

P.E.R.C. NO. 90-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Respondent,

-and-

Docket No. CO-H-88-38

TRENTON LOCAL NO. 11, NEW  
JERSEY STATE POLICEMEN'S  
BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Trenton Local No. 11, New Jersey State Policemen's Benevolent Association against the City of Trenton. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act when it transferred officer Dwight Stein and filed disciplinary charges against him, allegedly in retaliation for his activities as Local 11's second vice-president. The Commission found, in agreement with a Hearing Examiner, that neither the transfer nor the disciplinary charges were discriminatorily motivated.

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JERSEY STATE POLICEMEN'S  
BENEVOLENT ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, George T. Dougherty, City Counsel  
(Michael L. Bitterman, Assistant City Counsel)

For the Charging Party, Szaferman, Lakind, Blumstein,  
Watter & Blader, Esqs. (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On July 27, 1987, Trenton Local No. 11, New Jersey State  
Policemen's Benevolent Association ("Local 11") filed an unfair  
practice charge against the City of Trenton. The charge alleges  
that the City violated the New Jersey Employer-Employee Relations  
Act, specifically subsections 5.4(a)(1), (3) and (5),<sup>1/</sup> when it

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<sup>1/</sup> These subsections prohibit public employers, their  
representatives or agents from: "(1) Interfering with,  
restraining or coercing employees in the exercise of the rights  
guaranteed to them by this act. (3) Discriminating in regard to  
hire or tenure of employment or any term or condition of  
employment to encourage or discourage employees in the exercise  
of the rights guaranteed to them by this act. (5) Refusing to  
negotiate in good faith with a majority representative of  
employees in an appropriate unit concerning terms and conditions  
of employment of employees in that unit, or refusing to process  
grievances presented by the majority representative."

transferred officer Dwight Stein and filed disciplinary charges against him, allegedly in retaliation for his activities as Local 11's second vice-president.

On October 7, 1987, a Complaint and Notice of Hearing issued. The City filed an Answer denying that its personnel actions were retaliatory.

On January 21 and 22, March 28, May 10, 11 and 19, and June 20 and 22, 1988, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. The City filed a post-hearing brief on November 7, 1988.

On January 20, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 89-19, 15 NJPER 108 (¶20053 1989). She found that the transfer and disciplinary charges were not motivated by Stein's protected activity and in any event would have occurred absent that activity.

On February 21, 1989, after receiving an extension of time, Local 11 filed exceptions. It challenges several findings of fact and argues that the personnel actions were discriminatorily motivated.

On March 13, 1989, after receiving an extension of time, the City filed a response. It urges adoption of the Hearing Examiner's recommended findings of fact, especially her credibility determinations, and her conclusions of law.

On June 23, 1989, the parties argued orally.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-31) are comprehensive and accurate. We incorporate them, with these responses to Local 11's exceptions.

Finding nos. 6 and 8 conclude that Captain Capasso did not know that Stein was a Local 11 vice-president until after he transferred Stein. The Hearing Examiner credited Capasso's testimony on this point. While we have serious doubts that Capasso was unaware that Stein was a union officer, we will not disturb the Hearing Examiner's credibility determination. A contrary finding would not change the outcome of this case.

Finding nos. 25 and 26 review statistics on Stein's productivity for April, May and June 1987. Local 11 asserts that these statistics were not a basis for the transfer. But we agree with the Hearing Examiner that Stein's productivity record, while not the only factor, was a motivating factor in his transfer. His ratio of accidents investigated to accident summonses issued was far below the average for the first quarter of 1987. He was warned that he would be transferred if his ratio did not improve. We need not decide whether Stein would have been transferred absent the July 9 incident. Stein's investigation/summons ratio for at least the first quarter of 1987 contributed to the decision to transfer.

Finding nos. 29 and 30 concern Stein's accepting an assignment at 1:18 p.m. on July 9, 1987 to investigate an accident even though he had been told 11 minutes earlier to report to court. The facts found are accurate.

Finding nos. 34 and 36 concern a conversation at 2:22 p.m. on July 9 between Sergeant Morgan and Stein about when Stein would report to court and what Morgan would tell the judge. The PBA asks

us to discredit Morgan's testimony that the tone of Stein's voice was "abnormal, arrogant and sarcastic" and to reject the Hearing Examiner's inference that Stein was in fact sarcastic because Local 11's president had heard this conversation and decided that "if there was going to be an argument about the court appearances, I was going to be there on behalf of our people" (4T89). Based on the transcript of the July 9 dispatch tape, we agree with the Hearing Examiner that the president overheard the conversation with Morgan, not a later conversation with Meyer which did not specifically refer to a court appearance (Compare 4T88 with R-17). We decline to secondguess the Hearing Examiner's credibility determinations on these findings.

Finding nos. 37, 38 and 39 address Stein's delay in reporting to court. Local 11 contests the "implication" in these facts that Stein acted improperly in investigating two accidents and writing up his reports before returning. The underlying facts are all accurate and speak for themselves. We draw no inference about the propriety of Stein's conduct.

Finding no. 41 addresses two prior occasions when Stein did not appear in court. Local 11 asserts that this finding is gratuitous and irrelevant to the transfer. Again the underlying facts are accurate. A Hearing Examiner does not weigh the evidence in the findings of fact; she simply finds the facts. When analyzing the evidence later on, the Hearing Examiner did not rely on these facts.

Finding nos. 42, 43 and 44 address the exchange between Meyer and Stein when Stein reported back to the traffic office at 3:10 p.m. The Hearing Examiner credited Meyer's account of this meeting but Local 11 asks us to reverse that determination. We decline to do so. The Hearing Examiner carefully analyzed all the evidence and reasonably explained why she accepted Meyer's testimony.

Finding no. 46 addresses a conversation a few minutes later among Meyer and Morgan and Local 11's president. The Hearing Examiner credited Meyer and Morgan. We accept that determination.

Finding no. 47 addresses Meyer's oral order that Stein write an explanation of the July 9 incident and Stein's response requesting a written order so as to eliminate any confusion. Local 11 asserts that this finding wrongly implies that Stein acted improperly. The findings are all accurate and speak for themselves. We draw no inference about the propriety of Stein's conduct.

Finding no. 50 concerns the disciplinary charge based on Meyer's written report of July 10 (R-20). Local 11 asks us to note that this report did not refer to any performance problems. We so note.

Finding no. 52 concerns Stein's transfer. Local 11 asserts that the transfer was not based on Stein's low productivity since Meyer's report leading to the disciplinary charges did not mention that problem. But Stein's investigation/summons ratio was a factor in Meyer's recommendation that Stein be transferred and Capasso's

agreement to do so. Capasso did not testify that the transfer was based solely on R-20 (8T71).

Finding no. 54 accurately recounts a memorandum (CP-27), written two days after this charge was filed, from Capasso to Deputy Chief Courtney on the reasons for Stein's transfer. We do not read the reference to Stein's negative attitude to include his complaints on behalf of the officers he represents. It is directly linked to his responsibilities as an accident investigator and his alleged reluctance to issue summonses.

