

H.E. NO. 2005-10

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

In the Matter of

NJ/STATE JUDICIARY (MIDDLESEX),

Respondent,

-and-

Docket No. CO-2004-168

AFSCME COUNCIL 73 LOCAL 1064,

Charging Party.

**SYNOPSIS**

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that a supervisor singled out Charging Party's union president for scrutiny and a critical job performance evaluation because of her union activities. Charging Party asserted that the evaluation and scrutiny was part of an on-going pattern of harassment by management. The Hearing Examiner found that Charging Party failed to satisfy the Bridgewater standards. The Hearing Examiner found that although the union president was engaged in protected activities, Charging Party did not demonstrate by direct or circumstantial evidence that the decision-maker, her supervisor, was aware of, or hostile, to her union activity. Charging Party also failed to prove a pattern of harassment as evidence of union animus. In any event, Respondent established a legitimate business justification for the critical performance review.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent, Peter C. Harvey, Attorney General  
Karen Selby, Deputy Attorney General

For the Charging Party, Alice Weisman, Attorney  
AFSCME Council 73

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On December 8, 2003, AFSCME Council 73 Local 1064 (Charging Party or Local 1064) filed an unfair practice charge against NJ/State Judiciary (Middlesex) (Respondent or State). The charge alleges that the State violated 5.4a(3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when Union President Allison Perez was singled out by her supervisor

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<sup>1/</sup> This provision prohibits public employers, their representatives or agents from: "(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."

for scrutiny and given a critical job performance evaluation because of her union activities. Charging Party asserts that the evaluation was part of an on-going pattern of harassment by management and requests that all hostile and inappropriate actions cease and that a September 2, 2003 memorandum criticizing Perez' job performance be withdrawn.

On June 18, 2004, a Complaint and Notice of Hearing issued (C-1).<sup>2/</sup>

On August 17, 2004, Respondent filed its Answer. It admits that its supervisor, John Pushko, met with Perez and issued a September 2, 2003 memorandum outlining what occurred at an August 29, 2003 meeting in an attempt to counsel and improve Perez' job performance which Pushko deemed inadequate. It denies that it was hostile to Perez's union activity, and that Perez was discriminated against for her union activities.

A hearing was held on December 1, 2004 at which the parties examined witnesses and presented exhibits. Briefs and replies were filed by January 28, 2005. Based on the record, I make the following:

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<sup>2/</sup> "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits respectively. Transcript references to hearing dates are "T".

FINDINGS OF FACT

1. Allison Perez has worked in the Middlesex vicinage<sup>3/</sup> for sixteen years in various titles and for the last nine years has served as Local 1064 president (T85, T121). When she was first hired in Middlesex she was assigned to the Law Division and then Mass Tort (T85-T86). Since 2001 Perez has been assigned as a judiciary clerk three (JC-3) in Special Civil Part (T86).

Lillian Brenes was Perez' immediate supervisor and trained Perez when she was assigned to Special Civil Part (T87). Perez' duties consisted of printing out various reports including finance reports, stipulations of dismissal and settlement, wage executions, straight executions and docketing statements (T77, T87).

In 1999-2000, the vicinage implemented JEFIS (judiciary electronic filing imaging system) resulting in an increase in the number of judgments filed (T58-T59, T81-T82). As part of her daily responsibilities, Perez printed and collated the approximately one-hundred daily JEFIS filings and checked them against the daily JEFIS report for accuracy (T87, T91).

Perez was also responsible for separating, date stamping and filing printouts of fifty to two-hundred writs prepared each day

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3/ I take administrative notice that the New Jersey State Court system is organized into units or vicinages (fifteen in all) which are comprised of between one and several counties - e.g. Morris and Sussex Counties together comprise one vicinage whereas Middlesex County is one vicinage by itself.

(CP-2, T77, T87, T89-T90). When preparing straight execution writs, however, Perez did not do the mathematical computations or enter them into the system (T92). She became responsible for the preparation of these writs, including the mathematical calculations, only after Lillian Brenes left Middlesex vicinage in February 2003 (T93).

2. A straight execution is a writ of execution against goods and chattel which is one method by which a creditor can satisfy a judgment against a debtor (T15, T45). The preparation of the straight execution is done by clerks in the Special Civil Part of the Court (T14). The clerks check the information on the judgment, including any fees, for accuracy and then enter the information into the automated case management system (ACMS) utilizing various computer screens (T16, T46).

Calculating interest credits is a part of the process and must be done accurately in order to ensure that the court officer collects the correct amount on the judgment (T56).

Recalculations may be necessary each time an execution is issued involving the same debtor (T47-T48). Once all the information and calculations are entered, the computerized system (ACMS) triggers the printing of the writ the next business day (T16).

