P.E.R.C. NO. 86-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERKELEY TOWNSHIP

Respondent,

-and- Docket No. CO-84-311-17

BERKELEY TOWNSHIP PBA LOCAL 237,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Berkeley Township PBA Local 237 filed against Berkeley Township. The charge had alleged that the respondents violated subsections 5.4(a)(1), (2), (3), (4) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when they allegedly interfered with the rights of Local 237 and the employees it represents. Local 237 specifically alleged that the respondents interfered with the right of a patrolman and Local 237 officer to speak at a Township committee meeting; the right of Local 237 members to discuss labor-related matters with PBA members from other municipalities, and the right of employees to file grievances. Local 237 further alleged that the respondents asked the Seaside Heights Police Department to supply information for use against a union officer; that the administrator told a captain that if the PBA won a longevity grievance, layoffs might result, including the captain's son who was a Local 237 officer; that the respondents denied the same captain a promotion to police chief because they wanted to retaliate against the captain's son; that the respondents threatened to lay off employees if Local 237 "played tough"; that the respondents ordered that superior officers investigate and discipline Local 237 officials for using Township facilities for discussions with PBA representatives from other municipalities; that respondents violated the parties' collective negotiations agreement by requiring the administration's permission before Local 237 used Township facilities and by requiring Local 237 to pay for copies of Township documents; and that respondents undermined Local 237 and its consultants by communicating directly with unit members concerning terms and conditions of employment. The Commission finds that the PBA failed to prove its allegations by a preponderance of the evidence.

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In the Matter of

BERKELEY TOWNSHIP

Respondent,

-and- Docket No. CO-84-311-17

BERKELEY TOWNSHIP PBA LOCAL 237,

Charging Party.

Appearances:

For the Respondent, Murray & Granello, Esqs.
(James P. Granello, of Counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, of Counsel)

DECISION AND ORDER

On May 21, 1984, Berkeley Township PBA Local #237 ("Local 237") filed an unfair practice charge against Berkeley Township ("Township") and the Township's administrator. The charge alleged that the respondents violated subsections 5.4(a)(1),(2),(3),(4) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (7) Violating any of the rules and regulations established by the commission."

34:13A-1 et seq., when they allegedly interfered with the rights of Local 237 and the employees it represents. Local 237 specifically alleged that the respondents interfered with the right of a patrolman and Local 237 officer to speak at a Township committee meeting; the right of Local 237 members to discuss labor-related matters with PBA members from other municipalities, and the right of employees to file grievances. Local 237 further alleged that the respondents asked the Seaside Heights Police Department to supply information for use against a union officer; that the administrator told a captain that if the PBA won a longevity grievance, layoffs might result, including the captain's son who was a Local 237 officer; that the respondents denied the same captain a promotion to police chief because they wanted to retaliate against the captain's son; that the respondents threatened to lay off employees if Local 237 "played tough"; that the respondents ordered that superior officers investigate and discipline Local 237 officials for using Township facilities for discussions with PBA representatives from other municipalities; that respondents violated the parties' collective negotiations agreement by requiring the administration's permission before Local 237 used Township facilities and by requiring Local 237 to pay for copies of Township documents; and that respondents undermined Local 237 and its consultants by communicating directly with unit members concerning terms and conditions of employment.

On August 15, 1984, a Complaint and Notice of Hearing was issued. The respondents then filed an Answer admitting certain of

the factual allegations,[2] but denying that it had committed any unfair practices and raising several affirmative defenses.

On December 5,6,7,11, and 19, 1984, Hearing Examiner Alan R. Howe conducted a hearing. At the outset, the Hearing Examiner dismissed the Township's administrator as a respondent. The parties then examined witnesses, introduced exhibits, and made motions.[3] They waived oral argument, but filed post-hearing briefs by March 18, 1985.

On April 15, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-37, 11 NJPER ___ (¶_____ 1985) (copy attached). He found that Local 237 had not proved any of its charges by a preponderance of the evidence and recommended dismissal of the Complaint.[4]

2/ The respondents admitted, for example, that its administrator told a captain that if Local 237 won a longevity grievance, further layoffs might be necessary.

3/ At the close of Local 237's case, the Township moved to dismiss the Complaint. The Hearing Examiner dismissed the allegations concerning subsections 5.4(a)(2),(4) and (7), but not (a)(1) and (3).

4/ Local 237 requested and received an extention of time until May 13, 1985 in which to file exceptions, but did not file exceptions within that time. Instead, on June 18, it asked for a further extension until July 2 in which to file exceptions.

We reject Local 237's belated request for a retroactive extension of time in which to file exceptions. While it felt it had good reason for seeking more time, we reject this untimely request. Nevertheless, we emphasize that we have an obligation independent of exceptions to review the record carefully and to arrive at conclusions. Maywood Bd. of Ed. v. Maywood Ed. Ass'n, 168 N.J. Super. 45, 62 (1979). We have done so.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-18) are accurate and thorough. We adopt and incorporate them here. We specifically adopt his credibility determinations. We will, however, clarify one matter. In finding of fact no. 18, the Hearing Examiner found that the administrator told the captain that if the PBA won its longevity grievance, then more police officers, including the captain's son, might be laid off; this finding is consistent with the administrator's testimony and the respondents' answer which admitted that such a statement had been made although without specific reference to the captain's son. In the ensuing discussion, however, the Hearing Examiner appears to find it incredible that the administrator would have made such a statement (p. 25). We resolve this seeming contradiction by finding, consistent with the administrator's testimony and the Answer's admission, that the administrator told the captain that if Local 237 won the grievance, further layoffs might result. We add that the administrator told the captain he was referring to a possible rippling effect in future budgets rather than immediate layoffs; that the captain was then the acting police chief and department head; and that the administrator did not expect the captain to report the conversation to Local 237.

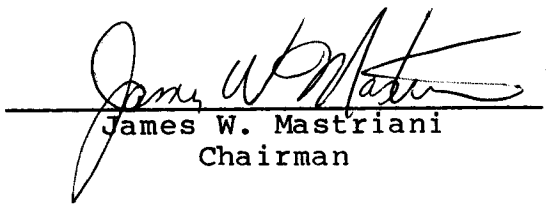
Given these findings of fact and credibility determinations, we agree with the Hearing Examiner that the disputed actions were not motivated by a desire to retaliate for protected activity and that Local 237 has failed to prove its allegations by a preponderance of the evidence. We need comment on only one

matter: the longevity grievance. Although the administrator did say that further layoffs might be necessary if Local 237 won the longevity grievance, he also explained he was talking about possible future layoffs based on the economic ripple effects rather than immediate retaliatory layoffs. Further, the administrator made this comment to a department head and the comment was isolated. Under these circumstances, we believe this comment did not rise to the level of an unfair practice.5/

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, Wenzler and Hipp voted for this decision. Commissioner Graves voted against this decision.

