

H.E. NO. 2016-3

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

In the Matter of

PASSAIC COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket Nos. CO-2012-294
CO-2013-310

POLICE BENEVOLENT ASSOCIATION
LOCAL 286 (SOA),

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the County of Passaic did not violate N.J.S.A. 34:13A-5.4a(3) and derivatively 5.4a(1) when it changed the assignment and shift of PBA Local 286 (SOA) President, Captain Charles Tucker. The Hearing Examiner found that the County transferred Tucker for legitimate non-discriminatory reasons to comply with its long range staffing plans and to ensure proper supervision levels. The Hearing Examiner recommends the Commission find that the County independently violated N.J.S.A. 34:13A-5.4a(1) of the Act, through its representatives' conduct when a chief called Tucker to tell him and other department members to "stop talking" about a certain issue while attending a PBA mini-conference, and during a conversation in which the chief said that he could "retaliate" against PBA members for filing overtime grievances.

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 that 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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Appearances:

For the Respondent,
Genova Burns and Giantomasi, attorneys
(Jennifer Roselle, of counsel)

For the Charging Party,
Loccke, Correia and Bukowsky, attorneys
(Merick H. Limsky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 20, 2012 and April 26, 2013, PBA Local 286 SOA (Charging Party or SOA) filed unfair practice charges against the Passaic County Sheriff (County or Sheriff). CO 2012-294 was filed April 20, 2012 and alleged that the County, through its Sheriff's Department, retaliated against SOA President, Captain Charles Tucker, by changing his assignment and shift from the Crime Scene Investigation Unit (CSI) to a patrol position in January 2012, in alleged violation of N.J.S.A. 34:13A-5.4a(1),

(2), (3), (4), (5), (6) and (7)^{1/}. CO 2013-310 was filed April 26, 2013 and alleged that Tucker's supervisor, Chief Michael Dunlop, threatened retaliation in connection with employee overtime requests, and improperly telephoned Tucker while Tucker and other officers were attending a PBA mini-conference in alleged violation of N.J.S.A. 34:13A-5.4a(2), (3), (4), (5), (6) and (7).

As remedy, PBA Local 286 (SOA) requests, among other things, an Order directing the County to place Tucker in his assignment prior to January 2012; to cease interfering with SOA business, to cease intimidating SOA members for exercising their rights concerning their terms and conditions of employment; and an appropriate posting.

On May 20, 2013, the Director of Unfair Practices consolidated the cases and issued a Complaint and Notice of Hearing on the 5.4a(1) and (3) allegations of both charges (C-1). The Respondent filed an Answer and amended Answer to CO 2012-294 on February 5 and June 13, 2013, respectively. The Respondent filed an Answer to CO 2013-310 on June 13, 2013 (C-2). Hearings

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

were conducted on August 13 and 14 and September 26, 2013^{2/}.

Initial briefs were filed by December 22, 2013. Reply briefs were filed by January 6, 2014 and the record closed on that date.

I hereby make the following:

FINDINGS OF FACT^{3/}

Background

1. PBA Local 286 SOA (SOA) represents all superior officers employed by the Passaic County Sheriff (Sheriff). The most recent collective agreement between the SOA and the Sheriff was effective from January 1, 2007 to December 31, 2014 (J-5; C-1)^{4/}. Among the relevant sections of the parties' collective agreement is a management rights clause (Article 4) whereby the employer retains the right, among other things, to hire, promote, transfer, assign and retain employees within the agency (1T56; J-5)^{5/}.

Berdnik Becomes Sheriff

2/ The transcripts in this matter will be denoted as follows: August 13, 2013 - 1T; August 14, 2013 - 2T; and September 26, 2013 - 3T. The exhibits will be denoted as follows: C - Commission; J - Joint; CP - Charging Party, and R - Respondent.

3/ Since the charges have been consolidated, the facts will be presented chronologically as though filed as a single charge.

4/ The parties fully executed this agreement after the conclusion of the hearing.

5/ The terms "transfer" and "reassign" are used interchangeably throughout this decision.