At the same time that information is being checked and entered into ACMS the clerk is responsible for finding the physical file jacket and matching the information on the file to

the paperwork being generated (T46). All jackets which are pulled must be refiled in cabinets on one of two floors (T67-T68, T200).

When the straight execution writ is generated the next day, it is assigned to a Special Civil Part court officer who is charged with collecting on the judgment through various means such as freezing the debtor's bank account(s) and/or seizing the debtor's car(s) or other non-exempt chattel (T15, T47). The court officer receives a fee for this service (T15).

If the clerk recognizes an error in the writ before it is given to the court officer, he/she can go to the finance department and have the writ backed out of the system to correct the error (T61, T131-T132). The system identifies the employee who made the error in the first instance because each employee has an ID number in the system (T61-T62, T132). If there is an error in the writ once it is in the court officers' hands, however, the officer will return the writ to the post-judgment team and request a new one reflecting the accurate figure (T60).

3. Lillian Brenes is currently an administrator in the Union vicinage (T44). From 1998 until February 2003, she was Perez' direct supervisor serving as post-judgment team leader in Special Civil Part in the Middlesex vicinage (T44-T45). From August 1999 until October 2002 Brenes reported directly to Assistant Civil Division Manager Lloyd Garner (T21, T23, T41).

In 1998 Brenes assigned two employees to primarily handle the preparation and entering of straight executions: one employee was assigned to enter information for straight executions into ACMS, while the other employee was responsible for distributing writs generated the next day to court officers for collection on the debt (T18, T34, T49, T74-T75, T81). There was also a "floater", an employee who assisted on an as needed basis (T50). All three employees also had other duties and responsibilities such as staffing the counter, mail rotation, the courthouse run and answering telephones (T18-T19, T73, T76). In 1998 there was approximately a weeks worth of backlog in entering straight executions (T50).

Within a year, Brenes' staff was decreased. She lost the floater and had only two employees assigned primarily to entering straight executions (T51). At the same time that staff decreased, the number of judgments filed increased after the implementation of JEFIS in 1999-2000. The backlog for straight executions, therefore, increased (T51-T52).

By the time Brenes left Middlesex in February 2003, she was handling straight executions for half of her work day with the assistance of Perez and, only occasionally, assisted by another employee, Annette Boyd (T34, T36, T52-T54, T66-T67, T71, T77). Perez did not handle all aspects of the straight execution preparation because she was not trained to calculate the various

fees and costs as well as interest credits (T55, T82). Brenes handled those calculations.

Brenes had no complaints about Perez' job performance (T56). Perez had worked for her since 2001 (T67). Perez made no more errors than other employees Brenes supervised (T56) Brenes, however, had no experience supervising Perez when Perez' responsibilities included all aspects of entering writs of execution, such as computation of costs and fees (T78).

During the period when Brenes, with Perez' assistance, was responsible for entering the straight executions, there was a backlog of one-thousand (1,000) straight executions (T71). In Brenes' opinion, based on her experience in Middlesex vicinage, one employee working full-time entering straight executions was not enough to handle the volume of judgments entered daily (T67). For instance, Brenes testified that on a good day she (Brenes) could prepare thirty to forty straight executions (T72). These writs would be relatively uncomplicated, first time, straight executions which required no interest calculations (T72). Brenes admitted, however, that she never actually prepared writs eight hours a day because her responsibilities included staff supervision (T71-T73).

4. Lloyd Garner is currently clerk of the Special Civil Part/assistant civil division manager in the Union vicinage. From August 1999 through October 2002, however, he held that same



position in the Middlesex vicinage where he was primarily responsible for the management of the Special Civil Part and the staff assigned to it (T14). He was Brenes' direct supervisor.

Middlesex and Union vicinages are comparable in the number of writs processed - Middlesex is the fourth largest vicinage in volume while Union is the fifth largest (T30). Essex and Hudson vicinages have greater volume than Middlesex while Monmouth and Ocean vicinages have less volume (T32).

Garner is familiar with the entry of straight executions and explained that writs are not all alike - some are simple taking five minutes to perform and others more complicated taking half an hour to perform (T16-T17). While Garner managed the Middlesex Special Civil Part, the number of writs generated in any given week varied from about four hundred (400) in a heavy volume week to one hundred and fifty (150) in a less busy week (T17, T65, T113-T114).

In October 2002, when Garner left Middlesex, there was a backlog of perhaps one-thousand (1,000) writs of straight execution, representing five or six weeks worth of work (T21, T43, T66, T71). Even though Brenes was primarily responsible for entering straight executions (with the assistance of Perez) in October 2002, Garner never criticized Brenes' job performance (T23, T67).