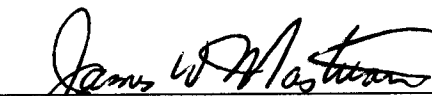
In re Bridgewater Tp., 95 N.J. 235 (1984), states the standards for assessing allegations that personnel actions were motivated by a desire to retaliate against an employee for protected activity. The Hearing Examiner accurately described these standards (15 NJPER at 114). Given her findings of fact, she correctly concluded that neither the transfer nor the disciplinary charges were discriminatorily motivated and that they would have occurred even absent Stein's protected activity. Having adopted her findings of fact, we now concur in her conclusions. As the Hearing Examiner did, we end our analysis with these determinations. Once we find that personnel actions have not been illegally motivated, we have no jurisdiction to consider whether they were otherwise fair or warranted.

Local 11 has not excepted to the recommended dismissal of the 5.4(a)(5) allegation. We accept that recommendation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Reid, Johnson & Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision. Commissioner Ruggiero was not present.

DATED: Trenton, New Jersey

July 31, 1989

ISSUED: August 1, 1989



H.E. NO. 89-19

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

In the Matter of  
CITY OF TRENTON,

Respondent,

-and-

Docket No. CO-H-88-38

TRENTON LOCAL NO. 11, NEW JERSEY  
STATE POLICEMEN'S BENEVOLENT ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Trenton P.B.A. second vice president was not transferred or brought up on disciplinary charges in retaliation for his protected activities. P.B.A. failed to establish that the commanding officer who effected the transfer and disciplinary charges knew of the vice president's union activities or of his frequent complaints about the traffic unit's policies and procedures. P.B.A. also failed to show that City agents showed any animus to those protected activities.

The Hearing Examiner further finds that even if the P.B.A. had met the first part of the Bridgewater test, the City would have transferred the employee and would have brought disciplinary charges against him even in the absence of his protected activities.

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

H.E. NO. 89-19

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

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Charging Party.

Appearances:

For the Respondent,  
George T. Dougherty, City Counsel  
Michael L. Bitterman, Esq.  
Assistant City Counsel

For the Charging Party,  
Szaferman, Lakind, Blumstein,  
Watter & Blader  
Sidney H. Lehmann, Esq., Of Counsel

HEARING EXAMINER'S REPORT AND  
RECOMMENDED DECISION

On July 27, 1987 Trenton Local No. 11, New Jersey State  
Policemen's Benevolent Association ("PBA or "Local 11") filed an  
unfair practice charge alleging that the City of Trenton ("City")  
violated subsections 5.4(a)(1), (3) and (5) of the New Jersey  
Employer-Employee Relations Act, N.J.S.A. 34:13A et seq., ("the

Act") 1/ by filing disciplinary charges against Local 11's second vice-president, Dwight Stein, and involuntarily transferring him, both in retaliation for his exercise of rights under the Act and without negotiations with Local 11.

On October 7, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On November 6, 1987 the City filed an Answer, admitting that Stein was transferred but denying that any disciplinary actions were retaliatory. The City further asserted that transfers are not negotiable. I conducted hearings on January 21, 22, March 28, May 10, 11, 19, June 20, and 22, 1988, at which the parties examined witnesses and presented exhibits.2/ Both parties waived oral argument and asked to submit briefs. The

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Transcripts of hearing are referred to as follows: the January 21 hearing transcript is "1T-"; the January 22 hearing transcript is "2T-"; the March 28 hearing transcript is "3T-"; the May 10 hearing transcript is "4T-"; the May 11 hearing transcript is "5T-"; the May 19 hearing transcript "6T-"; the June 20 hearing transcript is "7T-"; the June 22 hearing transcript is "8T-". Charging Party's exhibits are referred to as "CP", Respondent's exhibits as "R", and jointly submitted exhibits as "J".

City did so on November 7, 1988.<sup>3/</sup> Local 11 did not file a brief. Based upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. P.B.A. Local 11 represents the City's patrolmen and detectives. The City and Local 11 are parties to a collective negotiations agreement covering this unit (J-1).

2. Patrolman Stein was an accident investigator assigned to the traffic unit. The traffic unit is commanded by Lieutenant Paul Meyer. Traffic Supervisor, Sergeant Thomas Morgan, assists him. Traffic is part of the special operations section, which is commanded by Captain Frank Capasso (5T4; 6T109; 8T50-51, 8T63-65).

The traffic unit consists of accident investigators, selective enforcement officers, parking violations officers, crossing guards, and the unit secretary. Accident investigators primarily investigate accidents. Selective enforcement officers primarily enforce the motor vehicle code using radar and monitoring traffic (1T49, 1T143-144; 3T52; 4T76; 5T6).

Stein's Employment History

3. Patrolman Stein was transferred into the traffic unit in 1981 at his request. He held that assignment from August, 1981

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<sup>3/</sup> Both parties agreed to simultaneously file briefs by September 30. By joint request of the parties, I twice extended the briefing period, and briefs were finally due October 21. Although the City's brief was late, I considered it.

until he was involuntarily transferred back to the patrol section on July 15, 1987<sup>4/</sup> (CP-4, CP-5; 1T128; 2T52-56).

4. During Stein's 14-year employment with the Trenton police department, he has maintained a satisfactory work record. He had never been suspended, fined, formally reprimanded or brought up on charges before 1987. Stein received an award for valor in 1979 and several letters of commendation or appreciation. He was once recommended for officer of the year (CP-2; 1T111; 1T113-120).

In July, 1985, he was given his only written evaluation,<sup>5/</sup> by then traffic commander, Lt. Fred Reister. That evaluation indicates that Stein's performance was satisfactory, rates his court appearance as "good," and notes, "Officer has good courtroom demeanor, usually prepared and familiar with his case prior to entering the courtroom. Answers his subpoenas when given, testifies adequately." (CP-6; 1T129-143; 2T55).

#### Stein's Protected Activities

5. Stein has been Local 11's second vice-president and chairman of trustees since 1981. For three years prior to that, he was a Local 11 trustee. He was most recently reelected in June, 1987. Local 11 President, Thomas Murphy, told the police chief of the unopposed slate of officers. The PBA forwarded the list of

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4/ Patrol is a less desirable assignment because there are three shifts instead of the two in traffic (2T55).

5/ The evidence does not suggest that there was ever a formal evaluation system in the department.

officers to the chief and posted it in the police station (CP-3; 1T120-122; 2T48; 4T71-73; 4T127-130; 4T179-181).

6. Stein's duties as second vice-president include attending bi-monthly PBA meetings, participating as an alternate on Local 11's negotiations committee, and handling complaints and grievances from officers in traffic and Patrol (1T125; 4T73-76).

