and- Docket No. CO-H-2001-10

PROBATION ASSOCIATION OF NEW JERSEY,

Charging Party.

Appearances:

For the Respondent, David Samsom, Attorney General of New Jersey (George N. Cohen, DAG, of counsel)

For the Charging Party, Fox and Fox, attorneys (Daniel J. Zirrith, of counsel)

DECISION

On July 21, 2000, the Probation Association of New Jersey filed an unfair practice charge against the State of New Jersey Judiciary. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] by reassigning nine senior probation officers in the Mercer vicinage in retaliation for the protected activity of current or former PANJ officials. A

1/ These provisions 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."

similar allegation involving the Essex Vicinage was withdrawn at hearing.

On October 12, 2000, a Complaint and Notice of Hearing issued. On January 25, 2001, the Judiciary filed an Answer denying that it violated the Act and asserting several defenses.

On April 19 and 24, June 5 and 6, July 30 and 31, and August 6, 2001, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On August 29, 2002, the Hearing Examiner recommended dismissing the Complaint. H.E. 2003-5, 28 NJPER 382 (¶33140 2002). He found that PANJ did not prove that the Judiciary's selection of a shop steward, union president and union vice-president to be part of a nine-person reassignment, was in retaliation for protected activity. Instead, he found that the Judiciary implemented a reassignment/transfer program for legitimate business reasons devoid of hostility or discriminatory motives.

On September 26, 2002, PANJ filed exceptions and a supporting brief. PANJ asserts that the Hearing Examiner erred in finding that several management witnesses -- Chief Probation Officer Michael Green, Human Resources Manager Angelina Bowers, Family Division Manager Alfred Federico, and Trial Court Administrator Jude Del Preore -- were reliable and credible

witnesses. In particular, it asserts that: Green was not a reliable witness because he did not accurately answer a question concerning a conversation with Master Probation Officer Arlene Johnson about Local 103 Vice-President Kevin Farley, one of the transferred senior probation officers; Green, Bowers, Federico and Del Preore were not credible witnesses because they gave contradictory testimony; and Green was a more reliable witness than Farley and therefore, the Hearing Examiner should have found that PANJ proved hostility regarding Farley's selection for transfer.

On October 16, 2002, the Judiciary filed an answering brief responding to each of PANJ's exceptions.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-45), including his credibility determinations.

The Hearing Examiner found that beginning in 1995, the Judiciary engaged in a strategic planning process that culminated in a 1998 report which recommended, in part, the use of employee teams. Team development might result in reassignments.

To implement the team concept, the vicinage policy team decided to cross-train employees. All employees holding journeymen positions -- which included senior probation officers -- would eventually be transferred and cross-trained. The policy team decided to reassign nine senior probation officers in the Spring of 1998; three officers were to be reassigned from each of three divisions.

Division managers Green, Eberhardt and Federico decided which senior probation officers would be reassigned and made recommendations to the trial court administrator. He approved the recommendations. Among the nine reassigned were a shop steward, the union president, and the union vice-president.

PANJ argues that Chief Probation Officer Green was not a reliable witness because he testified that he did not have a conversation with Master Probation Officer Arlene Johnson that the Hearing Examiner found, in fact, had occurred. The conversation involved an earlier attempt by Senior Probation Officer Farley to obtain a position in the Drug Court. The Hearing Examiner explained that Green's responses to the questions concerning that conversation were accurate in context. We accept that explanation. Even if we were to accept that Green was avoiding having to answer the question in the affirmative, that fact does not prove hostility to protected activity.

PANJ argues that the management representatives who testified were not credible because their testimony was contradictory. The Hearing Examiner noted that one of the witnesses better recalled the details of the meetings where the employees to be reassigned were discussed. We agree with that assessment and conclude that the minor factual discrepancies do not undermine the overall credibility of the witnesses or prove that an illegal reason motivated the reassignments. The Division Managers were told to select officers for reassignment. They made

recommendations about who would leave their divisions and where they should go. The Human Resources Manager passed along those recommendations to the Trial Court Administrator who made the final decisions. That is the picture painted by the witnesses' testimony and it does not evidence anti-union animus.

Finally, PANJ argues that Probation Officer Kevin Farley was a more reliable witness than Chief Probation Officer Michael Green. It contends that Green's testimony was inconsistent with the testimony of other management witnesses and that, in light of that inconsistency, the Hearing Examiner should have found hostility.

A Hearing Examiner is in the best position to assess witness credibility. Absent other evidence in the record that convinces us that some other version of the events occurred, we will not overturn a credibility determination. No such evidence is present in this case.

The charging parties contend that the transfers of the nine senior probation officers were motivated by hostility towards protected activity and thus violated 5.4a(3). The standards for assessing such discrimination claims are set forth in In re Tp. of Bridgewater, 95 N.J. 235 (1984).

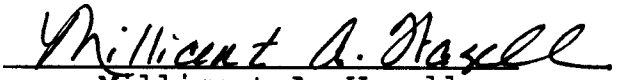
The Hearing Examiner found that the record conclusively shows that the Judiciary implemented a reassignment/transfer program, and particularly chose to reassign the nine senior probation officers, for legitimate business reasons devoid of

hostility or discriminatory motives toward PANJ. He reached that conclusion based in large part on his assessment of witness credibility. Absent compelling evidence to the contrary, we have not disturbed those determinations. See City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980). Given the Hearing Examiner's overall findings, including his credibility determinations, and absent any persuasive showing that those findings should be rejected, we adopt his conclusion that PANJ did not meet its burden of proof on its allegations concerning the reassignments. We therefore adopt the recommendation to dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002

H.E. NO. 2003-5

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

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and- Docket No. CO-H-2001-10

PROBATION ASSOCIATION OF NEW JERSEY,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the State of New Jersey Judiciary did not violate the New Jersey Employer-Employee Relations Act by transferring nine senior probation officers. The Hearing Examiner found that the Probation Association of New Jersey did not prove that the Judiciary's selection of a shop steward, union president and vice-president for transfer as part of the nine employees selected, was done in retaliation for their exercise of protected conduct. Relying on In re Bridgewater Tp., 95 N.J. 235 (1984), the Hearing Examiner did not analyze the Judiciary's proferred business justification for its actions since the Charging Party failed to first meet its burden of proving hostility.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2003-5

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

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and- Docket No. CO-H-2001-10

PROBATION ASSOCIATION OF NEW JERSEY,

Charging Party.

Appearances:

For the Respondent, David Samsom, Attorney General of New Jersey
(George N. Cohen, DAG, of counsel)

For the Charging Party, Fox and Fox, attorneys
(Daniel J. Zirrith, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 21, 2000, the Probation Association of New Jersey (PANJ) filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that the State of New Jersey Judiciary (Judiciary) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A.

34:13A-5.4a(1) and (3)[1/] in both the Mercer and Essex vicinages.[2/] In the Mercer Vicinage, PANJ alleged that on or about May 22, 2000, nine probation officers it represents were involuntarily transferred from one division to another within the vicinage, and it alleged that six of the nine employees were current or former union officials (including current PANJ Local 103 President Robert Murray and Vice President Kevin Farley) who were transferred due to the exercise of their protected activity. PANJ also alleged that the union officials were singled out for the transfer; the transfer caused extreme hardship on the affected individuals and Local 103; that neither Murray nor Farley was given sufficient time to pack and transfer union records; that the short notice for the transfer resulted in insufficient time to notify members of their officers new locations which was intended to disrupt union activities; and, that the transfers have created a hardship for the union officials.

PANJ alleged that in the Essex Vicinage, on or about June 5, 2000, Local 101 Vice President Garry Kaplan was involuntarily

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1/ These provisions 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."

2/ Vicinages are districts created by the judiciary throughout the state generally equating to counties.

transferred due to the exercise of his protected activity. PANJ further alleged that Kaplan's transfer was a hardship on Kaplan and the union; made it more difficult for members to contact and meet with him; and may have prevented him from attending grievance hearings.

Finally, PANJ alleged that the Judiciary's actions in both vicinages were retaliation for its officers engaging in protected activity and constituted coercion, interference and discrimination in violation of the Act. PANJ seeks an order rescinding the involuntary transfers, and directing payment of compensatory damages, legal fees and costs.

A Complaint and Notice of Hearing was issued on October 12, 2000. The Judiciary filed an Answer on January 25, 2001, denying that it violated the Act and asserting several defenses. A hearing was held on April 19 and 24, June 5 and 6, July 30 and 31, and August 6, 2001.3/ PANJ withdrew the allegations regarding the Essex Vicinage on July 31, 2001 (C-3).

Both parties filed post-hearing briefs by January 8, 2002, and reply briefs by February 5, 2002.

Based upon the entire record, I make the following:

3/ The transcripts will be referred to as 1T, 2T, 3T, 4T, 5T, 6T and 7T, respectively.

Findings of Fact

1. PANJ represents case-related professional employees employed by the Judiciary, including probation officers, senior probation officers, and master probation officers. Local 103 represents the Mercer Vicinage. Senior Probation Officers Robert Murray and Kevin Farley are president and vice president, respectively, of Local 103.

On or about May 16, 2000, nine senior probation officers received written notices from Angelina Bowers, Human Resources Manager, dated May 9, 2000 (J-1 and J-3 packages) notifying them they were being reassigned to a different division within the vicinage effective May 22, 2000 (1T55).[4/] The following chart lists the notified employees, their union position (if any) and the divisions they were in and reassigned to:

Employee	From	To
Robert Murray Local 103 President	Criminal Div.	Probation Services Div. Adult Probation
Kevin Farley Local 103 Vice President	Probation Div.-Adult	Criminal Division
John Soden Local 103 Shop Steward	Family Div.	Probation Div.-Adult
Vince Carnevale Former Vice President	Probation Div.-Adult	Family Division
John Hargrove	Criminal Div.	Family Division

4/ The Judiciary consistently referred to these personnel movements as "reassignments", but PANJ most often referred to them as "transfers". In this case, I find no material legal distinction between the terms.