Garner, however, would get periodic complaints from his superiors concerning the backlog (T22).<sup>4/</sup> Although he made suggestions to deal with it, Garner did not have the authority to implement his suggestions without approval which he rarely received (T22). On one occasion he was given the authority to authorize two-hundred (200) hours of overtime which substantially reduced the backlog (T22).

Currently, in his position as clerk of the Special Civil Part/assistant civil division manager in the Union vicinage, Garner has six employees assigned to the post-judgment team sharing the responsibility of entering straight executions. Garner's administrative assistant assists them on occasion (T31). However, no one person does this task full-time (T40). The six clerical employees also do other work (T31). Garner has no knowledge of how many writs one individual doing the task full-time could produce in a day (T40).

Garner is also currently a trainer for the State in Special Civil Part core curriculum which includes the preparation of writs of straight execution (T31). The training is for a full day (T32). In this capacity he travels to every vicinage (T32). Garner observed that in vicinages of similar size to Middlesex, there is more than one person assigned to enter writs of straight

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<sup>4/</sup> During his tenure at the Middlesex vicinage, the volume of writs increased each year due to an increase statewide in the courts' jurisdiction (T41).

execution. He does not know specifically how many employees are assigned to entering such writs, because each vicinage has a different organizational structure which would dictate the number of individuals assigned to this task (T33). In the smaller vicinages, where the volume of writs is smaller, one person is assigned full-time to the task of entering straight executions (T33). In Garner's opinion, this task is not a one-person job in Middlesex, although he is not familiar with the procedures or standards for processing and preparing straight executions in Middlesex since his departure in October 2002 (T33, T38). During the three years that Garner managed the Middlesex Special Civil Part court, however, he never assigned only one person to enter straight executions on a full-time basis (T30).

5. Assistant Civil Division Manager John Pushko was assigned to Middlesex vicinage in February 2003 after Garner left the vicinage (T142).<sup>5/</sup> Pushko's responsibility was to manage the case load and staff of approximately twenty-five employees assigned to Special Civil Part (T142).

When Pushko first came to Middlesex, he determined that the office was in chaos, because it was not meeting the standards set by the Administrative Office of the Courts (AOC) for work output. In his opinion, it was one of the worst vicinages in the State in

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<sup>5/</sup> The record does not reflect who acted as assistant civil division manager of Special Civil Part in Middlesex vicinage between October 2002 and February 2003.

job performance despite being staffed at the same ratio as other vicinages (T142-T143, T149-T150, T189). For instance, in the quarter before Pushko was assigned to Middlesex (October 2002 through December 2002) the State's average backlog for entering a straight execution was twelve (12) days, whereas the average in Middlesex was twenty-four (24) days (T143).<sup>6/</sup>

Pushko recounted that when he first arrived in Middlesex in February 2003, he went to the then team leader, Lillian Brenes, to inquire about a huge stack of paperwork he observed (T212-T213, T216). Brenes told him that the stack consisted of fifteen hundred straight executions which had not been entered (T213, T216). To Pushko, Brenes appeared to be accepting of the backlog (T213). Brenes left the vicinage one week after Pushko arrived (T216). Pushko concluded that the backlog might have been acceptable to his predecessors, but it was not acceptable to him (T213).

As a result of what Pushko perceived to be significant areas of under-performance, he sought information from other vicinages and, as a result, identified problem areas in need of improvement and instituted many changes (T143, T150-T151, T189, T213). He discovered that in the area of entering straight executions

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<sup>6/</sup> Additionally, the State's average in this time period for entering a judgment was nine and a half days whereas in Middlesex the average was twenty-seven and a half and the State average for entering a wage execution was fourteen days but the average in Middlesex was sixty-one days (T143).

Bergen vicinage set a daily quota of fifty to fifty-five per person, Hudson set a daily quota of forty straight executions per person, while Essex vicinage set twenty to twenty-five straight executions per day per person as the standard (T150, T171, T189-T190). He spoke to administrators in Essex and Hudson and learned that in addition to entering straight executions, their employees had other responsibilities such as answering phones and filing (T193).

Pushko visited the Bergen vicinage, because it is comparable in numbers to Middlesex, and their operation was run more efficiently in Pushko's opinion (T191). He observed the operation and discovered that one person was responsible for entering straight executions (T191). That person was also responsible for other duties because the entering of straight executions was not considered a full-time job (T192).

Finally, in order to better understand the problems he identified in post-judgment, Pushko taught himself how to enter judgments, wage executions and straight executions (T176, T211). He was able to enter seven straight executions the day he learned that function (T194). Sometime thereafter, Pushko timed himself: while answering phones and handling other requests, he was able to enter over one hundred (100) straight executions in a day (T176, T184).