Stein attended PBA meetings the first and third Fridays of every month. By contractual agreement, PBA officers on duty are excused from assignment to attend PBA meetings. When attending evening meetings, Stein notified his sergeant. The sergeant was responsible for notifying the commanding officer, who, after 5:00 p.m., would be the captain.<sup>6/</sup> It was noted on a log sheet (1T123-125; 4T73-74).

7. Negotiations for the current contract began in October 1986 and continued through the summer of 1987. Murphy characterized negotiations by July, 1987, as "stalemated and uncomfortable." Stein was responsible for soliciting suggestions for negotiations from the uniformed division. Local 11's officers--Murphy, Smith, Dougherty, and occasionally Stein,<sup>7/</sup>--were released from duty to attend negotiations sessions, provided they informed the supervisor. Stein was excused by Lt. Meyer to attend negotiations (1T124-125; 2T49-52; 4T75; 4T76; 4T132; 4T133).

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<sup>6/</sup> The record does not establish that Capt. Capasso was the captain on duty in the evenings, nor that the sergeant actually notified the captain.

<sup>7/</sup> As the alternate, Stein attended negotiations when a PBA team member was unavailable (4T76).

8. Lt. Meyer acknowledged that beginning in January, 1987, he knew Stein was an officer in Local 11. Captain Capasso did not know Stein was a Local 11 vice-president until after he transferred Stein.<sup>8/</sup> (7T16; 8T59; 8T80-81).

#### Stein's Complaints

9. Local 11 believed that Stein was being "harassed and threatened" with a transfer because of complaints he made to superior officers on behalf of himself and other officers. These complaints concerned two areas: management's emphasis on improving the traffic unit's "productivity", and problems with the computerized court notification system (4T86-87).

10. When Meyer took command of the traffic unit in January, 1987, Capasso told him he wanted more "productivity", i.e. more summonses issued, from officers.

Meyer took steps to raise productivity. He changed the practice of compiling statistics to a monthly basis and included a ratio of accident summonses issued as a percentage of accidents investigated to track performance. He and Sgt. Morgan held meetings with the officers to explain that accident summonses should be

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<sup>8/</sup> In the absence of contrary evidence, I find this fact based upon Capasso's credible testimony that it was only after he signed Stein's transfer that he learned Stein was a Local 11 officer. See fn. 6.

increased. Meyer also issued a memo (R-1)<sup>9/</sup> to explain summons issuance procedure (R-1; 1T45-46; 1T155; 4T82-83; 5T20-21; 6T157-158; 6T161).

Meyer also started conducting monthly meetings with each officer to review his statistics as compared with other officers and with the officer's own prior performance. The officers were offended by the practice and referred to them as "report card" sessions (3T53-54; 6T161).

11. As a result of Meyer's directives to write more tickets, officers complained to Murphy and Stein about being used as "fund raisers" rather than issuing summonses that could be won in court. Officers felt that they should have more discretion in terms of writing tickets and felt that the command just wanted to see statistics. During staff meetings, both Murphy and Stein opposed what officers perceived as a possible ticket quota system; the officers wanted to know what the quota was and why. Stein raised the issue of discretion in writing summonses at several monthly

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<sup>9/</sup> R-1 provided, "When investigating an accident officers should endeavor to determine who was at fault and if there was a violation of the law. Generally a summons should be issued whenever the investigating officer feels that a charge can be successfully prosecuted in municipal court. Discretion may still be used, however, if a summons is not issued, it should be explained in the narrative."



staff meetings; <sup>10/</sup> Stein and Patrolman Alan Tormondson, also an accident investigator, had also complained earlier to Lt. Cole, the previous traffic commander, that too many of their tickets were being dismissed in court (1T47; 1T82-85; 1T157; 4T84; 4T182-183; 7T53).

Stein also raised the issue at his individual report card session with Meyer in early April. He questioned how many tickets were required (1T159).

As a result of officers' complaints about the equity of the statistics, Meyer changed the monthly reports to also include accidents involving juveniles, accidents on private property and hit-and-run accidents (6T161-162).

12. In mid-1986, the City implemented a new system of notifying officers of court dates by computer printouts. Each officer received a computer printout of his cases scheduled or rescheduled by the violations clerk. Usually the printout contained cases scheduled for a month at a time and were received about once a week or every other week depending upon the court case load. That system is still in use (1T43; 1T92-94; 1T148-149; 3T4-5).

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<sup>10/</sup> I reject Meyer's testimony that while he knew officers were unhappy with the concept of the report cards sessions, he was unaware that Stein was one of the officers who had complaints. It is far more likely that, as Officer Alan Tormondson, Stein and Murphy testified, Stein frequently complained about a statistical comparison, since he was the least productive traffic officer (1T82-85; 1T156-157; 4T84-85; 7T53).

Murphy, Stein, and Tormondson all confirmed that there were many occasions when traffic unit officers experienced problems with printouts. Printout distribution was inconsistent.<sup>11/</sup> Printouts were not always received prior to the scheduled court date, leaving officers unaware of and unprepared for scheduled court appearances (1T28; 1T43; 1T150-151; 3T4; 4T138-139).

Additionally, printouts were not always accurate. Some cases listed on the printouts had already been heard. Officers were sometimes simultaneously scheduled to be in different court rooms, so officers were incorrectly told that they had missed court (4T80; 4T141-142).

13. Officers complained to Stein<sup>12/</sup> about these problems with the computer notification system. Stein told Murphy and also complained to Lt. Cole, the previous traffic commander, and later with Lt. Meyer on behalf of the traffic officers. Tormondson and other officers in the traffic section complained to superiors and to the court administrator that the computer printouts were not always coming out on time (1T94; 1T26-28; 1T149-150).

Murphy also met informally with Lt. Cole and later with Lt. Meyer and asked if a better system could be used. Unsatisfied,

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<sup>11/</sup> Although Morgan testified that he or his secretary places computer printouts in officers' mailboxes, I credit Murphy's testimony that sometimes his printout were put in his mailbox and sometimes delivered underneath or taped to the PBA office door and sometimes handed to him (4T79; 6T39).

<sup>12/</sup> Employee grievances could be channelled through any Local 11 officer (2T51).

Local 11 wrote to the chief and then to Public Safety Director Lucherini about the problems (R-6; 6T159).

14. Complaints about the computerized court notification system continued into the fall of 1987. Meyer and Capasso issued memoranda in October, 1987 clarifying court scheduling procedures and requiring officers having problems with the system to submit documentation to Meyer. Officers continued to orally complain, but no written complaints were filed (R-13, R-14; 4T77-80; 4T140-145; 4T148-149; 5T53-57; 6T75-76; 6T145).

15. Murphy heard from Morgan, Meyer and Courtney that Stein would be transferred at the end of June. On April 22, 1987, Local 11 wrote to City Administrator Richard Porth requesting a meeting to discuss Stein's threatened transfer. Porth met three times with Murphy. Murphy believed that the threat to transfer Stein was retaliation for his complaints, and was coming from Deputy Chief Courtney.<sup>13/</sup> However, Murphy said of Stein's transfer threat, "If [Stein] didn't issue the summonses like they wanted, he was going to be transferred." (CP-21; 4T84-87).