John Hargrove Former Exec. Board Member	Criminal Div.	Family Division
John Goodman Former Exec. Board Member	Family Division	Criminal Division
Carol Finkelstein	Criminal Div.	Probation Div.- Adult
Kym Williams	Probation Div.- Adult	Family Division
Marilynne Baldwin	Family Division	Criminal Division (J-3.)

The Family Division and Probation Services Division/Adult Supervision are located in one building (175 So. Broad Street, Civil Courts Building), and the Criminal Division is located at 209 So. Broad Street, known as the Old Criminal Courthouse (3T146-3T147). Thus, the reassignments of Murray, Farley, Hargrove, Goodman, Finkelstein and Baldwin were to a different building. Soden, Carnevale and Williams remained in the same building.

The reassignments resulted in Murray and Farley being transferred to the other's previous division. Murray took certain priority union files with him, but he did not have room to move the union's filing cabinet to his new location, resulting in it being moved to Farley's new office (1T80, 1T136-1T137). Local 103 does not have its own office (1T135).

Some of the reassigned employees were pleased with their reassignments, some were unhappy, and some had no particular sentiment (1T143).

In addition to the May 2000 reassignments of the nine senior probation officers, Chief Probation Officer Michael Green had reassigned two clerical employees and two probation investigators

from the Probation Division in 1998 and 1999 (7T72-7T73, 7T100-7T101). Other employees in the vicinage (not represented by PANJ) were also reassigned before May 2000. At least one AFSCME official was reassigned (5T173).

Between September 18, 2000 and February 26, 2001, the Judiciary reassigned at least twelve employees, including one court services supervisor; two administrative specialists; three judiciary clerks; three investigators; and three senior probation officers-Sarah Lewin, Paul Martoni and Patricia Van Noy (R-3; 3T139-3T143). Some employees had requested their transfers but all those reassignments had been implemented to effect the vicinage's organizational goals (3T140, 3T143).

2. The Judiciary began a strategic planning process in 1995 to define its mission and goals. That process concluded with the issuance of the Strategic Planning Committee Report to the Supreme Court on March 31, 1998 (R-2). Goal Five of R-2 provided:

> DEVELOP AND IMPLEMENT A TRIAL COURT STRUCTURE DRIVEN BY THE PRINCIPLES OF TOTAL QUALITY MANAGEMENT, UTILIZING TEAMS TO ENHANCE ACCESS, PROVIDE TIMELY SERVICE, AND PROMOTE EFFECTIVE CASE MANAGEMENT.
>
> While there is a greater need for centralized governance in attempting to achieve judicial unification, the appropriate role of decentralization in the Judiciary's organizational structure nonetheless must be recognized. Because of New Jersey's tradition of local access to courts, the Judiciary has a vested interest in being able to delegate operating authority to vicinages and within each vicinage to empowered personnel, so long as all are in active pursuit of common goals and share

the same sense of purpose. Indeed, COE II[5/] recommended that the new unified judicial culture be characterized by "collaboration, participative management, and consistently outstanding judicial performance." COE II at 13. To this end, the Committee recommends the following strategic initiatives.

The Committee recommended the following strategic initiatives to help achieve Goal Five.

(A) The Judiciary should complete the development and implementation of integrated case management teams consistent with established divisional models.

(B) Senior and middle management should be organized so as to complement the team structure.

(C) The Judiciary should strengthen its commitment to provide technical and skill training as well as technical assistance during the development of a team and periodically thereafter.

The Strategic Report further noted:

COE II recommended that to achieve the goals of participative management, collaboration, and sharing of responsibilities, the Judiciary should "create high performance teams to increase efficiency, efficacy and commitment to quality service." COE II at 22. That recommendation reflected the experience of the private sector that companies effectively organized in teams demonstrate improved quality of service, reduced operating costs, faster response to technological changes, and increased staff commitment to superior performance. It also recognized that many of these same benefits are found within the Judiciary where teams have been implemented.

5/ COE II refers to the "Committee on Efficiency II" which was the Judiciary's committee charged with producing recommendations to reform the court system. COE II preceded the Strategic Planning Committee herein, and issued its own recommendations in May 1996 that are being referred to by the Strategic Planning Committee (R-2, p.4).

> While the New Jersey Judiciary has been a pioneer in the implementation of integrated work teams in case management, the concept has not yet been fully developed, in large part because of the separate vicinage cultures arising from a long history of local funding. Unification presents an opportunity for full implementation of the team concept as an organizing principle for the Judiciary's workforce.

Management leaders within the Judiciary considered "sharing of responsibilities" referred to in R-2 to include cross-training and reassignments and transfers in order to meet Goal 5 (3T131-3T132).

As a result of the completion of R-2, Human Resources Manager Bowers issued a memorandum to all judicial employees on June 9, 1998 (J-1 package), advising that team development might warrant reassignments, and asking anyone interested in a reassignment and/or transfer to notify her by June 30th.

That notice provides:

> As a result of the goals and objectives developed by Division Managers, several major organizational changes are anticipated in the coming months. The development of teams in some additional operating divisions may warrant some work reassignments.
>
> These anticipated changes may, however, be an opportunity for reassignment and/or transfer. Anyone interested in a lateral reassignment should notify me as soon as possible of their interest. Please copy your Division Manager on this request. Work assignments will be made in accordance with the overall needs of the organization, giving due consideration to employee requests and notification.
>
> Please submit your requests to me by JUNE 30, 1998. Requests for reassignment will be kept on file for one (1) year.

In late 1999 or early 2000, the Vicinage issued its "New Millennium" report (R-1), which listed organizational objectives and specific goals it hoped to implement in 2000. One of the key goals identified in R-1 was "Culture of Continuously Improving Quality Service and Process", which emphasized expanding and refining the training offered to staff at all levels of the organization.

On April 12, 2000, a notice (T2000-3) was posted providing for an opportunity for transfer/reassignment between divisions within the vicinage and asking those interested to notify Bowers.

In response to the posting, Bowers received several requests for reassignment/transfer. Jeffrey Filippo, Judiciary Clerk made such a request on January 7, 2000 (J-1); Senior Probation Officer John Soden requested a transfer to probation services-adult supervision on March 16 and April 13, 2000 (J-1) Soden's March 16 and April 13 transfer requests stated in pertinent parts:

> 3/16 - "It is my understanding that there will be a vacancy in the adult division in the near future. I believe it is going to be within the sex offender unit. I am taking this opportunity to formally apply for that position. . . .";
>
> 4/13 - "This is in response to the T2000-3 notice of transfer opportunity that was posted. I am formally expressing my interest in transferring to the Probation Services Division in the Adult Unit. Both opportunities peek my interest and I am anxious [to] learn more about them. . . .";

Senior Probation Officer Marilynne Baldwin requested a transfer to Probation Services Division on March 20 and April 14, 2000 (J-1). Baldwin's first request said:

> "This memorandum is to express my interest in a transfer to either the Probation Supervision or Child Support Division when an opportunity becomes available." Her second request asked to be reassigned to either of the positions noted in Bowers T2000-3 announcement.

Senior Probation Officer Robert Murray requested (through e-mail) on April 13, 2000, a transfer to the Probation Services Division.

Murray's written request stated:

> In response to your notice of a reassignment opportunity T2000-3, I am interested in applying for the openings in the Adult Supervision Division [Probation Services] that are described therein. After speaking with Mrs. Haggerty I am particularly interested in working with her on the specialized caseload there (Position #2). This does not represent a general request for transfer.
> (J-2 and CP-5).

Prior to May 2000, Murray had been assigned to the Criminal Division for approximately twelve years (1T38). On July 22, 1996, Murray had sent a memorandum to the then Criminal Division Manager asking for a transfer to the Probation Division. That request follows:

> It has come to my attention that there have been a number of openings recently in the Adult/Juvenile Probation Department. I would like to be considered for one of the positions available, or any position that may become vacant in the future.
> (J-1).

After receiving the new transfer requests by April 14, 2000, Bowers sent a memorandum dated April 20, 2000 (J-1 package) to Vicinage Chief Probation Officer, Michael Green listing the employees who expressed an interest in the reassignment opportunity. That memorandum provided in pertinent part:

RE: Reassignment Opportunity T2000-3

Attached please find copies of letters of interest regarding the above referenced reassignment opportunity. The interested individuals are as follows:

Benjamin Ons, Probation Officer CSE
Kelly Burness, Sr. P.O.
Peter Diaz, P.O.
John Soden, Sr. P.O.
Marilynne Baldwin, Sr. P.O.
Robert Murray, Sr. P.O. 6/

On May 9, 2000, Bowers issued memoranda to senior probation officers Murray, Farley, Baldwin, Goodman, Soden, Hargrove, Williams, Carnevale and Finkelstein notifying them of their reassignments to other divisions effective May 22, 2000 (J-1 and J-3).

3. Sometime in early 2000, the vicinage policy team--which included Mercer Vicinage Trial Court Administrator (TCA) Jude Del Preore--decided that in order to implement the team structure recommended in R-2, it needed to develop employee teams by cross-training employees to obtain experience in different divisions of the Judiciary (3T73, 3T101, 3T103).

Judiciary's management believed that its organizational effectiveness would be improved by cross-training because it would

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6/ Bowers sent a similar e-mail memorandum to Trial Court Administrator Jude Del Preore on May 16, 2000 listing just Soden, Baldwin and Murray which also said: "The following probation officers requested transfers in connection with the last posting regarding Notice of Reassignment Opportunities (T2000-3) dated April 12, 2000." (J-2 packet).

allow management to move or reassign employees, including probation officers, to other divisions as needed (3T104-3T107). Cross-training was also considered to be an asset for career progression within the Judiciary (3T70-3T73).