To illustrate his point, Pushko demonstrated during the hearing how to enter a straight execution (R-6, T176-T184). He worked on a laptop computer which was projected onto a wall of the hearing room (T178). The demonstration began about 1:42 p.m. Pushko completed the entry of the straight execution in approximately three minutes.<sup>2/</sup>

6. After Brenes left Middlesex in February 2003, there was a two month period with an interim Team Leader, Khadijah King, handling the post-judgment team (T93). At the time, Perez, together with four or five others, were responsible for entering straight executions (T93-T94). Perez and the others were also responsible for manning the public counter, answering telephones and dealing with mail. Perez also performed duties as a court clerk (T93-T94). Since Perez possessed only limited knowledge of how to enter straight executions before Brenes left the vicinage because Brenes had done the computation of costs and interest credits, Perez was trained to do these computations by Ms. Chin who was temporarily assigned to assist in the preparation of

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<sup>2/</sup> The straight execution entered by Pushko was from the firm of Pressler and Pressler which according to the witness, accounts for a significant amount of work handled in special civil on a daily basis. Pushko describes the Pressler and Pressler writs as more difficult because the costs and credits are pre-calculated and, therefore, any mistakes have to be justified (T197). On cross examination Charging Party suggested to Pushko that the pre-calculation made entering the Pressler writ easier. Whether the Pressler writs are more or less complex is immaterial to my decision.

straight executions (T95-T96). Chin's permanent assignment was in Mass Tort. Employees from Mass Tort were assisting to reduce the backlog (T97).

In April 2003 Lorelei King replaced Khadijah King (no relation) as Perez' supervisor (T92-T93). Lorelei King had no judiciary experience (T95). By mid-June 2003 King determined that the backlog had been sufficiently reduced. The backlog in straight executions in the week beginning June 16, 2003 was fifty (50) straight executions (R-4, T169). The responsibility for entering straight executions was then assigned to Perez, because King felt it was a one-person job (R-5, T97-T99, T101, T168). When King made this assignment, she did not relieve Perez of her other duties, such as rotating into the courts as a court clerk when other clerks were sick or on vacation (this happened only occasionally), preparing exemplified documents for out of state judgments, and answering phones including occasional calls from Spanish speaking callers which might happen three or four times a month (T93, T102-T106).

Having no prior experience with entering straight executions, King was consulting Chin and then instructing Perez (T98). King's instructions, however, were inconsistent (T100). During this time period several mistakes were being made in the preparation of straight executions, particularly in regard to the calculation of costs and credits ( R-2, T99-T100, T132-T133).

By the end of July or beginning of August 2003, Perez requested King on several occasions to provide additional training from an outside source who could give her consistent instructions in the calculations of costs and credits (T100-T101). Perez made some of these requests in the presence of another employee, Dawn Stambakis (T108, T131). Stambakis confirmed that she heard Perez request King to provide training in entering straight executions (T131).

During the period when Perez was assigned as the only person responsible for straight executions, the backlog increased (T102). As of August 22, 2003, the backlog of unentered straight executions grew to eight hundred and seventeen (817) from fifty (50) in mid-June (R-4, T170).<sup>8/</sup>

In mid-August 2003, Trial Court Administrator Gregory Edwards called a meeting of King, Civil Division Manager Resipole and the post-judgment team to discuss reducing the backlog in entering straight executions (T108). Edwards noted that there had been overtime committed previously to reduce the backlog and now offered whatever training would be necessary to reduce it

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<sup>8/</sup> From June 2003 to August 2003, the backlog in other areas also increased but at a slower rate (R-4). For instance, the backlog in entering wage executions grew from three hundred seventy-nine (379) to five hundred sixty-one (561), while the entering of judgments grew from four hundred five (405) in this same period to six hundred ninety-six (696). Only the backlog in statements for docketing dropped from a backlog of three hundred thirty in June to one hundred ninety one in August (R-4).



further (T108-T109). He arranged for a full-day training session for all employees in the post-judgment team which took place on August 28, 2003 (T110, T175).

Perez and another employee received specific training on all aspects of the proper way to enter straight executions (T111, T204). Perez noted that the instructions given to her by the trainer were different than the instructions she received from King (T111).

7. In August 2003 the post-judgment team was losing its team leader, Lorelei King, and the team was still not functioning up to the standards set by the AOC (T144). After the August 28, 2003 training session, Pushko decided to meet with each member of the team to discuss where the team currently stood and to set performance goals for the team and for individual team members (T117, T144, T171).

Before the meeting Pushko asked King and the other team leaders to look at a sample of each employee's work for the summer of 2003 to check for errors (R-2, R-3, T159-T167, T205, T210, T220). The sampling prepared by King for the post-judgment group revealed that with the exception of Perez, the other members of the team had consistently error-free work (R-3, T166).