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<sup>13/</sup> In December, 1985, Murphy was directed to ticket officers' cars in the parking lot and "at one time" his hours were changed." (4T105). In January, 1986, Local 11 filed unfair practice charges (CO-86-185) with this Commission charging that City agents were harassing Local 11 President Murphy. That charge was withdrawn on the basis of a settlement agreement between the parties. At Local 11's request, I take administrative notice of this charge and its withdrawal. However, I find that neither Murphy's testimony concerning events on which this charge is based, nor the filing of the charge establish any proofs relevant to the instant dispute.

Stein's Productivity

16. When Meyer took command of the traffic unit in January, 1987, Capasso told him he wanted to see more productivity from traffic officers. As a result of Meyer's review of the 1986 annual report and conversations with Capasso and former traffic commander Lt. Cole, Meyer learned that Stein was the least productive of the six accident investigators. Capasso told Meyer to advise all officers that "poor performance would not be tolerated," and "anyone who wasn't performing regardless of who they were, would be subject to transfer." Capasso told Meyer to have Stein get his statistics up or face transfer (6T113; 7T5; 7T9; 8T55-58).

17. At an individual report card meeting with Stein in early April<sup>14/</sup> Meyer advised Stein that his statistics, especially his accident/summons ratios, were very low. He warned Stein that if they were not brought up, he would be transferred out of the unit at the end of the quarter (June 30) (1T160; 2T73-74; 6T161-164).

Meyer also admonished Pollard and Volosky to get their accident ratios up, and further warned Pollard that he would be transferred if he did not improve his ratio. After that, Pollard and Volosky brought their ratios up to within the normal range (7T9-10; 7T54).

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<sup>14/</sup> Stein testified that this meeting took place at the end of April; however PBA grieved the threatened transfer in mid-April. (see fact no. 15).

18. Stein felt that he was being threatened to improve or be transferred. As a result of Stein's April "report card" session with Meyer, Morgan kept a check on Stein's productivity. Stein's productivity improved, and then declined again. At Stein's next report card session in May, Meyer told Stein that his accident statistics had improved but they could be better. The transfer threat was not renewed (1T160; 2T7-9; 5T23-25).

19. The 1986 annual report (CP-7; R-11) shows that except for Dunscomb, who only worked as an accident investigator for part of the year, Stein investigated the greatest number of accidents but issued the fewest number of summonses in every category for 1986.

20. The January, 1987 report (R-3) shows Stein worked the greatest number of days of all accident investigators.<sup>15/</sup> He investigated the most accidents of all investigators, and although his selective enforcement summonses were in the middle of the range for the accident investigators,<sup>16/</sup> (14; the range was 11-17), he issued the fewest radar summonses (3; the range was 10 to 22), and no parking tickets (the range was 1 to 12).

21. In February, Stein worked the greatest number of field hours of the accident investigators. Again he issued the fewest number of parking summonses (3; the range was 7 to 14), the fewest

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<sup>15/</sup> Field hours was not a component of the January report.

<sup>16/</sup> These ranges are from the lowest to the highest of the other accident investigators; selective enforcement officers' ranges were not used because they have a much greater emphasis on issuing summonses.

number of radar summonses (3; the range was 17 to 35), the fewest number of selective enforcement summonses (8; the range was 8 to 33), and the fewest number of accident summonses (10; the range was 18 to 34). In February, 1987, the number of accident summonses issued became an additional component of the monthly reports. Stein's February percentage of accident summonses issued to accidents investigated was 20%, as compared with a unit average of 43% (Ex. R-4).

22. In March Stein worked 141 field hours (the range was 146 to 173). His selective enforcement summonses were the fewest of the accident investigators (13; the range was 15 to 47), and his accident summonses were the lowest (11; the range was 22 to 34) but he was within range on his radar summonses (17; the range was 16 to 35), and also on his parking summonses (12; the range was 7 to 50). Stein's March percentage of accident summonses issued to accidents investigated was 25%, as compared with a unit average of 46% (R-5).

23. In April, Stein worked 120 field hours (the range was 54 to 142). During April, Stein's accident summonses were within the range (23; the range was 11 to 32), his parking summonses were within range (8; the range was 3 to 39). His radar summonses and selective enforcement summonses were both the lowest, except for the officers who only worked 54 hours that month. However, he did get his accident summonses up to 46% of the accidents issued, as compared with the unit average of 52% (R-6).

24. In May, Stein worked 147 field hours, out of a range was 80 to 158. That month, he was within range in radar summonses, parking summonses, selective enforcement summonses, and accident summonses. He also investigated more "hit-and-run" accidents (which usually do not result in summons) and more accidents investigated than any other officer. His ratio of accident summonses to accidents investigated was 42%, as compared with the unit average of 66% (R-7).

25. In June, Stein worked 122 field hours out of a range of 51 to 168. Although he was again in range on radar summonses (24 the range was 19 to 39), he was again the lowest (except the officer who only worked 51 hours) in selective enforcement (14; the range was 18 to 38), the lowest in parking summonses (9; the range was 12 to 21). Although he is within the numerical range (24; the range was 20 to 51 in accident summons), his ratio of accident summonses to accident investigated dropped to 39%, as compared to the unit average of 65% (R-8).

26. Meyer met his goal to increase productivity in the unit for 1987. The monthly reports show the traffic unit increased its ratio of accident summonses issued to accidents investigated every month from January through June (R-18). Stein's ratio improved in April, but declined again in May and in June. Further, it was only in April that he came within 20 percentage points of the traffic unit average for accident summonses as a ratio of accidents investigated. Meyer felt Stein was reluctant to write tickets because he was attempting to avoid going to court (7T55).

27. When Stein was asked to explain how other officers working similar hours and investigating a like number of accidents could have time to issue so many more tickets than Stein, he said, "Well, I was also second vice-president of the PBA and some of that time is allotted for me to be doing PBA business." He couldn't estimate how much of that time was devoted to union business. However, I credit Meyer's explanation that Stein's low productivity could not be attributed to his union activities because such time is not charged as "field time". Meyer's explanation is confirmed by Murphy's PBA time being charged as "other." (R-4, R-5, R-6, R-7, R-8; 2T65; 7T17).

#### The July 9 Incident

28. On July 9, 1988, Officer Stein was working as an accident investigator on the 7:30 to 3:30 shift. Stein had five cases scheduled for traffic court at 1:00 p.m. in the Police headquarters building. Stein never received the July 2 printout listing the five cases, but could not recall whether he received a similar printout dated June 26, which also listed the five cases. <sup>17/</sup> (R-2, R-9; CP-9; 2T9; 3T5-7; 3T31-32).

29. At 1:07 p.m., the dispatcher announced over the police radio, "The following officers are needed in Courtroom A: Dwight

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<sup>17/</sup> Given the acknowledged problems with the computer notification, I credit Stein's and Tormondson's testimony that they both first became aware that they had court cases scheduled July 9 when they were notified by the radio dispatcher (1T81-82, 1T94).