Del Preore testified that the transfer policy was intended to benefit both the individual employee and the organization by providing for career development and advancement, organizational awareness and development, and cross-training and work force diversification (5T118, 5T126-5T127, 5T145, 5T148). Del Preore defined organizational development as the ability to move employees around for career development and progression, and for promotions and advancements (5T145). He said it would enhance the organization by giving the Judiciary the option to redeploy its work force to address work load needs, to provide for career development and improve customer service; and would benefit employees by giving them promotional opportunities throughout the organization (5T118, 5T144-5T148). Federico and Green corroborated Del Preore's explanation of the policy (3T70-3T72, 3T96-3T103, 3T122-3T124; 7T21-7T24). I credit Del Preore's testimony.

In order to achieve one of the vincinages' strategic plan goals--specifically that employees holding all journeymen positions serve in different divisions--the policy team decided to transfer or reassign employees, including senior probation officers, because they are at the journeyman level (5T115-5T116, 5T118, 5T170). The policy team decided to transfer/reassign nine senior probation officers that spring (5T116).

Jude Del Preore explained the vicinage's policy reasons for transferring the senior probation officers and others:

> We . . . decided . . . for reasons of career advancement, development for organizational awareness and effectiveness for work force development, work force training and special technical and school training that we would target various groups within the organization that were at the journey[men] level . . . and begin to move some of those people around. So they would get greater knowledge of the organization for their own good as well as . . . the good of the organization. (5T117-5T118).
>
> [S]enior probation officers were targeted for this particular move because they're at the journey[men] level (5T118).

Del Preore further explained that vicinage strategy assumed that over time all journeymen positions would serve in different divisions (5T170).

Neither Murray nor Farley directly contradicted Del Preore's explanation of the Judiciary's transfer/reassignment policy or the need for the policy, but Murray considered the need for cross-training "nonsensical" and Farley considered it a "farce" (1T81, 2T66). Frank Middleton, a principal probation officer, however, confirmed that the Judiciary has policies and procedures regarding career progression and development (3T8).

I credit Del Preore's explanation of the Judiciary's organizational/career development policy, the need for the policy and the reason the title of senior probation officer was selected for transfer/reassignment. There was no contradictory evidence. While testifying Murray, Farley and Carnevale questioned the basis

for their own (and Soden's) selection for reassignment, they did not, however, provide specific evidence challenging the policy or its designation that senior probation officers be reassigned.

4. Robert Murray has been employed by the Judiciary for about 13 years, the first twelve in the Criminal Division, and the last year (after the reassignment) in Probation Services/Adult Supervision (1T38). Murray has been president of PANJ Local 103 for about three and one half years (1T39).

Both Murray and Local 103 Vice President, Kevin Farley, have been active union officers. They file grievances with and send e-mails to management representatives on behalf of unit members. When Murray has union-related business to discuss or has filed grievances, he usually tries to raise issues and resolve them through e-mail with the affected division manager, Federico (Family) or Eberhardt (Criminal), and/or TCA Del Preore (1T53-1T54).

Between December 1999 and May 2000, Murray sent approximately 40 e-mails to Judiciary management concerning evaluations, parking and dress code violations, employees working out of title, payments for individuals, and matters of nepotism and promotion (1T49-1T51; 1T107-1T129). The "evaluation" matter concerned the form used for evaluations. In late 1999 or early 2000, Dave Eberhardt, the Criminal Division Manager, and Murray's supervisor, decided to rewrite the evaluation form. Murray saw the new format and raised concerns. He discussed the matter with Eberhardt, who provided Murray with certain information used to write the new evaluation form (1T105-1T110).

Several parking issues arose which Murray sought to resolve, some before and some during the December 1999 through May 2000 period. Murray brought his concerns to Chuck McGarichz for the Judiciary and their conversations ended with resolution (1T111-1T113).

A dress code issue arose when an individual employee raised concerns with Murray. After their discussion the employee resolved the issue by discussing it with the supervisor (1T119).

A unit work issue arose when Dave Eberhardt expressed his intent to have senior probation officers work as team leaders in the Criminal Division. Murray discussed the matter with his immediate supervisor, Karen Delfino. He did not discuss it with Eberhardt, nor did he know if Delfino discussed it with Eberhardt. Murray was not required to do team leader work and did not know whether any probation officers did such work (1T120-1T123).

The payment issue concerned two employees who did not receive a full increment by year 2000. A grievance was filed by a representative other than Murray, and he had no further involvement in the matter (1T123-1T126).

Murray's reference to nepotism/promotions concerned two matters. First, Murray believed that Eberhardt promoted an employee (no name was given) because of a friendship they shared. No grievance was filed regarding that promotion (1T127-1T129). Second, Murray explained that he and Eberhardt were once friends but now they were not because of Murray's union activities (2T15-2T16).

While I credit Murray's testimony to the extent that he personally believed that he and Eberhardt were no longer friendly because of his (Murray's) union activity, I do not credit it as sufficient evidence that Eberhardt, in fact, disliked Murray because of his union activity, or that he promoted someone else based upon friendship.

In April 2000, Murray and Farley met with several employees from the Family Division, including Soden, Goodman and Baldwin, who raised concerns about out of title work and not being paid for "beeper duty" (1T73, 1T147-1T153). In response, Murray met with Family Division Manager, Alfred Federico on April 19, 2000, and discussed staff being scheduled to work the "front window". Murray and Federico did not resolve the matter, and Murray sent TCA Jude Del Preore a memorandum on April 25, 2000 (CP-7) sharply criticizing Federico and his management style.7/ Murray sent copies of CP-7 to Farley, Soden and Federico.

7/ Examples of Murray's criticism of Federico in CP-7 include the following:

> I met with Mr. Federico. . . . I fully expected a reasonable solution to this issue. This was not forthcoming in our discussion.
>
> . . .
>
> I am deeply disturbed by Mr. Federico's arrogant, cavalier attitude at taking the professional staff away from their duties and forcing them to work at the front desk so a team leader can have a meeting with all of his clerical staff at once. . . . He doesn't even argue that the meeting is important at all, he states that we should just call it

Footnote Continued on Next Page

As a follow-up to CP-7, Murray, on May 12, 2000, filed three grievances with Federico, alleging in part a "lack of respect and dignity for the professional employees in the Family Division" (1T44-1T45) (CP-7 attachments grievance nos. 515, 516, 550).

These grievances were the first ones Murray had filed in three years (1T46). At some undisclosed time, Federico told Murray that he would not deal with him on grievances, that he would deal only with shop steward Soden (3T85).

One of the grievances, No. 515, alleged that Federico's comment that employees could "work anything below you but nothing above you" harassed and intimidated the professional staff. Grievance No. 516 alleged that ordering probation officers to work the "front window" on May 11 changed terms and conditions of employment without negotiations. Grievance No. 550 alleged a

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7/ Footnote Continued From Previous Page

> cross-training. He follows with, wait until they're ordered to do court clerk duties and data entry. This arrogance of power is new to me, and certainly flies in the face of the team concept. . . .
>
> Another issue that has surfaced is the way in which Mr. Federico handled this. As I informed you before while talking to him on the phone he took no responsibility for this action and blamed the team leaders for this decision and schedule.
>
> One more issue that needs to be addressed and that is the consistent berating of the staff by the management I was told that the management constantly tells the staff that "you can work anything below you but nothing above you." I asked him [Federico] if this was said by him and he admitted to saying it in meetings.

contract violation because assigning employees to work the front window showed no regard for the respect and dignity of the professional employees. None of those grievances were resolved at the first step, and all were moved to the second step to Human Resource Manager Bowers on May 31, 2000, and presumably resolved at that level.

Murray did not file any grievances with Eberhardt, his own division manager prior to his selection for transfer (5T48), but testified that before and during the December 1999 through May 2000 period, family members and friends of supervisors were being promoted in the division. No grievances were filed regarding any such promotions (1T127-1T130). I cannot rely on that testimony; no names or information about relationships between the employees and Eberhardt or any other manager or supervisor was provided to support Murray's testimony. Without evidence, it is too self serving to be credited.

5. Kevin Farley has been employed by the Judiciary over thirteen years. When he first became a probation officer, he spent approximately one and one half years in the Criminal Division and then voluntarily transferred to Probation Services-Adult Supervision in 1990, where he remained until he was involuntarily transferred back to the Criminal Division in May 2000 (2T30-2T31). Farley has been vice-president of PANJ Local 103 for about three and a half years, and was a shop steward for the preceeding six years (2T32, 2T78).

Farley had told Michael Green, the Chief Probation Officer and manager of the Probation services division, that he did not enjoy doing criminal case management work, that he did his best work in adult supervision, and that he was not a proficient typist (2T66, 2T75). I credit that testimony.

In early 2001, Farley interviewed for a senior probation officer position in the Drug Court, part of the adult criminal division (4T92-4T93). He was interviewed for the position by Arlene Johnson, the master probation officer who oversees much of the Drug Court operation, and by Principal Probation Officer William Benjamin (4T85-4T92, 7T83), the supervisor of the Drug Court operation (4T97).[8/] They also interviewed Michael Stellwag (4T97, 7T83).

Johnson preferred Farley for the position and recommended him to Benjamin, but Benjamin disagreed (4T97) and Johnson never personally made a recommendation to Green (4T96, 7T83-7T84). Benjamin made one "joint" recommendation to Green, recommending Stellwag for the position (7T83). Green appointed Stellwag to the position.

In its post hearing brief, the Charging Party argued that Green was not a reliable witness at least in part because he denied talking to Johnson about Farley. That argument is misleading and unpersuasive. Johnson had admitted she did not personally give

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8/ The hierachy of probation officer titles began with Chief Probation Officer, then Principal Probation Officer, Master Probation Officer, Senior Probation Officer, and finally Probation Officer.