Pushko met with three of the four members of the post-judgment team, Perez, Bishic Chi and Lakshmi Kelvadi (T145). One member of the team, Lenket Torda, was on leave and did not meet

with Pushko (T145). He then followed up the meetings with memos to each employee attaching the sampling prepared by King of the employee's work (R-3, T-146, T159-T160).

In the meeting with Perez, Pushko discussed the errors she had made in entering straight executions (R-2, T117, T146, T157): Although Pushko did not give Perez a specific number of straight executions he expected her to enter on a daily basis, based upon his own learning to do straight executions and the speed with which he accomplished the task as well as his discussions with other administrators and visit to the Bergen vicinage, he concluded that Perez was underperforming (CP-1, R-5). She was told that her output per day was substandard, namely, that on average she was entering between five to seven straight executions per day which was below expectations (R-1, T120, T146). In response, Perez explained that she was not the only one making errors because King had asked her to correct errors made by other employees (T118). Perez also told Pushko that she had many other time consuming duties in addition to entering straight executions and pointed out that she had only been formally trained the day before their meeting (T117-T118).

Pushko memorialized the August 29, 2003 meeting in a September 2, 2003 memorandum to Perez (CP-1, T119, T156). The purpose of the memo, according to Pushko, was to increase Perez' productivity (T187). Attached to the memorandum was the summary

of Perez' errors in entering straight executions for the months of July and August 2003 prepared by her supervisor, King (R-2, T157-T159). The other employees on the post-judgment team also received printouts with samplings of their work prepared by King and attached to the memos Pushko gave them (R-3, T159-T160).

In the memo, Pushko communicated to Perez his expectation that since she had received training, the errors should not be repeated (T159). Pushko's memorandum was not put into Perez' personnel file, but the wording of the memorandum regarding her job output and the accuracy of her work product was incorporated into her performance evaluation which was put in her personnel file (T122, T186). Pushko also kept the memo for his own personal file which contains information on his staff (CP-1, R-5, T187).

Perez disagreed with Pushko's conclusions. She felt that the job of entering straight executions was a three-person job (T174). Perez generally disputed Pushko's assessment of her job performance and memorialized her concerns in a September 13, 2003 letter to which he responded on October 2, 2003 (R-5, T119). Pushko countered what he described as inaccuracies in Perez memo; they disagreed about whether entering straight executions was a one-person job (R-5, T174). Pushko also noted in his October 2nd memo that Perez had never requested him or anyone else as far as he knew to provide additional training. I credit Perez's

testimony which was supported by Dawn Stambakis that Perez made at least one request to Lorelei King for training. Perez's testimony, however, is not inconsistent with Pushko's memo. Perez did not request training specifically from Pushko, and there is no evidence that King communicated Perez's request to Pushko (T215-T216).

Other employees on the post-judgment team also complained to Pushko that their job required more people to meet Pushko's performance standards (T174). The person responsible for wage executions thought it was a two-person job, but Pushko felt it was a job for one person (T174). Similarly, the person responsible for entering judgments complained to Pushko that the job required three people, but Pushko concluded it was a two-person job (T174). Despite these complaints about understaffing, Pushko increased the productivity level of the post-judgment team to conform to statewide averages without increasing staff (T175). After the August 28, 2003 training, Perez made fewer errors and the backlog in straight executions, decreased (T111, T115).

8. Perez testified that as President of Local 1064, she receives employee complaints when they feel they are being treated unfairly (T121). No employees came to her in the summer of 2003 to tell her that they received a job performance memo from Pushko or to complain that they were treated unfairly, so

she concluded she was singled out (T121-T122). I draw no inferences from this testimony. Specifically, I do not infer from the lack of employee complaints that Perez was the only employee to meet with Pushko and receive a job performance memo or negative evaluation from Pushko in the summer of 2003. It is possible that some employees either received a positive evaluation or received a negative evaluation but concluded that it was a fair assessment of performance. In either situation the employee is unlikely to have complained to Perez. In particular, Pushko testified that one of the employees on the post-judgment team received her evaluation which contained both negative and positive comments (T217-T218). This employee thanked him for suggesting improvements (T218). Perez' testimony confirms that this employee did not complain to Perez.

9. Perez took sick leave from December 2003 through January 2004 (T116, T154). During that period a judiciary clerk, Mr. Chan, was assigned to enter straight executions while Perez was on leave (T154, T194). In the first week, when Chan was learning the job, he entered an average of ten straight executions per day which increased to twenty-two per day in the fourth week on the job (T155). Since Perez' return, Pushko has assigned an employee to spend half of his time entering judgments and half of the work day entering straight executions along with Perez because there has been an increase in the number of filings (T116, T153-T154,

T215). Even with the increase, in general, the post-judgment team is caught up with its work (T215).