Stein, Tormondson, Thatcher, Ayres, Oshman, and Hemsey; Courtroom A." Stein was not on an assignment at that time<sup>18/</sup> (R-17).

30. At 1:18, Dispatcher 25 <sup>19/</sup> asked over the police radio whether there were any traffic cars available to take an assignment (R-17; 3T12).

Stein answered the dispatcher, "North. What've you got?" <sup>20/</sup> The dispatcher gave him the location of an accident, and a pick-up time. Stein accepted the assignment and arrived at the accident scene at 1:26 p.m.. Stein obtained enough information about the accident to enable him to fill out an accident report (CP-9; CP-10; 2T15).

31. At approximately 1:30, while investigating the accident, Stein, "as a PBA representative," was called over the police radio by Patrolmen Elbertson, about "some type of problem

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<sup>18/</sup> Stein testified that he was engaged in investigating the Whittaker Street accident when he was notified by the dispatcher of court (2T10). However, Stein's later testimony, (2T14; 3T40) his daily log sheet for July 9 (CP-9), the Whittaker Street accident report (CP-10), and the transcript of the dispatchers' tape all indicate that that accident had not yet occurred. Stein's daily log shows he was engaged in no activity from 12:30 until 1:18. (CP-9)

<sup>19/</sup> The record does not indicate whether this was the same dispatcher who announced 11 minutes earlier that Stein and others were to report for court. There are several dispatchers working on any given day.

<sup>20/</sup> I do not credit Stein's testimony that his response to the dispatcher was, "I believe I said I was proceeding into court; if there was no one else to handle it, I would take the job." (3T45). This contradicts statements recorded on the dispatch tape (R-17), which I find more reliable.

that he wished to see [Stein] about." Stein intended to go to Elbertson, see what was involved, advise Elbertson that he would see him later, and then proceed to court. Stein responded to his request and met him at Helen Fuld Hospital. Stein acknowledged over the radio that he would go see Elbertson on his way in to court. Although Morgan heard this radio conversation, he did not interfere or order Stein not to go (2T15; 2T16; 6T53).

32. Shortly after Stein arrived at Helen Fuld Hospital, he heard an accident occur. Stein called the accident in to the dispatcher.<sup>21/</sup> Later he called the dispatcher back and was given a case number and pick-up time of 1:55 p.m.<sup>22/</sup> Stein investigated the accident. There was one injury, and both cars were moved (CP-9; CP-11; R-17; 2T17).

33. At 2:15 p.m., Sgt. Morgan learned that Stein had not yet reported for court because the assistant public defender came into Morgan's office looking for Stein. Morgan knew by then that Stein had already picked up the second accident (6T53).

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<sup>21/</sup> It is not clear from the record whether this was done by police radio or by telephone.

<sup>22/</sup> I do not credit Stein's testimony that when he became aware of the accident, he contacted the radio room and asked whether he should handle it or not, since he was wanted in court. Stein said he was then given a case number and pick-up time, meaning he was assigned to handle the accident. However, according to the dispatch tape, Stein wasn't given the case number and pick-up time until 2:21 p.m., when he apparently called the dispatcher back and asked for the case number and pick-up time.

34. At 2:22 p.m., Sgt. Morgan called Stein on the police radio and asked, "Any estimate on your time for heading into court?" Stein replied, "As soon as I finish the two accidents. I'm backed up." Morgan responded, "That didn't tell me anything. Do you have an approximate time for the judge?" Stein answered, "I don't have any idea. Soon as I finish the report and sign my name; could be from ten minutes to an hour." Sgt. Morgan then said, "10-4. When you complete, report to traffic." Stein replied, "10-4." Morgan described Stein's tone as "abnormal, arrogant and sarcastic." (R-17; 6T17-18; 6T-44; 6T47,48).

35. Morgan told Meyer that he had been trying to get Stein on the radio to get him to come into court. Shortly thereafter, at 2:53 p.m., Municipal Court Judge Fantin came into the traffic office with five summonses. Fantin complained that parties had been sitting for two hours and that Stein was holding up court. Fantin said he would dismiss the summonses (6T22-23).

Meyer called Stein on the radio at 2:59 p.m. and asked, "Are you tied up out on the street because we need you here at headquarters?" Stein replied, "I'm writing two accidents." Meyer then said, "If it's just the information, could you finish them up later, and come into headquarters now unless you're waiting for a wrecker or something.". Stein replied, "10-4, if you want me to come in, I'll proceed in." Stein arrived in the traffic office at 3:10 p.m. (R-17; 6T20, 6T21, 6T24).

36. Morgan found Stein's responses to him sarcastic and unhelpful. Murphy heard the exchanges between Stein and Morgan (and/or Meyer)<sup>23/</sup> on the police radio and decided that "...if there was going to be an argument about the court appearances, I was going to be there on behalf of our people (4T89). I find Murphy's perception of this conversation confirms Morgan's testimony about the nature and tone of the conversation.

Morgan also found Stein's reply unsatisfactory because,

"When you are out there investigating an accident you know how long basically, within a couple of minutes, not an hour, how long it is going to take you. Once you get the basic information...the other blocks and the narrative can basically be completed... at a later time, if necessary unless it's some kind of really complicated investigation. But those are the exceptions rather than the rule" (6T19).

Morgan's subsequent review of the Brunswick Avenue accident report showed it was an average accident with minor injury and was an uncomplicated report. Stein would have known at the scene how complicated the report would be (CP-11; 6T76; 6T82-83).

37. Meyer explained that accident investigators are responsible for notifying the radio dispatchers when they are not in service, or at least to advise dispatchers attempting to give them an accident that they have been otherwise detailed, e.g. court. Meyer, therefore, believed that Stein should not have

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<sup>23/</sup> From Murphy's recitation of the radio transmissions, I infer that he heard at least Stein's exchange with Morgan, and possibly also Stein exchange with Meyer as well.

responded to take the Whittaker Street accident. Other traffic cars in service or selective enforcement officers could have taken the assignment.<sup>24/</sup> Stein acknowledged that it is his obligation to advise headquarters of his status. There is no evidence to suggest that Stein ever notified the radio room or his commanding officers that he was going to be late for court because he was involved in the accident investigations (R-16; 3T50; 8T10-12).

38. Stein agreed that if he had gone directly to court when called, he would not have been in service to take the accidents. Stein believed the accidents had priority over court, and discipline could result if he didn't respond to an accident call (3T13; 3T34-35).

Stein's own testimony indicates why he did not proceed directly into court:

"From past experience I knew I have approximately one to two hours waiting time. I had time to go to [Elbertson] and see what was involved and go to court." (3T41-42).

Stein conceded that he had no way of knowing which court cases would be called first. When Stein was asked what would happen if all officers called to court had chosen not to report immediately, he said, "I guess I made a mistake and did the job because I took the assignment first...It was my assignment as a traffic officer." (3T49).