Green a recommendation for Farley (4T96). She said she had had a conversation with Green prior to the interview process where she voiced support for Farley. At the hearing, however, Green was being questioned about the drug court position Farley had applied for. When Green was asked if he had a conversation with Johnson concerning Farley, he said, two interviewers recommended Stellwag (7T52-7T53). Green was asked again if he had any communication with them (Johnson and Benjamin) about Farley at all and he said "No, I took their recommendation and submitted that" (7T53). I find Green's response an accurate answer to the question in the context of Johnson and Benjamin's interview of Farley for the drug court position. Green, I believe, did not think the question pertained to discussions outside the context of the formal interview and recommendation. Consequently, while I accept Johnson's testimony about talking to Green about Farley before the interview process began, I do not find Green's testimony that he did not speak to Johnson and Benjamin about Farley to be inaccurate in context, and I consider him a reliable witness.

Farley has been the primary union officer to deal with union matters in the Adult Supervision section of Probation Services (1T53; 1T68). His union activity significantly increased between December 1999 and May 2000 (2T36-2T37). He filed nine grievances between December 21 and 22, 1999 (CP-4) (grievance nos. 529, 530, 536, 537, 538, 539, 540, 541, 542) some of which concerned evaluations and the evaluation process (2T39-2T40). All nine

grievances concerned events in Farley's division at that time and were filed with Michael Green, Chief Probation Officer who was also the division manager for Probation Services (7T6-7T7). Farley and Green discussed all nine grievances on January 7, 2000, resolving most of them (2T82-2T83). Farley filed three more grievances between early February and early May 2000 (grievance nos. 543, 544 and 545) (CP-4).

Consistent with his usual practice, Farley had attempted to informally resolve with Green the issues underpinning the grievances before the filing dates in late December (2T42). Farley and Green informally resolved most grievances between them (7T50). The issue in two of the December 1999 grievances concerned the applicable standards for the evaluations, and Farley's own evaluation was also at issue. The Judiciary's position regarding contested evaluations is that employees first meet with their immediate supervisor (2T88). Farley did that to a point. He spoke to his immediate supervisor, Glen Buzzi, and asked for the criteria/standards for the evaluation, particularly the career path portion, but Buzzi did not know where that particular portion originated. Farley then told Buzzi he had to talk to Green about that issue (the career path portion of the evaluation). Buzzi apparently continued to press Farley to meet with him over the matter, but Farley resisted and insisted on speaking to Green (2T42, 2T87-2T91)

Farley soon met with Green regarding the evaluation issues. Green said to Farley: "This might affect your money."

Green was referring to Farley's failure to meet with Buzzi about his own evaluation, delaying it, Green thought, might delay Farley from receiving an extra thousand dollars he was otherwise likely to receive (2T92-2T93). This matter was resolved after Farley met with Buzzi. Based on these facts I do not infer a threat, but find Green's remark a statement of fact based on Farley's failure to meet with Buzzi.

At another point in their discussion, Farley posed a question to Green: "The next time we meet . . . am I going to need a union rep?", to which Green replied: "You might" or "maybe" (2T43, 2T95). Asked later if Green had made statements leading him (Farley) to believe he may be disciplined, Farley responded it was Green's "tone" (2T125-2T126). When asked if that response meant there were no specific statements, Farley again answered it was the tone; "I don't recall statements" (2T126). Although I find that Green made the remark and that it may have been intimidating to Farley, I cannot rely on Farley's testimony of Green's "tone" (which I did not hear, nor was it replicated on the record) or Farley's "belief" to conclude that Green's response that Farley might need his union representative suggested that Farley would be disciplined. Farley's testimony is not evidence. It is his own inference of his discussions with Green. Green denied making any threat of discipline and I credit that testimony (7T78). Farley and Green were unable to fully resolve the evaluation issues, which resulted in the filing of the December grievances (2T46). Several of the individual grievances were later resolved.

Grievance No. 529 alleged the Judiciary did not give the union "input" in the creation of the new evaluation forms, and failed to provide it more information about how employees would be evaluated. Farley did not know if there had been a final disposition of that grievance, but the parties agreed to continue their dialogue (CP-4; 2T83, 2T85-2T86; 7T76).

Grievance No. 530 alleged that Green's remark to Farley about not getting the extra $1,000 for failing to discuss his evaluation with Buzzi was a threat. That grievance was resolved when Farley met with Buzzi before January 7, 2000 and received his extra $1,000 (CP-4; 2T86-2T93).

Grievance No. 536 refers to the comment Green made to Farley that he might need a union representative the next time they met. Farley considered it a threat, but he neither pursued it to step 2 nor withdrew it, rather, it "disappeared" (CP-4; 2T94-2T96; 7T78). Since Farley admitted he did not recall any statements by Green suggesting discipline I consider his belief that Green's "tone" posed a threat an overexaggeration of their discussion that makes me doubt Farley's reliability as a witness. I infer from Farley's failure to pursue this grievance that there was little substance in his allegation.

Grievance No. 537 is basically a combination of grievance nos. 530 and 536 with no formal disposition (2T97).

Grievance No. 538 alleged the Judiciary failed to provide proper keyboard training. The grievance did not go to the second

level; the Judiciary offered a self-taught typing class called "Beacon" (CP-4; 2T98; 7T74-7T75).

Grievance No. 539 alleged that supervisor Glen Buzzi had established an unreasonable deadline to complete certain work. Farley sought to have the deadline extended. The grievance was resolved at the first step by Green; the deadline was extended, and the Judiciary offered overtime to employees who wanted to "catch up." Farley thought it was a fair resolution (CP-4; 2T99-2T100).

Grievances 538 and 539 concerned the lack of sufficient training in using the new CAPS computer program (2T44-2T45).

Grievance No. 540 alleged that the Judiciary failed to provide enough and/or proper training to probation officers using the CAPS computer system. Farley sought additional training for unit members. Although no additional training was provided, the grievance did not proceed beyond step 1. The probation officers just did the work (CP-4; 2T100-2T101).

Grievance No. 541 alleged that evaluators' personalities and their arbitrary and subjective behavior affected their interpretations of the standards and criteria used for evaluations. Farley sought retraining, and new standards and criteria for evaluators. The result of the grievance was an agreement for ongoing discussions on the topic (CP-4; 2T102-2T103).

Grievance No. 542 alleged that the 1999 evaluation for employee Lenore Toth be regraded for work performed in the juvenile section of probation services. At step #1, Green, on February 26,

2000, granted the grievant's request to remove certain information from the 1999 evaluation but rejected a request to change the overall rating. The grievance was not taken to step 2 (CP-4; 2T103-2T105). Farley did not know of Green's step one decision until May 30, 2000 (2T105).

On February 1, 2000, Grievance No. 543 was filed by Farley on behalf of three employees alleging that job positions were not properly posted in the building to which they were assigned, depriving them of adequate notice of a position in adult supervision. Farley wanted to have the positions reposted and employees reinterviewed. Green denied and signed the grievance on February 26, 2000 claiming the jobs were posted. Farley did not receive the decision until May 30, 2000, and did not file for step two (CP-4; 2T48-2T49, 2T105-2T106).

Grievance No. 544 was filed by Farley on February 2, 2000 alleging that the Judiciary misled the employees about the existence of promotional positions in probation services. The Judiciary had apparently posted a notice to fill one or two supervising probation officer position(s). Because the Judiciary used a general posting, most eligible employees incorrectly assumed that the position(s) would be in the Juvenile Section of probation services. Employees became angry when the individual selected for the position was placed in the Adult Section of probation services. Farley set up a meeting with Green over the matter. Farley sought as a remedy: "re-post and interview for the position." Green denied and signed

the grievance on February 26, 2000, claiming a position announcement had been posted. Farley did not receive the decision until May 30, 2000. Farley said this was one of the "hottest, most volatile grievances" but he did not pursue it to step two because he thought the parties had agreed to continue discussions on the topic (CP-4; 2T49-2T51, 2T106; 2T121).

Grievance No. 545 was filed by Farley and submitted to Green on May 5, 2000 as a request for information. An employee had been questioned about telephone calls she had made and Farley requested the telephone bills from Cindy Van Eck to verify if the employee's use of the telephone was improper. When Van Eck did not respond, Farley filed the grievance. Green did not conduct a step one hearing as the contract required. Instead, he sent Farley a memorandum on May 12, 2000 (CP-4 package with Grievance #545), explaining that he denied the grievance and the request for telephone bills because of a policy protecting confidentiality. Thus, the grievance was moved to step two before TCA Jude Del Preore who sustained it in part and denied part on June 5, 2000 (CP-4; 2T47-2T48; 2T50-2T51; 2T107; 7T64-7T67). On examination by Charging Party's counsel, Green conceeded that the contract requires, and it was his practice, to conduct a step one hearing, but that he did not do that in this grievance because "telephone bills attached to individuals within the Division just can't be turned over" (7T67-7T68). I credit that testimony. After reviewing the TCA's disposition of the grievance Green understood that regardless of his

reasons for denying a grievance he needs to conduct step one hearings (7T96).

During the time Farley was filing the above grievances he characterized his conversations with Green as "heated", and that the Local's relationship with the Judiciary was "volatile" (2T71-2T72). Green said he and Farley had a "working relationship"; that they have both agreed and disagreed on issues; they argued and raised their voices, but did not consider those discussions to be emotional or hostile (7T6, 7T42, 7T48-7T49). He knew there had been occasions where he and Farley had raised their voices but he said that was not inappropriate conduct by either of them, nor did it adversely affect his view of Farley's grievances (7T80-7T82).