2. Richard H. Berdnik became the Sheriff in January 2011 (1T15). Berdnik was immediately preceded as Sheriff by Jerry Speziale and County Business Administrator Charles Meyers, who served for 6 to 9 months (1T13, 1T54).

3. The Passaic County Sheriff's Office consists of approximately 650 employees and is organized into several divisions (2T51). The Office of the Sheriff consists of Berdnik, Executive Undersheriff Joseph Dennis, and Undersheriff Lisa Washington (all apparently appointed by Berdnik). Below the Office of the Sheriff are the Bureau of Law Enforcement (BOLE), also known as the patrol division (headed by Chief Michael Dunlop); the Court Services Division, also known as the court house division (headed by Chief Leonard Lovely); and the Correctional Services Division, which oversees the Passaic County Jail (headed by Warden Michael Tolerico and Deputy Warden Elbrus Basmouk) (2T28). The chief is the highest commanding officer in each division and the police staff ranks include, from highest to lowest, captains, lieutenants, sergeants, and non-supervisory rank and file officers (2T28 1T68; J-5). The rank and file officers are represented by PBA Local 286 (1T72).

4. Charles Tucker has been employed by the County Sheriff's office for 22 years (1T11). Tucker has served in the rank of Captain since 2001, and as the President of the SOA since 2009 (1T11, 1T19).

5. Jerry Speziale was Sheriff when Tucker became SOA President in 2009. Tucker testified that the labor relationship between Speziale and the SOA was "very professional but extremely friendly" (1T11). Tucker felt that Speziale addressed union matters:

on a personal level, and afterwards we talked about them professionally, and most of the time he would be in agreement with us. So as far as filing grievances, one or two at best. (1T12).

Tucker testified that when Meyers was acting sheriff, that labor relationship was also very professional, friendly and open (1T13). If Tucker wanted to speak with either Speziale or Meyers, he would call them to schedule a meeting; both had an "open door policy." (1T14)

6. When Berdnik became Sheriff in January 2011, according to Tucker, Berdnik requested a six-month "grace period" from the SOA; the union agreed not to file any grievances during this grace period while Berdnik evaluated the department (1T16).

After the expiration of the grace period, Tucker testified that if he wanted to see Berdnik on an issue, he was required to make an appointment with Berdnik's secretary (1T17). Sometimes Berdnik would not appear for an appointment and Tucker would learn via phone call or from Berdnik's secretary that the meeting was rescheduled (1T18). When they did meet, Tucker testified, the meetings were "contentious" and "final" - there was no

negotiation on the issues and Berdnik's answer was always "no" (1T18). As a result of having to reach the Sheriff through his secretary, Tucker considered their communication "minimal at best" by January 2012 (1T25).

When Berdnik is not available, Tucker files or discusses grievances with Undersheriff Dennis, Undersheriff Washington, or Business Administrator Meyers (1T54). This is different from how grievances were handled in the past (1T54). As Union President, Tucker believes he has the right to see the sheriff on any issues, though he acknowledges the sheriff is not contractually obligated to see Tucker without an appointment (1T59). I credit Tucker's testimony.

7. Michael Dunlop is a Chief of the Bureau of Law Enforcement (BOLE) of the Passaic County Sheriff's Department (3T12, 3T21). Dunlop has been in that position since 2011 (3T12). Prior to becoming chief, Dunlop was with the County for 17 years as a captain, a lieutenant, a sergeant, and an officer (3T12). Dunlop is a member of the PBA Local 286 SOA bargaining unit (3T13). Dunlop is familiar with Tucker as SOA president and previously reported to Tucker when Dunlop was assigned to the court house as an officer (3T13). As Chief, he was Tucker's immediate supervisor in both the CSI and patrol assignments (1T23).

Tucker considered his relationship with Dunlop to be contentious (1T25). Tucker testified that he "continually" had "confrontations" with Dunlop about the filing of grievances:

Everything was controversial...he would say, I don't like the way you are filing this. You are filing it wrong. I'm not going to accept it. It got to a point where he would just say I'm not accepting your grievance, and I would just go to the next step.