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<sup>24/</sup> On July 7, Lt. Meyer distributed a memorandum (R-16) to all traffic officers, providing, "when accident cars are out of service for any reason selective enforcement officers shall handle accidents..."

39. Accident report procedure is that the officer gets sufficient information to complete the report, go back in service, and write the report later as time permits (6T25; 7T77-78). Stein was attempting to finish both accident reports before he proceeded into court.<sup>25/</sup>

40. Ptl. Tormondson was also scheduled to appear in court at 1:00 p.m. that day. He accepted an assignment at 1:05 p.m. and arrived at headquarters at 1:50.<sup>26/</sup> He was not disciplined or reprimanded because of his arrival time (R-10; 1T30-31).

41. Stein failed to appear in court on two prior occasions. In February, 1987, he failed to appear in a federal court civil trial in answer to a subpoena. Lt. Meyer asked Stein to write a written explanation as to why he did not appear. Stein submitted a memorandum (R-19) to Meyer asking him to reduce his directive to a writing. Meyer did not pursue the matter. On another occasion, Stein failed to appear for municipal night court. When Meyer questioned Stein about it, he responded that he

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<sup>25/</sup> I infer this from the completion time on his log sheet (CP-9), his radio responses to Morgan and Meyer (see facts 34 and 35), and his comments to Meyer in the traffic office (See facts 43 and 44). Stein's log sheet shows both accidents were completed by 3:00, meaning the time the report was completed (3T37). Stein testified that he had not written the second accident report before he came into the station (3T39). He told Morgan and Meyer that he was working on his accident reports.

<sup>26/</sup> Tormondson testified that he was not on assignment, so he came directly into the station when called by the dispatcher. However, I credit his log sheet which indicates he was on an assignment from 1:05 to 1:50 p.m.

was investigating an accident involving a pedestrian which had been struck. Stein told Meyer that he had notified the court through the dispatcher that he would be unable to get to court that night due to the accident. Meyer accepted Stein's explanation and no discipline resulted (7T18; 7T68-69).

Insubordination/Profanity

42. On July 9, Stein arrived in the traffic office at 3:10 p.m. Lt. Meyer, Sgt. Morgan, Patrolman Tormondson, Patrolman Thomas Voloski, Parking Violations Officer Carol Havens, and Unit Secretary Anna Rosario were all present in the main area of the traffic office. Stein and Meyer both testified extensively about the exchange that ensued between them. Havens, Tormondson, Voloski and Rosario also testified about what they heard.<sup>27/</sup>

Meyer and Stein were standing in the main traffic office near the doorway of the office they shared. Tormondson had been talking to Meyer and Morgan. As Stein approached the three, Tormondson made a joke that the judge was going to give Stein six months if he were not on time (1T31; 3T60; 6T23-24; 7T44).

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27/ Except where noted, I credit Meyer's account of the incident: his testimony was clear, straightforward, and dispassionate. Meyer was the only witness that fully recalled the conversation (7T43-48; 7T68-71). Stein was upset at the time of the incident, thus clouding his ability to now recall all of the details. Tormondson, Voloski, Havens and Rosario could only recall parts of it, and asserted that they weren't really paying attention. Meyer's testimony is also consistent with his July 10 report of the incident (R-20).

43. Meyer told Stein several times to go to court (3T88; 7T44).<sup>28/</sup> Stein responded that as far as he knew he did not have court and would first have to check what he had scheduled. He couldn't recall if he was asked why he had not come in sooner (2T25).

Stein was upset<sup>29/</sup> and became very loud and said, "I am working on two goddamn accidents." <sup>30/</sup> (7T44; 7T70).

Meyer continued trying to tell Stein to get to court. Meyer also tried to explain to Stein that he (Meyer) had spoken to Judge Fantin and the court administrator about court schedules but that he could not complete a sentence because Stein continued to

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28/ Stein testified that he could not recall exactly what Meyer or Morgan said to him except that he was told to get to court (2T24). Stein acknowledged that Meyer and Morgan spoke in a normal tone of voice.

29/ Voloski agreed that Stein appeared to be upset (3T86).

30/ Stein acknowledged that he said he had been working on two accidents but denied using profanity. He said he didn't know if he was shouting, but that his voice might have been "a little raised", because, "I was advised I was wanted in court, why wasn't I there and as far as I know I didn't receive any notice that I was wanted in court on that date and I was working on two accidents and now I was being told to get into court right away." (2T25). Tormondson confirmed Stein was speaking in a raised voice during this exchange with Meyer (1T60-64, 68, 92). Rosario heard Stein mention something about two accidents. "She described his tone as loud but explained, "he's got a loud voice." (3T108). Voloski testified that Stein said something about investigating accidents, but couldn't confirm or deny that Stein used profanity. He described Stein's tone of voice as normal, "for Stein." Voloski could not confirm or deny that the conversation between Meyer and Stein was heated or that Stein was yelling or interrupting (3T58-61).



shout and interrupted, "I am doing my job." Meyer told Stein three times to go to court<sup>31/</sup> (7T44).

44. Meyer told Stein that he could finish the accident reports after court and if it went beyond his tour of duty that he would be paid overtime. Stein replied, "You will pay me overtime, it may take me 'til 10:00."<sup>32/</sup> Again Meyer told Stein to go to court. Stein then walked over to his brief case on the file cabinet near the main entrance from the hallway. Stein said at least once in a loud voice, "These so called bosses with no fucking balls. Nobody stands up for us."<sup>33/</sup> (7T44-45).

Stein then repeated the comment in similar words in a very loud voice.<sup>34/</sup> Meyer and Morgan went back into their office.

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<sup>31/</sup> According to Morgan, Stein was interrupting him in very loud tones, and Meyer "couldn't get a word in edgewise." (6T28). Voloski testified that he didn't know if Stein was interrupting (3T84).

<sup>32/</sup> Voloski agreed that something had been said about filling out overtime slips for continuing an accident report (3T60).

<sup>33/</sup> I have credited Meyer's version of that comment for the reason expressed in footnote 27. All six witnesses to Stein's outburst testified. All corroborated Meyer's testimony that Stein said something about "bosses not having enough balls to stick up for the men." While Stein was not sure how he phrased it, he acknowledged that he made the comment (2T33). Stein and others did not recall if his comment included the expletive. Given the extensive use of profanity in the police department (see fact 48), I infer, given Stein's state of agitation at the time, that he used the expletive attributed to him by Meyer. Accordingly, I credit Meyer's testimony on that point.

<sup>34/</sup> Although I find the repetition as a fact, I attach little significance to how many times it was said.

Much testimony was elicited during the hearing concerning to whom Stein addressed his comment: there are varying accounts of whether Stein was talking to Murphy or whether Murphy was even present. Given the nature and substance of the comment, and the fact that it was said in the third person,<sup>35/</sup> I find the insult was directed towards Meyer and Morgan, and that Stein was addressing his audience of colleagues in the traffic Office at the time. Although I credit Murphy's testimony that he was in or near the doorway of the traffic office during the final part of this exchange and heard Stein's comment,<sup>36/</sup> I find that it was not a private conversation between the two of them.