DATED: Trenton, New Jersey
July 1, 1985
ISSUED: July 2, 1985

5/ Given our conclusion that no unfair practices were committed, we do not consider whether the Hearing Examiner correctly decided to dismiss the administrator as a respondent.

H. E. No. 85-37

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

In the Matter of

BERKELEY TOWNSHIP,

Respondent,

-and- Docket No. CO-84-311-17

BERKELEY TOWNSHIP PBA LOCAL 237,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township did not violate subsections 5.4(a)(1)-(4) or (7) of the New Jersey Employer-Employee Relations Act by the conduct of the Township Administrator between March 1984 and November 1984. The PBA had alleged that several of its members had engaged in extensive protected activities such as filing grievances, speaking at a public meeting of the Council on the issues of layoffs, budgets, etc., by filing for arbitration. Further, the PBA alleged that the Township Administrator illegally interfered with the exercise of protected activities by PBA members by ordering a series of internal investigations in the Police Department between April and September 1984, threatening to use the Township budget to lay off PBA members and refusing to appoint a Captain to the position of Police Chief. The Hearing Examiner concluded first that some of the activities which the PBA claimed were protected were not in fact protected and second, that the PBA had failed to satisfy the first part of the test in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), in that the PBA failed to make out a prima facie case sufficient to support an inference that protected activities were a "substantial" or a "motivating" factor in the complained of conduct of the Township Administrator. No animus or hostility toward the PBA was established as required by Bridgewater. Finally, no domination or interference with the administration of the PBA was proven.

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

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

In the Matter of

BERKELEY TOWNSHIP,

Respondent,

-and-

Docket No. CO-84-311-17

BERKELEY TOWNSHIP PBA LOCAL 237,

Charging Party.

Appearances:

For Berkeley Township
Murray & Granello, Esqs.
(James P. Granello, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 21, 1984 by the Berkeley Township PBA Local 237 (hereinafter the "Charging Party" or the "PBA") alleging that Berkeley Township (hereinafter the "Respondent" or the "Township") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, within the six-month period preceding the date of the filing of the instant Unfair Practice Charge, the Respondent by its Administrator, Joseph Cara, has interfered with the rights of PBA members, including John Sullivan, Jr., from speaking at a public meeting on March 18, 1984 on issues of police layoffs, budgets, manpower, equipment, salary and related contractual matters; further, the Township has interfered with the rights of PBA members to discuss with PBA members from other municipalities the issues of budgets, layoffs and labor-related matters; in retaliation for the Charging Party's exercise of its rights to challenge the layoff of police officers, the Respondent

Township has sought to intimidate individual employees through its agent, Joseph Cara, by contacting the Seaside Heights Police Department in April 1984 and requesting that it supply the Respondent with any information that could be used against John Sullivan, Jr.; and stating to Captain John Sullivan, Sr., that if the PBA prevails in its longevity grievance there are going to be more police layoffs, including Captain Sullivan's son, John Sullivan Jr.; also, the Respondent advised Captain Sullivan in April 1984 that, despite a vacancy in the position of Police Chief, he would not be promoted to that position; additionally, the Respondent advised employees of the Township that if the Charging Party wanted to "play tough" it would use its budget to lay them off, and that if the Respondent and its Administrator cannot get to John Sullivan Jr. directly, the Respondent will get him through his father; the Respondent in April 1984 ordered that Superior Officers in the Police Department investigate and discipline PBA officials for using Township facilities, to which they have a right under the collective negotiations agreement; the Township violated existing practices and express provisions of the collective negotiations agreement by requiring that the PBA request and receive authorization from the Administrator prior to using Township facilities for PBA business; and finally, the Township undermined the Charging Party by communicating directly with members of the collective negotiations unit on issues involving grievances, terms and conditions of employment and discipline. All of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) of the Act.[1/]

1/ These Subsections prohibit public employers, their representatives and agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

"(7) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 15, 1984. Pursuant to the Complaint and Notice of Hearing, hearings were held on December 5, 6, 7, 11 and 19, 1984 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.[2/] Oral argument was waived and the parties filed post-hearing briefs by March 18, 1985.

An Unfair Practice Charge having been filed with the Commission, questions concerning alleged violations of the Act, as amended, exist and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Berkeley Township is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Berkeley Township PBA Local 237 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Township Police Department consists of the Chief of Police, one Captain, six Lieutenants, nine Sergeants and 27 Patrolmen. There are two collective negotiations units represented by the PBA, namely, a Superior Officers unit, which consists of the Captain, the Lieutenants and the Sergeants, and a unit of the Patrolmen. The collective negotiations agreement covering the Patrolmen was received in evidence as Exhibit J-1, and is effective during the term January 1, 1982 through December 31, 1984.

2/ At the conclusion of the Charging Party's case in chief, the Respondent made a Motion to Dismiss. After hearing argument on the Motion, the Hearing Examiner granted the Respondent's Motion to Dismiss the allegations that it violated Subsections(a)(2), (4) and (7) of the Act. The Hearing Examiner reserved decision on whether to grant the Motion to Dismiss as to the allegations that the Respondent had violated Subsections(a)(1) and (3) of the Act. The Hearing Examiner directed the Respondent to proceed with its defense without prejudice. The Hearing Examiner has decided, based on an analysis of the Charging Party's evidence in chief, that the Motion to Dismiss is hereby denied in all respects. Accordingly, the instant decision is based upon all of the evidence received in the hearings in this matter.

4. The Township Administrator is Joseph V. Cara, who assumed his duties on April 7, 1982. Effective July 1, 1983 the Township's form of government changed to a Mayor and a Council, which is comprised of seven members. Cara, as Administrator, and the Mayor constitute the Executive branch of the Township government. As Administrator, Cara is in charge of all departments, including the Police Department, except for Finance, Assessors, Engineering and Legal. Before joining the Township, Cara had worked as a Deputy Clerk in Manville from June 1977 through June 1978 and as Administrator/Clerk in Pompton Lakes from June 1978 through February 1982. In Manville, Cara had been involved in the budget for 1978 and left for "more money." In Pompton Lakes, Cara was involved in everything of a financial nature, including budgets. He stated that he had left Pompton Lakes because he had done "all that he could." From Cara's recitation of his educational credentials and past experience, the Hearing Examiner finds as a fact that he was well qualified to assume the position of Township Administrator.