Since her return from sick leave in February 2004, Perez has also been given standards regarding the specific number of straight executions to be entered in a day: eighteen (18) (T119-T120, T152). Pushko considered the standard to be a minimum standard (T172). Since implemented, Perez has been meeting or exceeding the standard, entering eighteen straight executions per day, as well as performing her other duties; answering phones, filing and staffing the counter (T153, T202). Pushko felt that Perez's performance improved because he set daily standards for her and because Perez was able to observe, from Chan's performance in her absence, that those standards were attainable (T172).

10. Despite the improvement in her work output, Perez feels that Pushko's criticism of her job performance was part of an on-going pattern of harassment and extra scrutiny by management because of her union activity (T123). In support of this contention, Perez related four examples of the pattern of harassment.

#### Brenes Scrutiny

One of Brenes' responsibilities as a supervisor was to monitor employee work time, including when an employee left the work site to attend to union matters (T68, T78-T79). Brenes

would be notified through documentation when an employee was attending a union meeting or other union activity and would forward the documentation to her immediate supervisor Lloyd Garner (T79-T80).

On occasion, however, when Perez left the building, Brenes received phone calls from Civil Division Manager Resipole and/or Assistant Division Manager Joe Lynch inquiring as to Perez' whereabouts (T68-T69). It is unclear from Brenes' or Perez' testimony during what time period Resipole and/or Lynch were making these inquiries or how many inquiries were made. Nevertheless, Brenes told Perez to let her know where she was during the work day. Thereafter, Perez let Brenes know where she was even if she went to the restroom (T124). According to Perez, other employees would tell Brenes only if they left the office - e.g. if they went to the courts - not if they were on another floor in the office performing a task like filing (T124-T125).

Brenes asked Perez if she knew why Resipole and/or Lynch called Brenes asking about Perez' whereabouts (T69). Brenes' testimony does not indicate if Perez gave her an answer but, according to Brenes, the phone calls stopped shortly after Perez spoke to Trial Court Administrator Gregory Edwards (T69, T175). There is no testimony to indicate the substance of the Edwards/Perez discussion or what, if anything, Edwards did to stop the phone calls from Resipole or Lynch. Neither Edwards,

Resipole or Lynch testified at this hearing and Brenes' testimony is vague on this point. Perez also did not testify about any discussion with Edwards about Resipole's and/or Lynch's concerns. Therefore, I cannot draw any inferences to support the Charging Party's allegations from the Perez/Edwards discussion or the telephone calls from Lynch or Resipole to Brenes.

#### Resipole Comments and Attitude after Grievance Hearing

After a grievance hearing (it is unclear from the testimony when the hearing took place), Resipole spoke to Perez on the street and complained about certain comments made at the hearing. Perez told Resipole that he should take his complaints up with Local 1064's counsel. According to Perez, for a couple of weeks thereafter, Resipole, who was a division head and supervised Perez' supervisor, gave her "dirty looks" (T125-T126).

#### Perez Transfer from Mass Tort to Special Civil

In 2001 Perez and another employee were involuntarily transferred on short notice to Special Civil Part after allegations of wrongdoing against them regarding an incident in Mass Tort (T86, T128). In Perez' opinion, other employees who were more culpable than she were not transferred (T128).

#### Pushko Counseling for Lateness from Break

Finally, as part of the alleged pattern of harassment, Perez describes being counseled by Pushko because she was two minutes late getting back to work from her break (T126-T127). Pushko



told Perez he was told to counsel her that coming back late from break was unacceptable (T127). Perez explained to him that she left for break late because she had been on the phone with an attorney which was part of her responsibilities and could not hang up on him (T127). As a result, she came back from her break late (T127). In her experience as union president, employees are only counseled for habitual lateness not one incident (T127).

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violated 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that

motives unlawful under our Act and other motives contributed to a personnel action. In dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision as to whether a Charging Party has proven hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

Here, Charging Party asserts that Local 1064 President Allison Perez received a critical performance review because of her union activity. It asserts, in essence, that her employer was hostile to Perez' union activities and set her up for failure in her job: Assistant Division Manager Pushko assigned Perez the task to enter straight executions when it had never been a one-person job, he gave Perez an immediate supervisor (Lorelei King) who lacked experience and knowledge in entering straight

executions, and then he did not provide training until the day before Perez received her critical evaluation.

Respondent denies that Perez was singled-out for her union activities. It asserts that Pushko acted solely out of a desire to improve Perez' performance and reduce the backlog in straight executions. Pushko believed his counseling of Perez and the other members of the post-judgment team was necessary and warranted.