Stein explained why he made the comment: "...in this particular case, I was advised I had court and I didn't know it until I was called on the air and then I'm supposed to drop everything and run into court." He was also referring to the occasion when he was questioned about missing night court and a reprimand Voloski received for not responding to an accident. He felt nothing was being done about officers' complaints (2T26-29).

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<sup>35/</sup> Except Morgan, (whose testimony on this point I do not credit) all witnesses agree the comment was in the third person, i.e. "these bosses...".

<sup>36/</sup> Morgan and Meyer denied seeing Murphy in the traffic office during the exchange with Stein. Morgan thought Murphy knew about the exchange by hearing the radio transmissions (6T30-31). I find this explanation inadequate. Murphy would only have reason to go in and offer reasons for Stein's behavior to Meyer and Morgan (see fact 46) if he had heard Stein's comment in the traffic office.

45. After the comment, Stein gathered his paperwork and went to court. All five cases listed on the court docket were called. The accident case was heard. The others, radar summonses, were dismissed. He finished court at 3:40. Stein completed his tour of duty at 3:40 and worked no overtime (CP-9; R-2, R-9; 2T33; 3T29-30; 7T76).

46. A few minutes later, Murphy came into the supervisors' office, offering explanations for Stein's behavior. Murphy said it was hot outside, Stein suffers from high blood pressure, diabetes and migraine headaches, and that this may be why he acted the way he did (6T29-30; 7T71).

47. After the July 9 incident, Meyer directed Stein to write an explanation about his conduct in the traffic office and the radio transmission. Meyer asked him if he understood. Stein initially responded "no" and Meyer again explained in detail what he wanted. He asked Stein if he understood and Stein replied, "Okay." and left (R-20; 8T15-16). Stein's written reply says,

"I fully intend to comply with your directive. However, I am confused by your verbal order as to what I am to write about. I therefore request that you reduce your verbal order to that of a written one and I will attempt to answer." (CP-12).

Stein and other officers have previously filed this form letter in response to directives to submit private reports. Meyer did not believe the form letter was an appropriate response. Meyer wanted Stein to complete the "private report" to get Stein's

side of the incident<sup>37/</sup> (CP-12; R-19; 7T19-20; 8T15-16; 8T47-48).

Other Profanity in the Department

48. According to Voloski, profanity and coarse language, including the word "balls," is used every day in the traffic office, even in conversation with superiors. Discipline has not resulted from such conversations. Tormondson never heard Stein use profanity to a superior officer (3T100, 3T102-103).

In an incident between Lt. Williamson and Deputy Chief George Courtney on April 29, 1988, Courtney twice cursed at Williamson. Finding Williamson near the traffic office, Courtney said in a loud, angry voice, "What the hell are you doing down here anyway?...I don't want you down here, get the hell out of here." Williamson filed a "complaint"(CP-19) to Chief Prihoda alleging Courtney violated police department rules. Lt. Williamson received no reply and does not know whether Courtney was reprimanded (4T51-54; 4T56).

On the morning of July 9, 1987, Patrolmen Harry Elbertson was called into Deputy Chief Courtney's office. During the conversation, Courtney's language was coarse, abusive and profane. He used the word "balls" two or three times. As a

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<sup>37/</sup> These "private reports," can be used against an officer during disciplinary proceedings. However, if the officer can adequately explain what happened in a private report no disciplinary charges result. However, in Meyer's opinion, there was no satisfactory explanation for Stein's conduct (8T46; 8T48).

result of the meeting, Elbertson asked permission to see the Chief of Police to file a grievance. He then called over the police radio and asked to meet with a PBA president or vice-president (see fact 31). Subsequently, Elbertson contacted Murphy and a grievance was filed August 14, 1987 (CP-18; 4T4-8; 4T10-12, 4T14-16, 4T21).

#### Transfer and Disciplinary Charges

49. After the incident in the traffic office on July 9, Meyer and Morgan went to see Capasso and Courtney about the incident. The four met that afternoon, and Meyer and Morgan relayed what had happened. The next day, July 10, Morgan gave Meyer a "private report" on the incident (CP-25), and Meyer referred that and his own report (R-20) to Capasso. Meyer recommended that disciplinary charges be brought against Stein. He also asked Capasso to transfer Stein out of the traffic unit (7T73-74; 7T85; 8T70).

50. On July 13, Capasso sent his written recommendation to Deputy Chief Courtney that disciplinary charges be filed against Stein (CP-26). The disciplinary charges against Stein are based on Meyer's written report of July 10. (R-20; 8T71). It charges Stein with failing to notify superior officers when he could be present in court, acting in an insubordinate and disrespectful manner, making derogatory remarks to superior officers, failing to give a written explanation of his actions as requested (CP-17).

51. Capasso talked with Stein on July 14 about the July 9 incident. <sup>38/</sup> Capasso asked Stein for his explanation of what happened. Stein told him he believed he did nothing wrong, and that he replied to Meyer's request for an explanation. Capasso indicated to Stein that he was not satisfied and disciplinary charges would result from the incident. He told Stein to go to the traffic office and pick up a copy. <sup>39/</sup> He also told Stein that Meyer had asked for Stein's transfer.

52. Capasso recommended Stein's transfer to Deputy Chief Courtney. Capasso based his decision to recommend Stein's transfer on job performance (8T60-61). He had received the January through March quarterly report and decided that Stein was the least productive accident investigator. Capasso had not received the quarterly report for April through June by July 10. He also had not seen any of the monthly reports for April, May or

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<sup>38/</sup> Capasso was uncertain about the date. I credit Stein's testimony that the meeting was on July 14. Capasso first testified that when he called Stein in, he indicated that "from the statistical report I'm receiving from the traffic unit...that the indications were that he was having a problem...." Capasso later testified that he did not discuss his productivity specifically with him, but said he discussed his reluctance to go to court (8T71). I credit Stein's version of the conversation that productivity was not discussed.

<sup>39/</sup> Capasso testified that he had not yet decided to initiate the disciplinary charges by this time. However, I credit Stein's testimony that the charges were already prepared and Stein picked them up immediately after the meeting with Capasso (8T115-1116).

June in "their final form."<sup>40/</sup> I infer from this that Capasso was aware of Stein's lack of productivity in some form. Although Meyer did not prepare a written report on Stein's performance until July 27, it is likely that at his meeting with Capasso on July 9, Meyer advised Capasso of Stein's continuing productivity problems.

53. On July 15, Courtney implemented the transfer effective July 19 (CP-5). He also approved Capasso's recommendation to bring disciplinary charges against Stein (CP-26).

54. By memorandum dated July 29 to Courtney, (CP-27) Capasso outlined his reasons for recommending the transfer. They included:

Job Performance. Stein has consistently been one of the least productive members of the traffic unit. He has shown a reluctance to testify in court....