5. At the time that Cara took charge of the Township Police Department, the Chief was Samuel R. Britton. Cara testified credibly that his relationship with Britton was good and that most of their communciation was oral although Cara had written memos to the Chief, some of which involved requests for the conduct of investigations by the Chief of matters within the Department. Cara testified on cross-examination that there were no particular problems with the Police Department initially except overtime in the Detective Bureau and the matter of a police officer threatening to issue only one ticket per month. These matters were investigated by Chief Britton to the satisfaction of Cara.[3/]

6. Cara worked on the 1982 budget, assisting in finalizing it, and assisted the Mayor in the preparation of the 1983 and 1984 budgets, each of which were submitted to the Council no later than January 15, 1983 and 1984.

3/ For example, see the report of Lieutenant Thomas S. Benson to Chief Britton on overtime for 1981 and 1982, dated March 15, 1983 (R-1).

7. The Local Cap Law permits a municipality to increase its budget no more than five (5%) percent over the previous year's final appropriation. The budget submitted to the Council by the Mayor and Cara for 1984 was $750.000 over CAP, which would have increased municipal services in several areas, including the addition of three more patrolmen in the Police Department. Council's decision was to reduce the deficit from $750,000 to $400,000 above CAP, and to adopt on February 6, 1984 a resolution calling for a public referendum on whether or not the CAP could be exceeded (R-2). The PBA actively supported the referendum, urging a vote in favor of increasing the budget over the CAP. The referendum was defeated on February 28, 1984, notwithstanding the support of the Mayor (R-3), the Council and the PBA.

8. In anticipation of a possible defeat of the referendum, Cara on January 31, 1984 sent a memo to Police Chief Britton and three other Department Heads, advising them of the necessity to eliminate personnel if the referendum was defeated, and that layoff notices would issue from the Office of the Administrator pending that eventuality (R-4). Also, in anticipation of defeat of the referendum, Cara on January 27, 1984 had advised the Mayor and Council of where proposed cuts should be made to bring the budget within the 1984 CAP (R-5). In that letter Cara also advised the Mayor and Council that he had spoken to the PBA on January 27th and asked if the PBA would "buy back" on gun maintenance, holiday pay, clothing allowances and tuition. The indication was that the PBA would not consent. Cara advised the Mayor and Council that he had requested on the same date a "buy back" from other unions on their Dental and Prescription Programs (R-7). Cara was subsequently informed that none of the collective negotiations units would agree to the "buy back" of the Dental and Prescription Programs (R-8). If the PBA had agreed to the "buy backs" requested by Cara, the saving to the Township would have totaled $81,000 for the year 1984. On February 2, 1984 Cara sent a letter to Donald G. Bennett of Civil Service, advising him of the proposed individuals to be laid off in the event that the referendum was defeated (R-6). Also, on February 6, 1984, Cara wrote to Bennett

regarding the elimination of two of the four Building Inspectors employed by the Township, inquiring as to the legality of such an action (R-9).

9. On March 5, 1984 Ronald R. Villano, the Labor Relations Consultant for the PBA, wrote to the Mayor of the Township requesting a meeting with the Council and the Administrator to review the budget in order to avoid the proposed layoffs in the Police Department (CP-39). Cara testified credibly that between the defeat of the referendum on February 28th, and a Council meeting on March 18, 1984 where the budget was adopted, certain data submitted to Cara by the Certified Public Accountant for the PBA was considered. It was Cara's opinion that the PBA was not getting proper advice regarding municipal finance.

10. The Council met in public session on March 18th where the matter before it was the adoption of the 1984 budget. There were approximately 200 people at the meeting, the majority of whom were PBA members, their families and supporters. Patrolman John J. Sullivan Jr. was one of the PBA members who spoke at the meeting. Cara described Sullivan's behavior as unorthodox and irrational, explaining that he approached the microphone in a tone of anger and verbally chastised the Council for not avoiding layoffs in the Police Department. Councilman Wilbur W. H. Lahann, a witness for the Charging Party, testified that Sullivan "went on for an hour," leaning against the back wall and hollering statements that were out of order. Lahann added that it was a "mob scene attitude" that was unbecoming of a police officer.[4/]

11. In or around March 19, 1984 Patrolman Sullivan and another Patrolman, Christian J. Roth, both officials of the PBA, went to Pompton Lakes on "PBA business." Their purpose was to investigate the budgets that Cara had been involved in while employed in Pompton Lakes.[5/] Sullivan testified that Frank McClintock, a former Building Inspector for the Township, had provided Sullivan with information

4/ Lehann also testified that shortly after the March 18th Council meeting he had a conversation with his neighbor, Lieutenant John A. Everitt, in which he indicated his disappointment with Patrolman Sullivan's conduct at the Council meeting, stating that he could have come to the Council privately to express his feelings instead of doing as he did in public.

5/ Manville became involved in April 1984, infra.

that Cara had had problems with the budgets at Pompton Lakes. Sullivan testified that his intention and that of Roth was not to get any adverse information on Cara. The Hearing Examiner does not credit Sullivan in this regard. On the date that Sullivan and Roth were in Pompton Lakes, Cara received three telephone calls regarding their presence and activity from the following persons: (1) Charles Ferraioli, the Auditor; (2) Donald Cromb, the Administrator; and (3) Ann O'Reilly, Cara's former secretary. The three complained about the conduct of Sullivan and Roth. Before the identity of Sullivan and Roth was known to Cara, he had called the Clerk at Pompton Lakes in order to learn their identity. It was the Chief of Police who ultimately informed Cara that the two individuals on "PBA business" were Sullivan and Roth.

12. On another date, in April 1984, Sullivan and Roth made a second visit to Pompton Lakes where they spoke by telephone with a former Mayor, John Spinnanger, who allegedly stated that when Cara was employed at Pompton Lakes there was a problem with layoffs, and that after Spinnanger went to an accounting firm, an additional $200,000-$300,000 was found and all layoffs were averted. Yet Sullivan testified that Spinnanger did not implicate Cara in any problem in this regard. On the same day that Sullivan and Roth revisited Pompton Lakes they also visited Manville. A Manville Police Lieutenant told Sullivan that Cara had had no problems there. Finally, after the trip to Manville and the two trips to Pompton Lakes Sullivan and Roth turned over the information they had obtained to PBA President David H. Van Zandt, which included three budgets from Pompton Lakes for the years 1979-1981 and one earlier budget from Manville. 6/ Cara testified credibly that at Pompton Lakes he was directed to send out pink slips and that this caused a lot of chaos. All of the pink slips were rescinded thereafter.