I give equal weight to Farley's characterization that his discussions with Green over the grievances were "heated" and Green's description that they disagreed, argued and raised their voices. Discussions resulting in argument and raised voices can reasonably be characterized as "heated". While I am not convinced that the heated discussions and Farley's description of the relationship between the union and management at that time made it a "volatile" relationship, I do find that Farley was an aggressive employee advocate who did not hesitate engaging Green.

I credit Green's testimony that he did not consider it inappropriate for Farley to raise his voice and that such conduct did not adversely affect his (Green's) view of the grievances. I also credit Green's description of the union's filing of grievances

as "part of doing business" (7T79), and that his discussions with Farley were not hostile. The record shows that Farley and Green together resolved most of the grievances, and those not resolved with Green moved to the next level apparently without any impediment from Green. I also find that the number of grievances resolved by the two tends to corroborate Green's characterization of the relationship as "business-like".

Between March 14 and May 15, 2000, Farley sent approximately 14 e-mail messages, most of them to Green, raising a variety of work related issues (CP-2, 2T55-2T57). He sent e-mails to Green on 3/15, 3/28, 4/26, 5/1, 5/2, 5/4, 5/12 and 5/15, sometimes two on one day. Some of the e-mails were critical of Green and other administrators. The e-mails of 4/26, 5/1 and 5/12 were particularly pointed. They follow:

4/26 Mike, Buzzi just asked me about cases for the c.e.p. court. I reminded him the balances were not accurate on caps yet. He made a typical Buzzi response they still have to get done. He also made reference to that this would affect my evaluation. I have remind [sic] you several occasions that the failures of the administration including caps is not the responsibility of the front line officers. We should not and will not tolerate threats such as this. Provide us with the proper resources and than we will attempt to do this overwhelming under-compensated job.

5/1 Mike, I have just received your memo on 4/28/00. Your accusation of a defamation of character by my truthful representation of the facts can be seen as you are trying to intimidate a union official from addressing the truth. It is the administration that is once again creating a hostile work environment. Remember these individuals will be performing the evaluations on the front-line officers. You may want to deny

it, but the past history and personalities of individuals do affect interpretations and decisions. I will remind you that any type of threat or form of intimidation against a union member especially an official for doing their job is a clear case of an unfair labor practice. I stand by my statements, and am willing to provide any testimony necessary to back them.

5/1 Mike, after reviewing your memo and my e-mails with some of my advisors several issues need to be clarified. First and foremost, as I stated before my observations were based on facts. I am more than willing to provide testimony on such. Second, one could interpret the tone of your memo and the accusations as an attempt to limit an open dialogue with LABOR. Was this your intent?

5/12 Mike, I cc you the attached memo on 5/9/00. Glen has started doing my case reviews which has put him in a awkward position. You have failed to abide by the agreement on 1/7/00 for grievances #0520 and #0541. It seems that the administration is once again going back on its word. Needless to say actions such as this will generate more grievances and bad blood between LABOR and management.

Farley's first memo of May 1 refers to a memo by Green of 4/28/00. That memo was not presented, consequently, Farley's response that Green's remarks were an attempt to intimidate the union is his (Farley's) own inference, but not evidence of whatever Green might have written. Similarly, Farley's second May 1 memo refers to Green's "tone" as an attempt to limit dialogue with the union. I cannot rely on Farley's inference of Green's tone, thus, I do not consider the e-mail to be evidence that Green sought to limit union dialogue.

Farley also testified that he has had "heated discussions" with Del Preore and others over a period of time regarding

union/management issues (2T72-2T73, 2T114). He defined "heated discussions" as:

> taking a strong position on behalf of the union, and they . . . taking a strong position on behalf of the Administration (2T114-2T115).

Del Preore agreed with Farley's definition. He testified that it was customary for him to have "round table" discussions with the various bargaining groups, which was an opportunity to sit across the table from one another and air issues of common interest, and that these discussions often included heated exchanges and emotional conversations with Farley and Murray (5T135-5T136, 5T167, 5T168).

But Del Preore also testified that he had not had heated conversations with Farley or Murray prior to the reassignments, and he did not deem it appropriate to treat Farley or Murray differently because of these conversations (5T168-5T169). I credit Del Preore's testimony. There is no contradictory evidence.

Farley testified that when he first met Del Preore several years ago, Del Preore said "I do not like grievances, we should work together" (2T52). When asked on cross-examination whether he liked grievances, Farley responded "No, I do not. They are a last resort" (2T111). Del Preore testified that he considered grievances to be part of labor-management communications; that he had never sought to deter anyone from filing grievances; and that he has never known Farley to be reluctant to file grievances (5T135, 5T172). I credit both Farley and Del Preore to mean that both of them preferred

resolving problems rather than dealing with them as grievances, but that Del Preore considered grievances a normal occurrence in labor-management relations and he did not deter Farley or anyone else from filing grievances.

6. John Soden had been a Local 103 shop steward in the Family Division for just four or five months when he was reassigned to the Probation Division in May 2000 (1T73). There had been no steward in Family before Soden assumed that responsibility and there was no steward in Family after he was transferred (3T84). Murray considered Soden one of the top three union point men in the unit (after Murray and Farley) (2T68). About one month before the transfers, a meeting was held in the Family Division regarding problems in that division. Three of the four people attending the meeting, including Soden, were subsequently transferred (1T73). No other evidence was produced regarding Soden's level of union activity preceeding the May 2000 transfers or whether he was instrumental in pursuing specific grievances. At the time of the hearings, Soden was apparently not employed in the vicinage (2T113, 6T38).

John Hargrove and John Goodman were both union executive board members in the early 1990's (1T168). No evidence was produced, however, regarding their level of union activity preceeding the reassignments in May 2000.

Vince Carnevale has been employed by the vicinage for 16 or 17 years (6T4). He was a union president and vice president in the

late 1980's (6T31) and was engaged in lobbying activities on behalf of the union in 1994-1995, leading to the unification of the state/county court system (2T69-2T70, 6T6). Prior to the reassignments in May 2000, Carnevale worked in the Probation Division/Adult Supervision for two years. That division was managed by Chief Probation Officer Michael Green (6T5). Carnevale was more active than other employees on behalf of Local 103 while employed in the Probation Division and Green was aware of his activities, particularly his coordination of local elections for officers (6T5-6T8).

At some point during his two years in Adult Supervision, Carnevale brought to Green's attention that an opening for a supervisory probation officer in the Juvenile section was unfairly filled by a more junior officer. Carnevale encouraged the union to file a grievance regarding that matter (seeking a reposting of the position) but the grievance was not successful. Carnevale himself, had not been interested in the position (6T9-6T12).

During his career with the vicinage Carnevale was unaware of any probation officer being involuntarily reassigned (6T9, 6T34), but since May 2000 other probation officers have been involuntarily reassigned (6T35). When he heard--in May 2000--of Farley being involuntarily transferred from Adult Supervision to the Criminal Division, he questioned Chief Green about the reasons for the move. Green told him there would be many changes in the divisions including that he--Carnevale--was being transferred too, from

Probation to the Family Division (6T9, 6T16, 6T26-6T27). Family Division Manager Federico told Carnevale that the focus of the reassignments was to cross-train officers with other duties (6T23). Carnevale was transferred to the Family Division at least in part because of his history of working with juveniles (3T93). Carnevale had never heard any statements or read any documents that specifically provided or led him to believe that Chief Green did not want to conduct business with Kevin Farley (6T21-6T22).

No evidence shows that senior probation officers Finkelstein, Williams and Baldwin were engaged in protected activity other than their mere union membership. Sometime after her transfer to the Family Division, Senior Probation Officer Kim Williams resigned her job at least in part because she would not have the opportunity to take summer furloughs in the Family Division (3T91-3T92, 6T45). Approximately one year after her transfer to the Criminal Division, Senior Probation Officer Marilynne Baldwin was promoted to a master probation officer (6T37-6T38, 6T42).

7. On March 28, 2000, a regular monthly division managers meeting was held and attended by Del Preore, Bowers, Federico, Eberhardt and others. Green was absent. A discussion was held regarding how employees would be notified of a reassignment, but no particular job title was discussed (5T19). Paragraph 7 of the minutes of that meeting (CP-8) reflect the discussions held at that time:

> We conducted a discussion to try to refine our internal procedure where individuals are

> transferred between units/divisions. Angie will coordinate the transfer. Individual Division Managers will receive a confidential memo from Angie. Division Manager will meet face-to-face with employee receiving transfer and notify them of the transfer and time frame. A copy of the memo will go to General Operations so they can make the necessary security changes.

The procedure for selecting which senior probation officers would be reassigned began soon thereafter. Since the vicinage policy team already decided to redeploy nine senior probation officers, Del Preore charged Bowers with the responsibility of developing recommendations to achieve that vicinage goal (5T118). He did not, however, suggest or provide criteria for selecting senior probation officers for transfer (5T122).

Eberhardt had the best recollection of how the senior probation officers were chosen. A meeting was held by mid-April 2000 with Del Preore, Federico, Bowers, Green, Eberhardt and Joe Davison, Eberhardt's assistant (5T12). Del Preore told the group that nine senior probation officers were being reassigned, and that past reassignments including court clerks, judicial team secretaries and investigators. He explained his position about more people becoming involved in the organization, and asked for the names of nine senior probation officers, suggesting they (the team members) keep the information confidential. Del Preore then left the room (5T10-5T12, 5T14, 7T30). He was unaware which senior probation officers had requested transfers in the past (5T129); and he did not select the people who were ultimately reassigned (5T193). The other team members remained in the room after Del Preore left, discussing

a time period to develop their selections and they agreed to meet in a couple of weeks (5T11, 7T30).

A second meeting was held with Bowers, Eberhardt, Federico and Green by late April at which time the division managers each gave Bowers the names of three senior probation officers they were recommending for reassignment from their respective divisions. Del Preore did not attend the meeting. There was no discussion at that time about how or why specific employees were selected for reassignment, but team members discussed the "best fit" i.e., the division to which employees should be reassigned (5T38-5T39, 5T44-5T45, 7T29). Bowers took those recommendations to Del Preore, who, along with the assignment judge, approved them (4T29, 5T44, 5T118).