Charging Party has met the first Bridgewater standard: Perez was engaged in union activity as Local 1064 President. However, although certain managers in the vicinage were aware of Perez' union activities, the Charging Party has not demonstrated by direct or circumstantial evidence that the decision-maker, John Pushko, was aware of, or hostile, to Perez' union activity. See generally, UMDNJ, P.E.R.C. No. 98-127 24 NJPER 227 (¶29107 1998) (Charging Party did not meet its burden under Bridgewater because it did not demonstrate that the decision-maker had knowledge of the individual's union activities.);  Tp. of Teaneck, P.E.R.C. No. 2000-45, 26 NJPER 48 (¶31018 1999) (No a(3) violation where record contained no evidence the supervisor/decision-maker acknowledged or cared in any way about Charging Party's protected activity.). For instance, there is no evidence that Pushko was involved in the processing of grievances or collective negotiations.

Charging Party also fails to prove that Respondent was hostile to Perez' union activity. Charging Party presents four examples of an asserted pattern of harassment as evidence of union animus. In the first example, Charging Party's witness, Lillian Brenes, who supervised Perez from 2001 until February 2003, testified that she received telephone calls from Civil Division Manager Resipole and Assistant Civil Division Manager Lynch inquiring as to Perez' whereabouts. Brenes' testimony was vague as to when these calls were made (presumably between 2001 to 2003) or under what circumstances, but admitted that she was responsible for keeping track of her staff when not in the office and, in particular, when they were attending to union business. Perez, as Local 1064 President, was responsible for notifying Brenes when she left the office generally and specifically on union business. The fact that Resipole and/or Lynch were checking on Perez' whereabouts, under these circumstances, carries no particular inference of hostility to her union activities. Nor does the fact that Perez, after being told to keep Brenes advised of her whereabouts, felt it necessary to tell Brenes where she was at all times, even when she went to the restroom, suggest that Resipole and/or Lynch required that kind of information because of Perez' exercise of protected conduct.

More importantly, even if their heightened scrutiny suggested hostility to union activity, no evidence linked

Resipole and Lynch to Pushko, who was the decision-maker in this case. Without direct or circumstantial evidence their alleged hostility cannot be imputed to Pushko. See, Village of Ridgewood, P.E.R.C. No. 99-114, 25 NJPER 341 (¶30147 1999) (Commission rejected ALJ recommended decision and found no direct or circumstantial evidence of union animus where the employee's supervisor, the decision-maker, was not hostile to the employee's union activities even though other supervisors exhibited hostility to the employee's activities as shop steward).

Brenes remained in the Middlesex vicinage for only one week after Pushko was assigned to Middlesex. Brenes testified that the Resipole/Lynch phone calls stopped after a period of time. It is highly unlikely, and there is no direct or indirect evidence, that the phone calls continued during the one week when Brenes' and Pushko's employment in Middlesex overlapped or that Pushko was aware of any instructions from either Resipole or Lynch to Brenes regarding Perez. I find there is no linkage between the asserted scrutiny of Perez by Lynch and Resipole and the subsequent actions of Pushko in setting performance goals and his critical evaluation of Perez' job performance.

Similarly, in the second example there is no evidentiary linkage between Resipole's alleged "dirty looks" directed at Perez after a grievance hearing and Pushko's subsequent actions regarding Perez. The record does not reflect when the grievance

hearing took place. Perez has been Local 1064 President since 1995. Timing is an important factor in determining whether or not hostility or union animus can be inferred. Op. Of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999). Since the timing in this instance cannot be determined, I can draw no inference of hostility from this event. Even if the timing of the hearing and subsequent "dirty looks" suggested hostility by Resipole to Perez, that hostility could not, on this record, be imputed to Pushko. There is no direct or indirect evidence of Pushko's relationship to Resipole, or even that Pushko knew Perez before being assigned to the Middlesex vicinage in February 2003.

The third example cited by Perez as evidence of a pattern of harassment and hostility to her union activities was her transfer in 2001 to the Special Civil Part. The transfer from Mass Tort resulted from an incident of misconduct by Perez and others. Perez and one other employee were transferred to Special Civil Part, but Perez maintains that others who were more culpable than she were not transferred. The intended implications are that these other "culpable" individuals should have also been transferred or Perez should not have been. This incident is anecdotal at best and suggests only that the employer had a legitimate business reason for its actions - Perez does not deny culpability. There is also no evidence that Pushko even knew of this transfer or that it affected his decision in doing Perez'

evaluation. Moreover, the timing of this event, two years before Pushko was assigned to Middlesex and two and one-half years before Perez' critical performance review, is too remote to support an inference of hostility or pattern of harassment for union activity. Tp. of West Orange.