Discipline. Officer Stein has been a disruptive influence to the traffic unit...Stein has exhibited a negative attitude in regards to his responsibilities as an accident investigator and traffic officer....It is not reasonable ...that Officer Stein should determine...that a violation did not occur and no court necessary in the majority of his cases.

Demeanor. On July 9, 1987...Stein exhibited a gross act of insubordination...attempted to intimidatate [Meyer and Morgan] by the use of loud, abusive and profane language...in front of several witnesses...(CP-27).

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<sup>40/</sup> According to Morgan, the monthly statistical reports are normally completed a week to 10 days after the end of the month. The quarterly report for April, May and June was probably not available before July 10 (6T74; 6T88).

55. The parties' collective negotiations agreement, (J-1) provides at Section 19:01:

...The Employer shall have the right, subject to the terms herein contained, to hire employees, to classify, assign, transfer and protote them, to discipline or discharge them for cause...(J-1, p. 35)

#### DISCUSSION AND ANALYSIS

Bridgewater Tp., 95 N.J. 235 (1984) sets forth the standard to determine whether an employer has illegally discriminated against employees in retaliation for their exercise of protected activity:

The employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, \_\_\_ U.S. \_\_\_, 103 S.Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. [Id. at 244]

The Court in Bridgewater added that to make its prima facie showing, the charging party must show that the employee engaged in protected activity, the employer was aware of the employee's protected activity, and that the employer was hostile towards the exercise of the protected activity 95 N.J. at 246. The charging party must establish a nexus between the exercise of the protected activity and the employer's responsive conduct. See Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and



University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

Local 11 has met the first part of the Bridgewater test. Stein's protected activities included holding office as second vice-president of Local 11, attending PBA meetings, and sitting on the PBA negotiations committee. I also find that Stein's frequent complaints about the inadequacies of the computerized court notification system and his objections to the commands' policies about issuing tickets are also protected activities.

The fact that Stein's "grievance" activity was informal in nature is irrelevant to the issue of protected activity under the Act. The Commission in Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶17002 1985) stated that "...Under Bridgewater...any level of protected activity could satisfy the first part of the test if that activity motivated the discipline..." (emphasis supplied). Further, the Commission also noted that,

"...individual employee conduct whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act..." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (at fn. 16) [¶4205 1978]. 41/

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41/ See Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); and Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986).

Meyer knew about all of Stein's protected conduct. However, the record establishes that Capasso did not know that Stein was an officer in Local 11 until after Capasso signed disciplinary charges and recommended the transfer. Further, while Capasso was aware that there were complaints from traffic about court notification procedures, there is no evidence that Capasso knew that Stein initiated any of these complaints or that Stein complained about the Department's ticket-writing policies.

The next question is whether or not there is prima facie evidence that the City's agents manifested any hostility or anti-union animus towards Stein's protected activity sufficient to satisfy Bridgewater, i.e., that anti-union animus was a motivating force or a substantial reason for the disciplinary charges and transfer.

Local 11 has failed to establish any proof of hostility or anti-union animus. First, there is no suggestion that Meyer or Morgan (the only City agents involved who knew of Stein's protected activities) ever commented about Stein being an officer in Local 11. He was not denied permission to attend union meetings or negotiations. Additionally, although the record establishes that Stein's productivity was significantly lower than other traffic officers, Meyer and Morgan never made a causal connection between that and the time Stein spent counselling officers about grievances or complaints. Even when Stein was late for court on July 9, the City agents did not conclude that Stein did anything improper by talking to Elbertson. It was not mentioned in the disciplinary charges.

Although Capasso's memorandum to Courtney recommending Stein's transfer does refer to Stein's "negative attitude" as one of the reasons for the transfer, that reference is specifically tied to Stein's failure to comply with traffic unit's policies and procedures, not Stein's frequent complaints as a basis for the transfer.

I recognize that anti-union animus may be inferred from the timing of an employer's actions. Here, however, I note that Stein was an active officer in Local 11 for many years without a problem. In fact, he was transferred to the more desirable assignment in traffic while active in Local 11. I infer no such animus.

Finally, although the PBA asserts that the harassment and threatened transfer came from Courtney, nothing in the record substantiates this. In fact, Murphy pinpointed the reason for the transfer when he said, "if [Stein] didn't issue the tickets like they wanted, he would be transferred." This is exactly what happened.

I do not find any evidence of discriminatory motive in the City's decision to transfer Stein or to bring him up on disciplinary charges. Accordingly, Local 11 has not met its burden to make a prima facie case.<sup>42/</sup>

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<sup>42/</sup> Even if the record demonstrated that Capasso and Courtney were aware of Stein's Local 11 activities or his complaints, Local 11 still failed to establish any hostility as required by Bridgewater.

Assuming arguendo that Stein's protected activities were a factor in the City's decision to transfer Stein and/or bring disciplinary charges against him, I find that the City would have taken the same actions even in the absence of protected activity.

The record shows that Stein was the least productive traffic officer both in terms of overall ticket issuance and in terms of his accident to summons ratio. Stein was warned in April, 1987 to bring his productivity up to within the normal range for the unit or be transferred. He failed to do so. Therefore, he was transferred.

I find that the disciplinary charges filed against Stein because of the incidents on July 9, were a legitimate exercise of the City's authority to discipline for cause, 43/ and were not in retaliation for Stein's PBA activities or his complaints. Stein failed to notify the court or his commanding officers concerning his delay in coming to court. He failed to give an adequate reply to Morgan concerning his expected arrival time for court. His loud and abusive conduct to commanding officers when he arrived in the traffic office was disrespectful. His comment about superiors not sticking up for the officers was derogatory and was said in front of

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43/ It is not my role to determine the merits of the disciplinary charges against Stein. My concern is only with whether the charges brought against Stein were retaliatory because of his protected activities.

five other people under Meyer's command. I find that Stein's disciplinary charges were initiated because of his actions on July 9 and would have been proffered against him even in the absence of his protected activities.

Local 11 also charged that the City failed to negotiate in good faith prior to transferring Stein. The City contends that it was not obligated to negotiate with Local 11 concerning the transfer because it has a managerial prerogative and a contractual right to transfer and assign employees. I agree. The City's right to transfer and assign its police is not mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978); City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986). Additionally, the parties' agreement clearly and unequivocally gives the City the right to transfer and assign personnel. Accordingly, I find that the City was not obligated to negotiate Stein's transfer.

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

#### CONCLUSIONS OF LAW

The Respondent City of Trenton did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) when it involuntarily transferred Dwight Stein from the traffic unit to Patrol Division of the Police

Department. Further, the City did not violate N.J.S.A.  
34:13A-5.4(a)(1), (3) or (5) when it proffered disciplinary charges  
against Stein because of his actions on July 9.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be  
dismissed.

Susan W. Osborn  
Susan Wood Osborn  
Hearing Examiner

Dated: January 20, 1989  
Trenton, New Jersey