Green corroborated Eberhardt's explanation that there were two meetings leading to the reassignments (7T28-7T30), but he could not recall whether they discussed specific dates to provide the notice (7T57-7T58). Federico only recalled one meeting; Bowers was confused about the meetings (4T17-4T32), and both were uncertain about discussions regarding which divisions the selected employees would be assigned (3T121-3T128). Del Preore testified he did not attend meetings with the division managers in advance of the dissemination of the transfer list (5T115), and that between the time he charged Bowers with getting the list and the time he approved the list he could not recall having any discussions with the division managers (5T120).

I credit Eberhardt's explanation of the two meetings that led to the development of the reassignment list. His testimony was the most direct and self-assured on this point. Green could not recall all events of the meetings; Bowers was the most confused witness about the meetings; Federico's testimony regarding the "one" meeting concerned the late April meeting where division managers presented their lists of selected senior probation officers and discussed where to place those selected officers (3T89-3T90, 3T121-3T125); and Del Preore acknowledged he could not completely recall (5T120). By crediting Eberhardt on this point I do not imply, nor infer that Green, Bowers, Federico and Del Preore are not-credible witnesses. I only find that Eberhardt's thorough explanation on this point was more reliable than the other witnesses.

8. The division managers selected the nine senior probation officers for transfer for different reasons. Alfred Federico, Family Division Manager, said his selection criteria included years of experience, benefit to the vicinage and requests for transfer (3T68-3T70, 3T78). He selected Marilynne Baldwin, John Soden and John Goodman for reassignment (3T69). All three had attended the April 2000 meeting that Murray and Farley had had with Federico leading to CP-7 (1T73). But he selected Baldwin and Soden because they both had previously requested a transfer from the Family Division (J-1, Finding of Fact No. 2) (3T69-3T70, 3T79, 3T125-3T126), and selected Goodman based upon his experience, years of service and report writing ability (3T79, 3T112), but he could

not say that Goodman had seniority over the other senior probation officers in his division (3T111-3T112).

Federico explained that Soden and Baldwin made both written and oral requests for transfer from his (Federico's) division, that it was his policy to discuss such requests with his employees and do what he could to fulfill the requests. According to Federico, Soden "made it known that he did not want to remain in Family" (3T87), he did not like Family and wanted to be transferred (3T82), and Federico believed he was transferring (and not reassigning) both employees as a favor to them to satisfy their requests (3T69-3T70, 3T84-3T87, 3T125-3T126).

Soden and Baldwin's written requests for transfer (J-1) were filed in March and April of 2000, just weeks before the transfer decision was made and implemented in May of that year. They both sought transfers to the Probation Services Division, Soden to the adult supervision section, Baldwin to child support. Soden's request was granted, Baldwin's was not; she was transferred to the Criminal Division.

I credit Federico's explanation for selecting Soden, Baldwin and Goodman for transfer/reassignment. Federico said he had a good working relationship with Soden but that Soden just didn't want to be in Family (3T85). I found Federico to be a reliable witness on the selection issue; neither Soden nor Baldwin testified at this hearing, consequently, neither they nor any witness

contradicted Federico on what Soden preferred.9/ Soden was transferred to the division he requested and remained in the same building. Baldwin's transfer led to a promotion.

9. David Eberhardt, Criminal Division Manager, selected Murray, Hargrove and Finkelstein for reassignment because they were the three most senior senior probation officers in his division (5T20-5T22). When asked if there was a reason he used that criteria (meaning seniority), Eberhardt said: "I was just figuring the easiest way to do it just go one, two, three. And one, two, whatever, just go down--right down the order of my employees." (5T22-5T23). A deciding factor in Eberhardt's selection was his desire to enhance the career progression and development of his most senior probation officers-to give them the motivation to progress to the next level. He noted that they could not get a master probation officer title in his division at that time (5T28-5T30).

Eberhardt also believed that his transfer selections would make the vicinage more organizationally effective. He noted that Murray had been seeking a transfer to probation services/adult supervision for some time, and as recently as April 2000 (J-1); and that both Finkelstein and Hargrove had been doing "PSI" reports since the late 1980's and both could benefit by expanding beyond criminal case management, and that Finkelstein was a detailed and

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9/ In fact, Farley testified that Soden told him that Federico told Soden that he (Federico) had transferred individuals who had requested transfers in the past (2T63). I credit that testimony.

compassionate investigator who could be an asset in other divisions (5T37, 5T71). In selecting Murray for transfer, and recommending that he go to adult supervision (5T38), Eberhardt did not consider the last sentence of Murray's April 2000 transfer request in which he (Murray) indicated it was not meant to represent a general request for transfer (5T60-5T61). There were no grievances filed or pending regarding Eberhardt's division at the time he selected Murray for transfer (5T48).

Eberhardt thought the job opportunities created by the transfers were fair, but those selected should have been given more time to move their possessions (5T107). I credit Eberhardt's testimony, particularly his explanation about why he chose Murray, Hargrove and Finkelstein. I found his "easiest way to do it" "right down the order of my employees" remark particularly persuasive because it represented a quick, logical, and honest explanation to make a tough selection. There was no direct contradictory evidence, and I found Eberhardt a well-informed, consistent and reliable witness. Murray testified the transfers/reassignments were done in secret, his own immediate supervisor, Karen Delfino, had not been informed of the pending change, from which he inferred that the reassignments were suspicious (1T81-1T82).

While I credit Murray that Delfino did not know about the transfers and that he (Murray) believed they were done in secret, I do not infer any improper motive. The Charging Party did not offer evidence that Murray, Hargrove and Finkelstein were not the most

senior probation officers in the Criminal Division. In fact, Kevin Farley testified that Eberhardt personally told him (Farley) he (Eberhardt) "took his top three veteran officers" (2T62). I credit Farley's testimony.

10. Michael Green, the Chief Probation Officer and Manager of the Probation Services Division testified that he selected Farley, Carnevale and Williams for reassignment based upon general organizational need, their knowledge, skill, ability and experience (7T10). Green selected those employees from among approximately ten senior probation officers in his division (7T12-7T13). He said he chose Farley in particular because of his strong knowledge of the vicinage computer programs, PROMIS-GAVEL, and CAP, but primarily PROMIS-GAVEL (7T11-7T12). He thought Farley would go to the Criminal Division (7T14). But Green knew nothing about Farley's typing/keyboard skills (7T11), and conceded that Farley may not have been "the most" proficient user of the computer programs; he (Green) said he selected him (Farley) because of ". . . his organizational skills, knowledge of the system, both in the Criminal and the Probationary, particularly with PTI [Pre-Trial Intervention]. . ." (7T13), taken together with his computer skills, his abilities made him a good candidate for reassignment (7T16, 7T18). Green also said he selected Farley in part to meet the vicinages' goals for cross-training and improving service, but career development was not a primary factor in his selection (7T21-7T22, 7T97). I credit Green's testimony. I found him to be a cooperative and trustworthy witness.

Carnevale and Williams generally were selected for reassignment for similar reasons (7T10), and Green recommended they go to the Family Division (7T33-7T34), but no specific testimony was elicited from Green regarding his selection of Carnevale and Williams.

Farley thought Green's selection of him for reassignment was "union bashing" and done in reaction to his exercise of union activity (2T59, 2T65, 2T77). He based that conclusion on his (Farley's) increase in union activity prior to May 2000 (2T65) and that he was the loudest PANJ voice in Local 103 (2T77). Farley further explained that he had not requested a transfer out of Probation Services (2T33); he had had heated discussions with Green and other management representatives over grievances (2T71-2T74); some of the e-mails he sent to Green were caustic (CP-2); and he claimed the reassignment adversely affected his ability to carry out his duties as a union officer(2T74). He also said he wasn't any more proficient in the use of the "PROMIS GAVEL" computer program than anyone else, and that he used the "CAPS" computer program in Probation Services but not in the Criminal Division (7T106-7T108).

I credit most of Farley's testimony. I believe he thought Green's selection of him was in reaction to his protected activity, that he and Green had heated discussions over grievances, as I found in Finding No. 4 earlier, that the reassignment had some impact on his ability to perform his union duties, and, that he was not the most proficient user of PROMIS-GAVEL. Green's explanation for

selecting Farley however, is more convincing than Farley's inferences of Green's "tone" and alleged remarks.

11. After division managers Green, Federico and Eberhardt revealed the names of the three senior probation officers they recommended to Bowers for transfer at the late April meeting, they discussed the divisions to which those senior probation officers should be transferred (3T89-3T90, 3T128; 4T28, 5T38, 5T40-5T41, 5T51, 7T31-7T34). Federico did not make specific recommendations on placements in other divisions (3T127). He did not recall who Eberhardt selected for transfer, nor did he remember Farley's or Murray's names being recommended for transfer (3T79-3T80). But Eberhardt recommended Murray to Probation Services (5T38); and Green recommended Farley to the Criminal Division (5T45, 7T14), and Carnevale and Williams to the Family Division (7T33). Carnevale was recommended for Family Division because of his prior work with juveniles (3T93). Eberhardt did not recall any discussion about reassigning senior probation officers for cross-training purposes, but did recall reference to organizational effectiveness (5T35-5T36). There was no discussion at that meeting about Murray's or Farley's union activity (5T48).

Bowers took the name and placement recommendations to Del Preore for approval and Del Preore informed her of the final assignments for the nine transferred senior probation officers (4T29, 7T71). She had the written notices prepared (J-1 and J-3) and gave them to the respective division managers who informed the

affected people of their reassignments on May 16, 2000 (3T130, 2T59, 7T85). Murray said Eberhardt told him at that time he (Murray): ". . .was to be reassigned and that this was cross-training and this is what you wanted anyway" (1T56). I credit that testimony.