6/ Cara testified credibly that he never took any punitive or retaliatory action against either Sullivan or Roth, or any PBA members, because of the events in Pompton Lakes and Manville. However, the Charging Party contends that thereafter Cara directed officials in the Police Department to undertake some nine or ten investigations between early April and September 1984, and that these investigations were a departure from the prior history of investigations in the Police Department, and were in retaliation against the activities of Police Department members on behalf of the PBA, commencing with the public budget hearing on March 18, 1984. (see Findings of Fact Nos. 14, 16, 19-21, 23-27, infra).

13. On March 20, 1984 Cara sent a letter to Chief Britton, stating that due to the layoff situation, overtime in the Police Department should be authorized only "when absolutely necessary or in the event of an emergency" (R-11). Thereafter, on June 4, 1984, Cara sent a letter to the Mayor and Council reporting on overtime in the Police Department for 1984 through May 24th, and recapitulating the overtime in 1983 and 1982 (CP-19). On June 7, 1984 Lieutenant Benson wrote to Cara giving an explanation of police overtime for 1982, which had been unduly high (CP-20).

14. On April 6, 1984 Cara wrote to Chief Britton, requesting that a check be made of certain telephone calls on the March 20th bill (CP-3). In particular, Cara asked for an investigation of calls made on March 19, 1984 to Pompton Lakes and Somerville (Manville). On April 10, 1984 Lieutenant Benson wrote to Cara, explaining that the two calls in question to Pompton Lakes and Somerville were made by the PBA and that President Van Zandt had stated that the Township would be reimbursed (CP-4). On April 11, 1984 Cara expressed to Benson displeasure with his merely stating that the PBA was going to reimburse the Township, adding that he expected that Benson would follow up the matter and that "disciplinary action would be carried out" (CP-5). Cara had also stated to Benson that the PBA was "carrying out (a) personal vendetta." Benson replied on April 12th, stating that the collective negotiations agreement (J-1, Article III, Section 4) precluded discipline, inasmuch as the PBA had the contractual right to use the telephone, providing it reimbursed the Township for its calls (CP-6). The PBA reimbursed the Township by check dated April 18, 1984 (CP-7). Although that would have appeared to be the end of the matter, Villano, the Labor Relations Consultant, sent two letters on April 24, 1984, one to Cara and the other to Lieutenant Benson (R-14 and R-15). Villano stated to Benson that any discipline would be immediately grieved. In his letter to Cara, Villano referred to Cara's direction to Benson that "discipline be carried out" and his allegation that a "personal vendetta" was being carried out against him. On May 17th Cara wrote to Villano, stating that the visits to Pompton Lakes and Manville by Berkeley Township police officers was a "bad reflection

of the attitudes and discipline of the Police here in the Township" (CP-8). Cara concluded by stating that he considered the matter closed but that "what transpired will remain on record here in the Township."

15. On April 9, 1984 Chief Britton wrote to Cara, informing him that he was going on sick leave of absence immediately (CP-36).[7/] Further, Britton advised Cara that he had assigned the duties of Deputy Chief to Captain John J. Sullivan, Sr.

16. On April 11, 1984 Cara wrote to Captain Sullivan in connection with an Article that was printed in the Times-Observer, which indicated that Township employees had placed a boat in the hallway of the building in which the Police Department is located (CP-38). Cara requested that an investigation be made "...as well as a full explanation why this was tolerated..." After stating that this was one more example of the "lack of control in the Police Department," Cara said that he would expect that "disciplinary action" be taken against the individuals involved. On the same date, April 11th, Cara had summoned Captain Sullivan to his office where, among other things, the boat incident was discussed, with Cara asking rhetorically whether this was all that the Police had to do. The flooding condition in the basement of the building was apparently caused by an underground stream. The Township had been trying to eliminate the condition. It was ultimately determined that Sergeant Gary Meier had placed the boat in the basement, and this was reported to Cara by Captain Sullivan by telephone.

17. At the April 11, 1984 meeting between Cara and Captain Sullivan, supra, other matters were discussed, including the health of Captain Sullivan as an obstacle to his appointment to Chief of Police. Captain Sullivan had had open heart surgery in September 1983 and returned to work on January 2, 1984. Cara stated that he did not feel that Captain Sullivan could take the stress of the job, to which Captain Sullivan responded that he could handle the job if there was no "political harassment or bullshit."

7/ Britton never returned to duty and retired. Pursuant to statute, an emergency appropriation of $35,000 was made by the Council to cover Britton's accumulated sick leave (R-12).

The result was that Captain Sullivan continued in an acting capacity until Captain Charles F. DeMey was appointed Chief of Police in November 1984.

18. Also, at the foregoing April 11th meeting between Cara and Captain Sullivan, Cara stated that Sullivan had hired a police officer from either Seaside Heights or Seaside Park with a "drug problem." Captain Sullivan testified credibly that he had never had the authority to hire and never did so, but adding that he had sat as a member of an interviewing panel in connection with the hiring of police officers. Captain Sullivan then stated to Cara that he had heard that Cara was after his son, Patrolman John J. Sullivan, Jr. Cara denied this, but stated that if the PBA won the "longevity grievance," infra, then Sullivan Jr. might be laid off.[8/]

19. On April 16, 1984 Cara sent a confidential letter to Captain Sullivan, following up on his information that one of the Township's Patrolmen served in the Police Department in either Seaside Park or Seaside Heights, and was terminated because of drug involvement (CP-21). Cara added that he had learned that the individual had had his record expunged, but was hired by the Township Police Department. Cara requested that Captain Sullivan undertake a "discreet and confidential" investigation.[9/] On April 24th, Captain Sullivan wrote to Cara, noting that he, Sullivan, was alleged to have had full knowledge of the above, and yet proceeded to hire the individual regardless of his past background (CP-22). Sullivan stated to Cara that in order to avoid any possible "conflict of interest" the investigation should be conducted by an impartial person.

8/ John J. Sullivan Jr. is the second junior Patrolman, following the layoff of the seven Patrolmen who were laid off as a result of the adoption of the 1984 budget, supra. There was considerable testimony regarding the longevity grievance, which was filed by the PBA in 1983, and which was heard by an arbitrator in 1984. Had the PBA won the longevity in toto it would have involved an expense to the Township of approximately $500 each for five Patrolmen, for a total of $2,500. Plainly, this expenditure would not be equivalent to even one Patrolman's salary and fringe benefits which, according to the testimony, exceeds $30,000 per year.

9/ Cara initially testified that his source of information for initiating this investigation was an anonymous telephone call from a male on March 19, 1984. The caller provided the information, which Cara set forth in his letter of April 16th to Captain Sullivan, supra. The caller also stated that Captain Sullivan had full knowledge, which Cara elected not to place in the said letter.