Finally, Charging Party asserts that Pushko's counseling of Perez for coming back late from a break was evidence of hostility to her union activity. Perez, however, admitted she came back late from break. While she proffered an excuse (she went on break late), Pushko would not have known that until after raising the issue. This single incident is too weak to support an inference of hostility to her union activities, especially since the record does not demonstrate that Pushko knew Perez before February 2003 or that he was even aware of her union activity thereafter.

Had these examples supported the asserted pattern of harassment and hostility, I find Pushko had legitimate and substantial business reasons for his actions, namely, to improve performance generally and to specifically reduce the backlog in entering straight executions. He identified Perez and others on the post-judgment team as under-performers after speaking to administrators in other vicinages of similar size to Middlesex, gathering statewide statistics, visiting the Bergen vicinage and teaching himself how to enter wage executions, judgments and

straight executions. Only after this research did Pushko conclude, in regard to Perez, that at an average of six straight executions per day, Perez was not meeting performance standards. In other vicinages of similar size to Middlesex, the per diem average ranged from twenty-five in Essex to fifty in the Bergen vicinage. Pushko, himself, was able to enter one hundred such executions in a day while performing other tasks. Even Charging Party's own witness, Lillian Brenes, established she could prepare thirty to forty straight executions in half a day while spending the other half of the day supervising the post-judgment team, and the judiciary clerk with no prior experience in entering straight executions who substituted for Perez from December 2003 through January 2004 averaged ten a day in his first week and twenty-two per day by the fourth.

Nevertheless, Charging Party asserts that Pushko's expectations of Perez's productivity were unreasonable because, in the opinion of Brenes and Lloyd Garner who was Pushko's predecessor, entering straight executions in Middlesex vicinage was not a one-person job. This argument is not persuasive. There was a backlog of one-thousand straight executions when Brenes and Garner left Middlesex vicinage in October 2002 and February 2003 respectively. The backlog had been reduced to fifty in mid-June 2003 when Perez's immediate supervisor, Lorelei King, assigned Perez the task of doing straight executions as a



one-person job. Two months later the backlog was over eight hundred and there were errors noted by King in Perez's work. Once Pushko counseled Perez in August 2003 to improve her performance and subsequently set a standard of eighteen straight executions per day, Perez has met or exceeded the standards. The backlog is substantially reduced with only occasional overtime assistance and the recent assignment of one person for half the work day to assist Perez.

Charging Party asserts that Pushko's assignment of King as Perez' supervisor is evidence that Perez was set up for failure because King had no experience in the judiciary, specifically with entering straight executions, and, thus, gave confusing and inconsistent directions to Perez causing her to make errors. This assertion is not evidence of hostility. Assuming *arguendo* that King was inexperienced, Perez was not. She had worked with the post-judgment team since 2001 and assisted Brenes in entering straight executions. Although Perez did not know all aspects of entering straight executions - *e.g.* calculating costs, fees and credits, Ms. Chin from Mass Tort was assigned to teach her. Even if the errors in straight executions are partially attributable to the inexperience of King and her inconsistent instructions, there is no evidence that King was aware of or hostile to Perez' union activities or that Pushko was aware of any complaints Perez had with King's supervision during the summer of 2003.

Additionally, although Perez made several requests of King for training, there is no evidence that King relayed those requests to Pushko. King did not testify, and Pushko denied knowing that Perez made these requests to King. The one-day training session which was eventually conducted in August 2003, was requested and arranged for by Trial Court Administrator Gregory Edwards based on the increased backlog in August 2003.

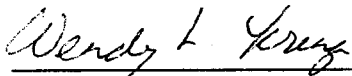
Charging Party's contention that Perez was set-up for failure is belied by the facts. Since Pushko has been assigned to Middlesex, the backlog in all areas of work has been decreased and/or eliminated without an increase in staff size. This has been accomplished by increasing staff productivity, including Perez'.

Finally, Perez was not singled-out by Pushko for a performance review or counseling. Pushko met with each member of the post-judgment team in August 2003 and followed up the meeting with a memorandum. Prior to each meeting, he requested and received from King a sampling of each employee's work during the summer of 2003. Perez' sampling demonstrated more errors than other members of the team. She was counseled by Pushko to improve both the accuracy of her work and her productivity. Since the counseling, Perez has met both of those goals supporting that the goals were not unreasonable or unattainable. Pushko's counseling positioned Perez for success, not failure.

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

**RECOMMENDATION**

I recommend the Complaint be dismissed.

  
Wendy L. Young  
Hearing Examiner

Dated: March 3, 2005  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 16, 2005.