Green called Farley to his office after learning of Murray's transfer and he suspected the same fate for himself (2T58-2T59).

After Green gave Farley his transfer notice, Farley asked where it came from. Farley testified that Green said "changes are being made", and he asked Green what criteria was used and then told Green ". . .this in my opinion it was a form of union bashing and I was being attacked for my union work and not through performance as a PO". Farley then testified that Green "flatly denied that". Farley further testified:

> He [referring to Green] kept making statements that it is affecting others, it is coming from above (2T59).

While I credit Farley that he and Green had a conversation at the time Green notified Farley of his reassignment, I find Farley tends to exaggerate the content of discussions. Thus, I cannot be certain of the accuracy of his recollection of the discussion with Green. Nevertheless, I credit Farley that he told Green he thought he was being attacked because of his union activity and that Green flatly denied it. However, I do not credit his testimony that Green made the "coming from above" remark. I believe that is Farley's choice of words, not Green's. But even if such a statement were

made, I find it does not suggest that Green was saying that the decision to select Farley came from above. I interpret that remark to mean that it was the decision to transfer senior probation officers that "came from above" and the alleged remark from Green is consistent with that fact.

Farley testified he then suggested he and Green go out for coffee so Green could tell him "the real deal", but Green refused, after which he (Farley) left Green's office (2T60). I credit Farley's testimony, but draw no particular inference from those facts.

Later that same day Farley spoke to Glen Buzzi, his immediate supervisor, about the transfer. Buzzi had not been aware of or involved in selecting Farley for transfer, and he did not support Farley's transfer and explained his reasons to Green (4T56-4T57). Farley testified that after May 16, 2000 Buzzi remarked to him: "I told you to calm down with the e-mails and the union stuff, something is going to happen" (2T61-2T62).

Buzzi denied making any such remark (4T58-4T59). In fact, he tried to dissuade Farley from thinking that his selection for transfer was related to his union activity (4T58). I credit Buzzi's testimony. He is on record for opposing Farley's transfer, he supported Farley's work in Adult Supervision, all of which gives greater weight to his testimony.

12. Murray's transfer disrupted his ability to communicate with unit members for at least a few days. His storage cabinet

could not be moved to his new office; it remained in his prior office building and was eventually moved to Farley's office (1T71, 1T137). Unit members could not immediately contact Murray because he had no phone or e-mail for at least a few days (1T78-1T79). No PANJ picnic was held that year (2T26). Farley considered Murray more able to deal with union issues arising from criminal case management (2T76). The move affected Farley by limiting his availability to those employees in Probation Services who came to him regarding union matters, and it put a great demand on his limited typing skills (2T74-2T75). Farley went from the Probation Services Division which had the most promotional opportunities for him to the Criminal Division which had none (7T24-7T25).

ANALYSIS

The primary issue in this case is why were Murray, Farley and Soden selected for reassignment to different divisions? If even one of them was reassigned because of his exercise of protected conduct, the Judiciary would have violated 5.4a(3) of the Act by discriminating against him because of the exercise of that conduct. A secondary issue is whether the Judiciary implemented the reassignment program to discriminate against Local 103 and/or the above named union officials.

The standard for deciding a(3) allegations was established by the New Jersey Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held: "no violation will be found

unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity." Id. at 246.

If the employer did not present 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 the hearing examiner, and then the Commission to resolve.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the

credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

The Reassignment/Transfer Program

The record conclusively shows that the Judiciary implemented the reassignment/transfer program, and particularly chose to reassign senior probation officers, for legitimate business reasons devoid of hostility or discriminatory motives towards Local 103.

Beginning in 1995, the Judiciary engaged in a strategic planning process that culminated in a 1998 report (R-2) which recommended, in part, the use of employee teams to promote efficient and effective case management. Judiciary employees were notified by memorandum of June 9, 1998, that team development might result in reassignments.

In order to implement the team concept, the vicinage policy team decided to cross-train employees in the different vicinage divisions to enhance individual career development as well as organizational development. It was decided that all employees holding journeymen positions--which included senior probation officers--would eventually be transferred and cross-trained.

The Judiciary's decision to transfer/reassign senior probation officers was consistent with its strategic plan and implemented to provide Judiciary the option to redeploy its workforce and not for any reason in violation of the Act.

The Transfer Decisions

Although TCA Del Preore approved the final list of senior probation officers for transfer, the division managers, Federico, Eberhardt and Green, and not Del Preore, decided which particular senior probation officers would be transferred. Each division manager selected three people. The Charging Party argued that they selected the three union point men for transfer, Murray, Farley and Soden because of their exercise of protected activity. While I find that the Charging Party satisfied the first two Bridgewater elements, it did not prove the third element, hostility.

The Charging Party sought to prove its case by relying on a combination of timing factors, credibility determinations and inferences it argued I should make in finding the facts of this case. While timing of events is certainly a legitimate factor in analyzing employer motivation, University of Medicine and Dentistry of N.J., P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Dennis Tp. Bd. Ed., P.E.R.C. No. 86-69, 12 NJPER 16, 18 (¶17005 1985); Essex Co. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); Rutgers, The State University, P.E.R.C. No. 2001-38, 27 NJPER 91 (¶32034 2001), it is not the controlling factor here. I did not make several of the credibility determinations and inferences the Charging Party sought. I found Federico, Eberhardt and Green to be reliable witnesses and credit their explanations for selecting Soden, Murray and Farley, respectively. A discussion of each selection follows:

Soden

The only evidence of Soden's protected activity is that he had become a shop steward in the Family Division four or five months prior to being reassigned to the Probation Division, and had participated in a union/management meeting regarding the Family Division one month before the transfer. There was no evidence he ever filed a grievance, or had a conflict or harsh words with Family Division Manager Federico. Similarly, there was no evidence that Federico or anyone else ever made a negative or hostile remark to or about Soden.

The record does show, however, that in March and April of 2000 Soden asked in writing to be transferred to the Probation Division. I credited Federico's testimony that Soden had also orally asked to be transferred from the Family Division and that he made Federico aware that he did not want to remain in that Division. Soden did not testify at this hearing thus I cannot infer he would have contradicted Federico's testimony. State v. Clawans, 38 N.J. 162, 171 (1962); Wild v. Roman, 91 N.J. Super. 410, 413-416 (App. Div. 1966); International Automated Machines, Inc., 285 NLRB 1122, 129 LRRM 1265 (1987). Ultimately, Soden was selected for transfer to the Probation Division to comport with his own wishes. While Soden may not have been transferred to the exact position he had requested, Federico thought he was doing Soden a favor by transferring him to Probation Services.

In its post hearing brief, the Charging Party noted that three of the four PANJ members who worked for Federico and attended the meeting with Murray and Farley regarding the Family Division (Soden, Baldwin and Goodman) were selected for transfer. It seeks an inference that the selections were based upon the exercise of protected activity. I make no such inference.

I find that the timing of Soden's appointment as steward and his participation in the meeting regarding the Family Division a month before the transfer were not the basis for Soden's selection for transfer. I found Federico a credible witness and believe he selected Soden for the reasons expressed above.

Murray

Murray was an active union president, particularly during the last several months prior to the transfer. During that time period he sent numerous e-mails to division managers and/or Del Preore concerning a variety of issues including evaluations, parking, dress code, out of title work and more. He discussed evaluation issues with Eberhardt who would not discuss with him the criteria for transfer selection. He met with Federico regarding problems in the Family Division, and eventually filed three grievances with Federico regarding the Family Division which were not resolved at the division manager level.

Murray believed that his union activity strained his prior friendship with Eberhardt, his own division manager. Further, as a result of a meeting on April 19, 2000 with Federico, Murray sent Del

Preore a memorandum sharply criticizing Federico. Subsequently, Federico refused to meet with Murray regarding grievances Murray filed, and Federico also expressed his intent to only meet with shop steward Soden.

The timing of those events just prior to Murray's selection for transfer certainly caused me to consider whether Murray's selection for transfer was in response to his exercise of protected activity. However, I found there was a glaring absence of hostility between Murray and Eberhardt, who actually selected Murray, to warrant a finding that Murray's transfer selection was tainted. The most the Charging Party could show about Eberhardt's relationship with Murray was that Eberhardt would not discuss the criteria for selection with Murray, and Murray thought his union activity had changed their relationship. Neither constitutes evidence of hostility.

The decision on whether the Charging Party made its case on Bridgewater's hostility test is guided by Rutgers which requires that all the evidence, including that presented by the respondent, be considered.

The record shows that in 1996, and more recently on April 13, 2000, just weeks before the division managers met with Bowers to give her their selections for transfer, Murray made a written request for transfer to the Probation Services Division. Eberhardt was aware of that request which was a factor in his decision to select Murray for transfer, though it was not the primary reason for

Murray's selection. Eberhardt testified without contradiction that he selected Murray, Hargrove and Finkelstein because they were the most senior employees in his division. I credited that testimony. That was the reason Murray was selected.

In its post hearing brief, the Charging Party referred to Murray's harsh relationship with Federico as a basis for his selection for transfer. PANJ also argued that the events caused by the transfer, Murray's inaccessability to his union file cabinet and other criminal division employees, and telephone and e-mail problems, demonstrated the Judiciary's animus toward Local 103. Those arguments are not persuasive. While Murray had sharply criticized Federico, and he in turn refused to discuss grievances with Murray, there is no evidence that Federico had anything to do with selecting Murray for transfer. There was no showing that Federico or anyone else suggested to Eberhardt that he transfer Murray because of his relationship with Federico.