20. In accordance with the wishes of Captain Sullivan, Cara wrote to Captain DeMey on April 25, 1984, requesting that he undertake the drug involvement investigation, supra. Cara set a deadline of three weeks for DeMey to submit a report.[10/] DeMey concluded initially that the investigation would have to go beyond an internal investigation of police personnel and, therefore, contacted P.J. Herbert, the Chief of Detectives in the Ocean County Prosecutor's Office. Herbert reluctantly informed DeMey that he lacked the staff to assist him and, as a result, DeMey instructed Lieutenant Richard T. Nevins of the Township Police Department to assist him. A list of all Police Department personnel hired over the last seven years was compiled and rigorously checked. This list of 22 individuals was then cross-checked with the Police Departments of Seaside Park and Seaside Heights. Herbert provided some assistance by verifying the lack of any record of expungings with regard to the 22 individuals on the list submitted by DeMey (R-18F). The list of the 22 individuals had also been sent to the Chief of Police of Seaside Heights. The Seaside Heights Chief reported to DeMey that there was no record of any of them having been charged with any drug involvement (R-18B). DeMey's ultimate conclusion, which was reported to Cara, was that there was no foundation to the charges of drug involvement by police officers in the Township Police Department and that the matter was "closed." Cara agreed with DeMey.

21. On April 18, 1984 Cara sent a letter to Lieutenant Nevins, requesting that he look into an allegation that Patrolman Richard Bush was selling real estate while on duty and in uniform (CP-24). Cara was acting on the basis of information received from a former Councilman, Nelson Ramont. Cara requested a detailed report, including any recommendation of disciplinary action. On May 9th, Nevins wrote to Cara, informing him that his investigation, which was made difficult by the hearsay aspect, disclosed that there was no evidence to support the allegation that Bush sold real estate while on duty and in uniform (CP-25). Therefore, Nevins concluded that the charges were

10/ All of the correspondence and papers in connection with the investigation, which was completed by mid-July or early August 1984, are set forth in a composite exhibit (R-18).

without foundation. Cara accepted the conclusion of Nevins.

22. In early May 1984 Cara formalized the method by which the PBA could obtain permission for the use of Township facilities for its meetings. The collective negotiations agreement provides in Article III, Section IV, that the Township shall grant the PBA reasonable use of its facilities for the purpose of conducting business so long as the PBA assumes the expense (J-1, p.4). Such requests by the PBA had been handled on an informal basis prior to May 1984. PBA President Van Zandt wrote to Cara on May 10, 1984 requesting permission to conduct a meeting on May 11th (CP-1). Cara granted the request in writing on the same date (CP-2).

23. On May 22, 1984 Cara wrote to Captain Sullivan, noting that Patrolman Dennis Callan had been repeatedley involved in disputes with the family of one Michael McArthur, and requesting that Sullivan conduct an informal investigation of Callan's conduct in connection with a recent incident involving charges filed by McArthur against Callan (CP-9). Captain Sullivan turned the matter over to Lieutenant Benson. It appears that the Callan family and the McArthur family are neighbors and that Callan has filed complaints against McArthur dating back to 1982. Captain Sullivan testified that he had referred McArthur to the Municipal Court. Cara next wrote to Captain Sullivan on June 18, 1984, informing him that he had heard that a Judge Anton had heard the case and ruled in favor of the McArthur family (CP-12). Lieutenant Benson wrote to Cara on June 20th, stating that Judge Anton did not hear the case because of a conflict, and that the matter was to be heard in the adjoining Township of Lacey on July 10, 1984 (CP-13). Benson reported in writing to Cara on July 25, 1984 that the McArthur-Callan matter had been heard on July 24th, and that McArthur dropped the charges against Callan, but McArthur pleaded guilty and was fined with costs (CP-15). There the matter of the Callan investigation ended.

24. Cara testified that in May 1984 a Township resident told Cara that he knew of three Township police officers, who had been arrested by the Vice Squad in New York City. The resident complained that Cara had done nothing. On May 23, 1984

Cara wrote to Captain Sullivan, asking that he research the matter, which had been discussed the day before, and obtain a report from the New York City Police Department (CP-26). On June 15th, Captain Sullivan wrote to Cara, advising him that his investigation had essentially turned up nothing, and that this had been confirmed by Chief Britton (CP-27). On June 18, 1984 Cara wrote to Sullivan and directed him to contact the New York City Police Department for a report on the alleged arrests of four of the Township's Superior Officers (CP-28). When Cara became disenchanted with Captain Sullivan's zeal, he took the matter from Sullivan and gave it to Captain DeMey. On June 22, 1984, DeMey wrote to the District Attorney in New York City and requested a check of its Police Department records to determine if any members of the Township Police Department had criminal records in New York City (CP-29). On June 28th, the Chief of Investigation of the New York District Attorney's office responded to DeMey's inquiry, advising that a computer name-check of all 49 members of the Township's Police Department indicated that there were no criminal records on file in New York State (CP-30). This letter was turned over to Cara by DeMey on July 5, 1984 (CP-31) together with two enclosures, which reported officially on the investigation conducted by the New York City Police Department (CP-32 and CP-33). This satisfied Cara and the matter was closed.

25. On June 18, 1984 Cara wrote to Captain Sullivan, noting that, on Good Friday, 17 police officers were on vacation, and that recently, on the Memorial Day weekend, 14 police officers were "out" (CP-18). Cara inquired why the Police Department was approving vacations around holidays, and stated that he was scheduling a meeting with Captain DeMey and the Mayor. Lieutenant Benson was directed to investigate and found that on Good Friday three police officers were on vacation, not 17, as stated by Cara, and that on the Memorial Day weekend two officers were on vacation, not 14.

26. On June 25, 1984, Cara wrote to Captain Sullivan, advising him that at 7:00 a.m. on that date a Municipal employee, James Kelly, heard a shot being fired outside of the Municipal Building (CP-34). Cara stated further that when Kelly investigated the nature of the noise, he noticed a light, in the parking lot where

Municipal officers park, had been "shot out." Cara stated that Sullivan must have been aware that a similar incident took place during the 1984 budget hearings. He requested a full investigation of both incidents, and a report from Sullivan to Cara. Captain Sullivan asked Detective David W. Hardie to undertake an investigation. Hardie was unable to produce any suspects, his only conclusion being that a .22 calibre or a .25 calibre rifle had been used. When this was reported to Cara, Cara's response was to send a letter to Captain Sullivan on August 6, 1984, in which he expressed disbelief that the persons in the general area between 6:30 a.m. and 7:30 a.m. on June 25th had stated that they did not hear anything "like a shot gun" (CP-35). Cara then stated that he suspected that the "culprit involved may be known and has not been disclosed." Cara then stated that he would keep the file open, and requested a report of "the first shoot out." Cara testified that that was the end of the matter and that no one was ever disciplined.

27. After Cara received a telephone call in September 1984 from a female caller, who complained about the overtime worked by Patrolman Roth, he turned the matter over to Captain DeMey for an investigation. On September 21, 1984 Captain DeMey sent to Cara a two-page letter, which set forth in great detail the history of Roth's overtime from January 1984 through September 1984 (CP-23). The bottom line was that Roth received more overtime than other officers because he never refused overtime when requested. Thus, there had been no abuse in the assigning of overtime to Roth. Cara testified credibly that there was no connection between his ordering an investigation of Roth's overtime and the fact that Roth had gone to Pompton Lakes and Manville in March and April 1984 with Sullivan Jr. Cara also defended his order of an investigation of Roth's overtime by stating that he had made a like request about one year earlier as to a Lieutenant Olds. This was not disputed by the PBA.

28. The ten investigations referred to in footnote 6, supra, concluded with the Roth overtime investigation, which is set forth in Finding of Fact No. 27. In response to a question by the Hearing Examiner, directed to Captain Sullivan, as

to whether any of the investigations initiated by Cara were baseless and without foundation, Sullivan responded in the negative (2 Tr. 155). However, Captain Sullivan then went on to state that a lot of the investigations were a "waste of time."

29. Cara testified convincingly that he had not initiated any of the above investigations in order to "get the PBA" although he acknowledged differences with the PBA over its tactics regarding the 1984 budget and the referendum involving the creation of a Public Safety Director, infra. Further, Cara testified credibly that none of the investigations were initiated by him as a result of the 1984 Council budget hearings or because of any PBA grievance, including the longevity grievance.

30. In an effort to establish animus towards the PBA by Cara, the Charging Party elicited from Cara that he may have said at an OAL hearing on November 28, 1984 that, "If the PBA wants to play hard ball, I'll use the budget." This statement by Cara, however, was not placed in any context, or related to any event, nor was a date established as to when Cara made such a statement. Given the foregoing, the Hearing Examiner finds as a fact that it has little probative value in the disposition of the issues raised by the Charging Party in this proceeding.

31. In several instance during the hearing in this matter, there were intimations that Cara had ordered the drug involvement investigation, supra, with John J. Sullivan, Jr. as the target. The Charging Party's testimony failed to adduce any concrete evidence to establish this as a fact. On the other hand, Cara testified without contradiction that the name of Sullivan Jr. never appeared in the drug investigation, and that no investigation of Sullivan Jr. had ever been ordered regarding his prior employment at Seaside Heights. He was hired by the Respondent on October 1, 1980. Cara stated that he did not know initially that Sullivan Jr. worked at either Seaside Heights or Seaside Park, but did learn so later. When Purnell M. Rowe, a retired Township resident, and a witness for the Charging Party,

infra, told Cara that Sullivan Jr. was the officer involved in the drug problem, Cara testified credibly that he questioned Rowe's credibility. See Findings of Fact Nos. 33-36, infra.

32. The retirement of Chief Britton, supra, provided Cara with an opportunity to seek the creation of the position of Public Safety Director in place of a Chief of Police. This, according to Cara, would eliminate inefficiency in the Police Department of the Township. The PBA was opposed to a Public Safety Director and worked actively against a referendum seeking authority to create this position. On November 6, 1984 the referendum was defeated 2-1, and immediately thereafter Captain DeMey was appointed Chief of Police on November 12, 1984.

33. The final witness called by the Charging Party on rebuttal was Purnell M. Rowe, whose testimony has been briefly referred to previously. Rowe has been a resident of the Township for 34 years and is retired. He regularly attends Council meetings and served for five years on the Board of Adjustment between 1978 and 1983. He has been very active in Township affairs over the years, and is presently a member of an organization known as "All Berkeley Citizens." If his testimony on direct examination were credited in full, or even in part, it would tend to establish an anti-PBA animus on the part of Cara. For example:

a. Rowe testified that on an unspecified date, outside of Dickerts Diner, Cara stated to Rowe that he understood that Rowe had information regarding John J. Sullivan Jr. and Seaside Heights and a drug problem. Rowe stated that he said that it was "not too healthy to spread this around" (5 Tr. 129).

b. Rowe also testified that Cara, in referring to Sullivan Jr. as the "baboon," stated that he was quite put out by his having gone to Pompton Lakes (5 Tr. 130).

c. Rowe said that Cara went to Seaside Heights where he was trying to get information on Sullivan Jr. Finally, according to Rowe, Cara said that he

was going to get rid of five more police officers in November, and would get Sullivan Jr., adding that this would cut the Police Department down to its proper size. (5 Tr. 131, 132, 135).

d. Rowe testified regarding two cases of grievances involving severance pay where Cara was allegedly impeding payment, stating that Cara said that he would make them use their money on lawyers' fees (5 Tr. 135, 136).

34. On cross-examination, fatal bias by Rowe toward Cara, several Council members and the present Mayor was established beyond doubt. For example:

a. Rowe acknowledged that he told Cara that Chief Britton was a "pig farmer," that Cara was a "damn big liar," that the Mayor is a "damn big liar" and "skinhead," that Councilman Edmund Corrigan is a "big liar," and that Councilman Lahann is "bad" and in a category all by himself (5 Tr. 147, 151, 152, 156, 158, 195). Rowe added that none of the Councilmen are doing their job (5 Tr. 158-9). Rowe also testified that 10 days before the 1984 November general election he went to the office of the Assistant Prosecutor and said that he wanted charges of non-feasance in office brought against Cara and Rene Gonzales, the Township Code Enforcement Officer, in connection with a zoning violation by a Township resident (see R-19 and R-20; 5 Tr. 162-3).

b. Rowe acknowledged his disappointment at not having been appointed by the present Mayor to the Zoning Board (5 Tr. 139, 196).

c. Rowe's organization, the All Berkeley Citizens, is behind a drive to recall the present Mayor and Council President (5 Tr. 138, 139). Cara is appointed by the Mayor. The Township has undertaken a legal challenge to the recall.

d. Rowe acknowledged that the Mayor and Cara wanted to add three additional police officers in 1984, but then added, incredibly, that the Mayor and Cara did so knowing it would be defeated and were out "to hoodwind the...public"

(5 Tr. 156).

e. In tracing Cara's alleged bias against the Township Police Department, Rowe testified that when Cara came to the Township in 1982 he received a traffic ticket and told Rowe that he would deal with "them" in the proper way (5 Tr. 153-4).