Similarly, there was no evidence that the ramifications of selecting Murray for transfer (i.e., his relocation to another building, telephone and e-mail problems, etc.), were, in fact, a basis for his selection. The argument that it was chaos just after the transfer and that employees could not reach Murray for a few days is not evidence of animus. Given the lack of evidence of hostility between Murray and Eberhardt, the Judiciary did not violate the Act by transferring Murray.

Farley

Green's reasons for selecting Farley for transfer may not have been as clearly defined as those given by Federico and Eberhardt for selecting Soden and Murray, respectively. Green said he selected Farley for transfer because of his good computer and organizational skills, and his knowledge of the probation and criminal systems, particularly PTI. The Charging Party challenged that explanation as pretextual and sought credibility determinations and inferences from me that Green was not a reliable witness in order to prove his selection of Farley for transfer was a hostile act.

It appears to me that the Charging Party is attempting to make its case regarding Farley by putting the cart before the horse, that is, by attacking Green's business justification for selecting Farley without first proving that Green was hostile to Farley because of the exercise of his protected activity. Under Bridgewater, the initial burden is on the Charging Party to prove hostility. Only if hostility is proven does the burden shift to the employer to demonstrate its business justification or that it would have taken the same action even absent the protected conduct.

The Charging Party relied on several actions and/or events in its attempt to prove hostility, but the sum of which really just challenged Green's credibility which I found more reliable than Farley's. For example, the Charging Party claimed that Green was untruthful in explaining Farley's selection for transfer when he allegedly told Farley that the decision selecting him for transfer

came from above. But I did not credit Farley's testimony that Green made such a remark because I often found Farley exaggerated the discussions he was engaged in such as the alleged Buzzi remark and the alleged "tone" of Green's remark. Nevertheless, I found that if Green made such a remark he was not untruthful because the remark does not suggest that he was saying that the decision to select Farley came from above, I interpret it to mean that the decision to transfer senior probation officers came from above which is an accurate comment.

Similarly, the Charging Party argued that Green threatened Farley when he said: "this might affect your money" referring to Farley's failure to meet with Buzzi for evaluation; and when Green responded positively to Farley's question about whether Farley would need his union representative. I credited Farley that Green made the remarks, but I found those remarks were not threatening. The first remark appears to be nothing more than a reminder to Farley that his own failure to meet with his supervisor for evaluation may delay his receiving a raise or an increment which was, in fact, resolved through grievance no. 530 when Farley met with Buzzi. In the second remark Farley admitted there were no threatening statements, just the tone of Green's remark, Farley thought, was enough for him to consider it a threat. I could not rely on Farley's perception of the tone of Green's remark to infer a threat.

I also could not rely on Farley's testimony that Buzzi told him to calm down with the e-mails and union stuff. Buzzi denied it, and I found him (and Green) more credible than Farley.

The Charging Party also challenged Green's credibility regarding his conversation with Johnson about Farley's interview for the Drug Court position. I found, however, that Green's testimony was neither misleading nor intentionally inaccurate.

A series of events the Charging Party primarily relied upon to prove hostility was the way in which Green handled or responded to the twelve grievances filed by Farley. In its post-hearing brief the Charging Party argued that the manner in which Green handled the three grievances filed by Farley in February/May 2000 (Grievances 543, 544, 545) in comparison to the way he handled the first nine grievances, demonstrated his hostility toward Farley. The first nine grievances were filed in late December and Farley and Green met in early January resolving most of them. Two grievances were filed in early February (543, 544) and Green denied those grievances by late February, but for some unexplained reason Farley did not receive Green's decision regarding those grievances until May 30, 2000. The final grievance (545) was filed on May 5, 2000, Green did not conduct a step one hearing but he denied the grievance by written memorandum to Farley on May 12, 2000.

The Charging Party argues that Green's delay in responding to the first two of those grievances (543 and 544) and failure to conduct a step one hearing on the third (545) is evidence of the deteriorating relationship between Farley and Green and proof of hostility. I reject that argument.

Green was questioned regarding grievance nos. 543 and 544 and never asked why Farley did not receive his decisions until May 30, 2000. The record shows that Farley did not receive Green's decisions on grievances 543 and 544 until May, but the burden is on the Charging Party to prove why that occurred. The Charging Party did not show what the practice or procedure was for providing the first step response to the grievant; it did not show whether Green was responsible for the delay; and it did not even show when or how Farley normally receives those responses or from whom. Consequently, I do not infer that the delay in Farley's receipt of Green's response to grievances 543 and 544 was attributable to Green, nor do I find it was indicative of a deterioration in their relationship or that it represented an act of hostility.

I, similarly, do not find Green's response to grievance 545 an act of hostility. Green had a plausible explanation for not conducting a first step hearing. He issued a written response to the grievance, and after Del Preore found that he should have conducted the hearing Green acknowledged that despite his reasons for denying a grievance he must conduct first step hearings. Though Green's decision on conducting the hearing was wrong, his explanation was reasonable and I do not infer he was retaliating against Farley for exercising his protected conduct.

The Charging Party also relied on other events to prove Green's selection of Farley for transfer was hostile. It claimed Green knew Farley had limited typing skills and that Farley did not

like criminal case work but still chose Farley for transfer to the criminal division and a position requiring more typing; that Green and Farley had had heated discussions; that Green refused Farley's request for an off the record conversation about why he was selected for transfer; that Green contradicted Eberhardt's explanation of the division managers meetings that led to the selection of the senior probation officers for transfer; and, that Farley was no more competent in Promis/Gavel and CAPS than anyone else.

I find those events do not justify an inference of hostility against Green. The Charging Party's suggestion that Green's selection of Farley for transfer despite the knowledge that Farley did not like criminal division work and couldn't type well was evidence of hostility, appears to place Green and the Judiciary in a catch-22. That is, since Green knew Farley did not want to work in the Criminal Division and preferred Probation Services, Green was faced with the prospect of capitulating to Farley's preference to remain in Probation Services or select him for reassignment knowing he'd be accused of violating the Act. The Judiciary has the right to exercise its prerogative to transfer and/or reassign personnel without being placed in such a predicament. Farley does not get to stay in adult supervision and/or avoid a transfer altogether just because he is the most active Local 103 official. Certainly the Judiciary knew that it might be accused of violating the Act by reassigning the union president and vice president, but the mere fact it transfers such

officials knowing they did not want to be transferred is not automatic evidence of hostility.

Green admitted that he and Farley argued and raised their voices. While I found such conduct could be considered "heated", I credited Green's testimony that such conduct by he and Farley was not inappropriate and that their relationship was businesslike. I did not credit Farley's description of the relationship as "volatile." Consequently, I do not draw an inference that Green and Farley's sometimes heated discussions was evidence of hostility by Green.

The Charging Party's arguments that Green's refusal to discuss the transfers with Farley in an off the record conversation, and its claim that Green's description of the division managers meeting differed from Eberhardt's, were both evidence of Green's lack of credibility from which I could infer hostility lack merit. There was no requirement that Green discuss the transfer decisions with Farley in such a setting and I draw no negative inference therefrom.

Regarding the division manager meetings, I have already found that Eberhardt had the best recollection of what occurred, but I did not find that Green, Federico or Bowers intentionally misrepresented what occurred at those meetings. I found only that their recollections were not as reliable as Eberhardt's on that subject. Thus, I cannot find that Green's differing explanation from Eberhardt's about the managers meetings compromised his credibility.

Finally, while I credit Farley's explanation that his computer skills were no more competent than any other senior probation officers, I cannot draw an adverse inference from Green's reliance on those skills as one reason for selecting Farley for transfer. At this point I am not judging Green's business justification for selecting Farley. The initial burden is on PANJ to prove hostility, not for the Judiciary to prove its business justification. Green said he chose Farley for transfer, in part, because of his strong knowledge of Promis-Gavel. He did not say Farley was the best at using that program. Farley did not deny he had strong knowledge of that program. He just said he wasn't any more proficient in its use than anyone else. Green's reliance on Farley's knowledge of the program, therefore, was not misplaced. Consequently, I cannot use Green's reliance on Farley's computer knowledge as a means to question Green's credibility or to find that such reliance constitutes evidence of hostility.

In its post hearing brief PANJ primarily relied on three cases to prove hostility, University of Medicine and Dentistry of N.J., P.E.R.C. No. 2001-65, 27 NJPER (¶32088 2001); West New York Bd. Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001); and Rutgers, the State University, P.E.R.C. No. 2001-38, 27 NJPER 91 (¶32034 2001). Timing was a factor in all three cases, and each of the respective hearing examiners found evidence of animus and/or hostility. In UMDNJ and West New York in particular, the hearing examiners did not credit employer witnesses.

In Rutgers, the Commission found that the demotion of a union member three days after that employee was awarded a promotion through the contractual grievance procedure met the Bridgewater standards because the supervisor gave no explanation to the employee prior to the demotion, the University's actions were inconsistent with its commitments, and the University failed to prove it would have treated other employees in the same manner. In West New York, the Commission found the Board transferred an employee for disciplinary reasons in violation of the Act. In UMDNJ, the Commission held the demotion of the union president violated the Act finding its asserted business justification pretextual.

Though relevant for comparison, the cited cases are inapposite to the Charging Party's case. Here, unlike the cited cases, I credited the employer's witnesses. I found Federico's and Eberhardt's explanations for selecting Soden and Murray, respectively, were credible and were not contradicted, and I found Green a more reliable witness than Farley. Additionally here, as opposed to the cited cases, since I could not rely on much of Farley's testimony and the Charging Party's arguments on behalf of Farley, I could not find that PANJ proved hostility regarding his selection for transfer. Thus, I did not consider Green's proferred business justification.

My decision here is more similar to the decision in Gloucester County College, P.E.R.C. No. 97-73, 23 NJPER 44 (¶28030 1996), where I did not draw inferences sought by the charging party and concluded hostility had not been proved.

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

RECOMMENDATION

I recommend the complaint be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: August 29, 2002
Trenton, New Jersey