35. Having appraised the demeanor of Rowe as a witness, and considering the obvious bias displayed by him towards the Respondent and its officials, the Hearing Examiner does not credit Rowe's testimony on direct examination, supra, which, if believed, would clearly tend to establish that Cara manifested animus toward the PBA and its members.

36. The Hearing Examiner credits the following testimony of Cara as to several matters on surrebuttal: that Rowe used the term "baboon" as to Sullivan Jr.; that the purpose of the recall petition is to remove Cara, among others; and that, as to the ticket incident in 1982, Cara did make mention of it to Chief Britton, but never "went after" the officer involved (5 Tr. 182, 189, 190, 193-4).

DISCUSSION AND ANALYSIS

The PBA Failed To Prove By A Preponderance Of The Evidence That The Township Violated Subsections (a)(1) And (3) Of The Act By The Conduct Of Its Administrator. 11/

Plainly, the instant case implicates the "dual motive" analysis of the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) where the Court drew upon the tests first enunciated by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980). See also, NLRB v. Transportation Mgt. Corp., ____ U.S. ____, 113 LRRM 2857 (1983).

The Wright Line test involves the following requisites in assessing employer

11/ The PBA failed to prove that the Township violated Subsections (a)(2), (4) or (7) of the Act by the conduct of its administrator or others herein: Cf. North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-111, 6 NJPER 193 (1980) and Randolph Twp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365, 367 (1982).

motivation: (1) The Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline (in this case retaliate); and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the Wright Line test by adding that the protected activity engaged in must have been known by the employer, and, also, it must be established that the employer was hostile towards the exercise of the protected activity, i.e., there must be a showing of anti-union animus (95 N.J. at 246). The Hearing Examiner also notes that the Charging Party must establish a nexus between the exercise of protected activity and the employer's conduct and response thereto: Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 643, 644 (1983).

The Hearing Examiner substantially agrees with the enumeration of protected activities engaged in by the PBA and its members between September 1983 and November 1984 as set forth at pages 2-5 of the Charging Party's brief except in two instances discussed infra. These protected activities include grievances filed, the use of Township facilities pursuant to the collective negotiations agreement, meetings with Township officials on the issues of the budget and layoffs, related correspondence with Township officials and the filing for arbitration with the Commission.

However, the Hearing Examiner seriously disagrees with the contention that the conduct of Sullivan, Jr. at the March 18, 1984 Council budget hearing, and the two trips of Sullivan, Jr. and Roth to Pompton Lakes and the one trip to Manville, constituted activities protected under the Act. Since the Hearing Examiner deems the actions of Sullivan, Jr. and Roth as critical to the Charging Party's case, these activities will be analyzed at this point.

At the March 18, 1984 Council meeting on the 1984 budget Sullivan, Jr. was one of the PBA members who spoke. The Charging Party's own witness, Councilman Lahann, testified in summary that Sullivan, Jr. went on for an hour, leaned against the back wall and hollered statements that were out of order, adding that it was a "mob scene attitude which I did not expect from a police officer." (3 Tr 30). Cara described Sullivan, Jr.'s behavior as unorthodox and irrational, explaining that he approached the microphone in a tone of anger and verbally chastised the Council for not avoiding layoffs in the police department. (See Finding of Fact No. 10, supra).

In or around March 19, 1984, Sullivan, Jr. and Roth went to Pompton Lakes on "PBA business," the true purpose of which was to obtain adverse information on Cara (See Finding of Fact No. 11, supra). Cara received three telephone calls that day from officials and an employee of Pompton Lakes, complaining about the conduct of Sullivan, Jr. and Roth. On another date, in April 1984, Sullivan, Jr. and Roth made a second visit to Pompton Lakes where they spoke with a former Mayor who, according to Sullivan, Jr., stated that when Cara was employed in Pompton Lakes there was a problem with layoffs. However, Sullivan also testified that the former Mayor did not implicate Cara in any problem in this regard. On the same day they also visited Manville where a police lieutenant told them that Cara had had no problems there. (See Finding of Fact No. 12, supra).

It is first noted that neither Sullivan, Jr. nor Roth, nor any other PBA members, were disciplined or retaliated against because of Sullivan, Jr.'s conduct at the March 18th Council meeting or the visits by Sullivan, Jr. and Roth to Pompton Lakes and Manville. Even if they had been disciplined for their conduct, the Hearing Examiner finds and concludes that the manner and method of the conduct of Sullivan, Jr. and Roth, supra, rendered their actions unprotected.

Support for this conclusion is found in City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (1983) where the Commission dismissed an unfair practice charge alleging that the City unlawfully suspended an employee who spoke out against a supervisor in the context of the employee having disrupted a general staff meeting called by the supervisor to discuss an alleged conspiracy over the issuance of an unauthorized check. In concluding that the employee's actions were outside the protection of the Act, the Commission distinguished two prior decisions: Hamilton Twp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (1979) and City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (1979).

Hamilton involved the conduct of an employee at a grievance meeting, with the Commission noting that wide latitude must be allowed in the grievance process in order to ensure its efficacy. The employee's offensive speech and conduct was recognized as lawful activity so long as "...the character of the conflict is not indefensible in the context of the grievance involved..." (5 NJPER at 116). Thus, in Hamilton a violation was found.

In Asbury Park, the president of the union was suspended for three days as a result of a shouting match with the city manager during a discussion regarding various employee complaints. In finding a violation, the Commission stated that in the processing and resolution of grievances the parties must be on an equal footing and an employee may not be disciplined for engaging in protected activity which happens to annoy the employer because it comes at an inconvenient or undesirable time (5 NJPER at 390). However, the Commission also observed in that case that the employee may not utilize his or her union position to attempt to undermine the employer's supervisory or management status, or to engage in offensive behavior.

Finally, in City of East Orange, supra, the Commission cited and discussed City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 214 (1978). There the Commission dismissed a charge, which alleged that two employees were dis-

ciplined for visiting and telephoning the auditing department without obtaining prior permission as required by a work rule. The Commission sustained the validity of the rule and noted that an employee may not act with impunity even though he may be engaged in what might be deemed protected activity in different circumstances (4 NJPER at 215).

The Township also cites the cases of Union County Prosecutor's Office, P.E.R.C. No. 84-38, 9 NJPER 646 (1983) and Pietrunti v. Bd. of Ed. of Brick Twp., 128 N.J. Super. 149 (App. Div. 1974), which the Hearing Examiner finds apposite. In Union County, the Commission disapproved of an employee's attempt to gather information pertaining to a grievance where the employee did not pursue proper channels and in Pietrunti a teacher's free speech and collective bargaining rights were held not to endow her with a license to villify her superiors in public. Both of these cases are pertinent to the conduct of Sullivan, Jr. on March 18th at the Council hearing and the conduct of Sullivan, Jr. and Roth in their two trips to Pompton Lakes and Manville. This is not to say that the Commission has not recognized the right of a public employee to communicate with a public official or to speak out at a public meeting of the employer: City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978); Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (1982), aff'd App. Div. A-1642-82T2 (1983); and Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

Based on the foregoing, the Hearing Examiner concludes that the activities of Sullivan, Jr. and Roth in March and April 1984 were not protected, Sullivan, Jr. having clearly exceeded proper bounds in his conduct at the Council hearing on March 18, 1984 and Sullivan, Jr. and Roth together having exceeded the bounds of propriety in their trips on "PBA business" to Pompton Lakes and Manville in March and April 1984.

The Hearing Examiner's conclusion regarding Sullivan, Jr. is in no way altered

or affected by the Charging Party's allegations and attempted proofs that he was made a target in the drug investigation which Cara initiated in April 1984. (See Findings of Fact Nos. 18-20, supra). As found in Finding of Fact No. 31, the Charging Party's testimony failed to adduce any concrete evidence to establish that Sullivan, Jr. was ever a target in the investigation. Cara credibly denied it and Rowe's testimony has been discredited by the Hearing Examiner. (See Finding of Fact No. 35, supra). Additionally, LaHann, the Charging Party's own witness, denied stating that Cara was trying to get Sullivan, Jr. (3 Tr. 19-21, 26, 28).

The Hearing Examiner now turns to a consideration of the nine or ten investigations undertaken by officials in the Police Department at the direction of Cara between early April and September 1984 and whether or not Cara was motivated by hostility to the PBA, i.e., manifested anti-union animus. The Charging Party contends that these investigations were a departure from the prior history and pattern of investigations in the department and were undertaken in retaliation against the activities of PBA members on behalf of the PBA,commencing with the Council budget hearing on March 18, 1984. The Hearing Examiner has made his findings regarding these investigations in Findings of Fact Nos. 14, 16, 19-21, 23-27, supra. It is not proposed to recapitulate them in any detail at this point. Suffice it to say that the only "discipline" which resulted from these investigations was as follows: (1) the investigation of the two PBA telephone calls in March resulted in Cara stating that the matter was closed but that "what transpired will remain on record here in the Township" (Finding of Fact No. 14, supra); and (2) in the case of the "boat" investigation, Sgt. Gary Meier received a reprimand (2 Tr. 168). In the overall context of the matters litigated herein these two matters are deemed de minimis. Further, the Hearing Examiner notes that he has credited Cara's testimony that the investigations

were not to "get the PBA" although he acknowledged differences with the PBA over its tactics regarding the 1984 budget and the referendum involving the creation of the position of a Public Safety Director (see Finding of Fact No. 29, supra).

Additionally, the Hearing Examiner has found that Cara testified credibly that none of the investigations were initiated as a result of the 1984 Council budget hearings or because of any PBA grievances, including the longevity grievance. Finally, the Hearing Examiner finds highly significant the testimony of Captain Sullivan, who when asked whether any of the investigations initiated by Cara were baseless or without foundation, responded in the negative (2 Tr. 155). The import of this testimony is in no way diluted by the fact that Captain Sullivan added that a lot of the investigations were "a waste of time." This proceeding is not concerned with whether investigations were a waste of time but rather whether investigations were initiated by Cara in retaliation for the exercise of protected activities by members of the PBA.

Based upon the foregoing, the Hearing Examiner concludes that the PBA has failed to prove that Cara was motivated by anti-union/PBA animus in his conduct herein. Thus, under Bridgewater the Charging Party has failed to make a prima facie case that protected activity was a "motivating" factor in Cara's conduct. It is noteworthy that Cara and the PBA had no problems and worked in unison in January and February 1984, in connection with the preparation of the budget and the referendum to exceed the CAP, falling out only after the defeat of the referendum on February 28, 1984 when Cara was compelled to move in the direction of layoffs in the Police Department and other municipal departments (3 Tr. 113, 114).

There are two final matters to discuss, which reinforce the Hearing Examiner's conclusion that the Township was not motivated by anti-PBA animus. First, the longevity grievance, of which much was made at the hearings in this matter. The only significance that it appeared to have is set forth in Finding of Fact No. 18 and footnote 8, supra. The potential monetary exposure of the Township, in

the event of the PBA having prevailed in toto on the longevity grievance, would have involved approximately $500 each for five patrolmen, or a total of $2500. Cara is alleged to have stated that if the PBA won this grievance then Sullivan, Jr. might be laid off. Since it was established that the salary and fringe benefits involved in the hiring of one patrolman exceeded $30,000 per year it is difficult to credit any testimony that Cara would have said that Sullivan, Jr. might be laid off if the longevity grievance was sustained in full. There is an enormous gulf between $2500 and $30,000 and it strains credulity to believe that Cara would have equated $2500 in Township expense to the laying off of Sullivan, Jr. Further, Sullivan, Jr. was the second junior patrolman, and not the most junior, following the layoff of seven patrolmen as a result of the adoption of the 1984 budget.

The second and last remaining item for consideration has to do with the fact that Captain Sullivan was not appointed Police Chief. It is clear to the Hearing Examiner that it was Sullivan's health, involving his open heart surgery in September 1983 and inability to handle stress thereafter, which resulted in Cara's ultimate decision to appoint DeMey Chief of Police in November 1984. (See Finding of Fact No. 17 and 2 Tr. 133-136). It is significant that Captain Sullivan declined to apply for the proposed position of Public Safety Director whereas DeMey applied for the position, which, of course, never came into being due to the November 1984 referendum (2 Tr. 120, 4 Tr. 58, 59).

The PBA having failed to satisfy the first part of the Bridgewater test, the Hearing Examiner need not analyze the second part pertaining to legitimate business justification. Suffice it to say that Captain Sullivan's testimony that he could not say that Cara's directed investigations were baseless or without foundation is a persuasive indication that Cara acted with legitimate business justification on behalf of the Township.

Accordingly, the Hearing Examiner must recommend that the alleged violations by the Township of subsections (a)(1) and (3) of the Act be dismissed.

* * * *

CONCLUSION OF LAW

The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) by the conduct of its administrator, Joseph V. Cara, between March 1984 and November 1984.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: April 15, 1985
Trenton, New Jersey