(1T53).

8. On November 6, 2011, at Berdnik's direction, Dunlop wrote and issued the following memorandum:

To: BOLE Officers and Supervisors
From: Chief Michael Dunlop
Subject: AUTHORIZED WINTER JACKET

The authorized jacket for all uniformed personnel within the BOLE is the Blauer, model 9810Z, Cruiser Jacket, Dark Navy. Any officer purchasing a jacket shall buy the Blauer jacket after this date. However, Officers will be permitted to wear leather jackets and other manufacturer jackets until December 2012, if previously purchased.

Officers are permitted to embroider their last names above the right breast pocket (gold lettering for Corporals and above, silver lettering for Officers), or use a metal nameplate, utilize a badge patch or their metal badge above the left breast pocket, have the Department or the Department SERT Patch on the left sleeve, and the American Flag on the right sleeve.

Sergeants and Corporals, shall have their gold stripes on both sleeves. Lieutenants and above shall have their rank embroidered, embroidered patches or metal insignia on their jacket's epaulets.

(R-1).

Tucker testified that in January 2012, as he was exiting an office at head quarters, he and Dunlop had a conversation about

the new jacket, and Dunlop ordered Tucker to purchase it "immediately" (1T25). Tucker told Dunlop that the jacket was a uniform change, and the department should cover the cost by contract (1T25)^{6/} Tucker showed Dunlop the clause in the contract and Dunlop told him "you are ordered to get the jacket" or "you will buy the jacket" (1T26, 3T56). Tucker interpreted Dunlop's words as an order and purchased the jacket (3T56).

Although the entire department was eventually ordered to get the jacket, Tucker believes he was the only individual specifically ordered to do so (1T27). On rebuttal, Tucker testified that he believes that his counterpart, Captain Serafino Caporuscio, was also ordered to purchase the jacket and did so (3T56).

Dunlop acknowledged that he and Tucker may have discussed the jacket during one of their "numerous" conversations, but denies that he specifically directed either Tucker or Caporuscio to buy the jacket, and in fact was also required to purchase the jacket himself (3T35, 3T36, 3T37).

^{6/} Article 16 of the parties' collective agreement, Miscellaneous, specifies at Article P that employees shall be responsible for all costs associated with the care, maintenance etc. of their uniforms. However, if the employer orders a uniform change, then the employer shall pay for said change.

I credit Tucker's testimony that he and Dunlop had a conversation about the new uniform jacket which Tucker understood as an order to purchase the jacket.

The Sheriff's Department Long Range Staffing Plan

9. Joseph Dennis has been the Executive Undersheriff of the Sheriff's Department since 2011 (2T27, 2T46). His duties include overseeing the day to day operations of the department, personnel and budgets (2T26). Dennis reports directly to the Sheriff and supervises Undersheriff Washington (3T46).

10. The sheriff's department has lost funding over each of the past several years, resulting in decreased staff (2T29, 3T82). The staff is also constantly changing because of the number of personnel who leave employment or go on leave (2T32).

Therefore, Dennis explained, there is a need for constant monitoring of the personnel in the department to fulfill the needs of the agency (3T32, 3T51). Dennis has a running staff plan on a spreadsheet whereby he tracks the positions which need to be filled in the various divisions and any staffing requests from the chiefs (3T80). The command staff then collects information, and sometimes solicits applicants, and meet and discuss a recommendation to the sheriff (3T81). Dennis prepares final staffing recommendations for the Sheriff's approval or modification (3T47-3T48).

As part of a long range staffing plan, the department planned to hire new officers in late 2012, and promote several new sergeants, allowing time for the sergeants to receive supervisory training and become familiar with their responsibilities. Thereafter, the next steps of the plan - certain transfers - would be executed in February 2013 (2T39, 2T40). The determination of who would be transferred was made with the participation of the chiefs and evaluation and input from other command staff (2T47).

Tucker's First Transfer

11. In January 2012, there was a staffing shortage of officers but the hiring process had to be delayed until later in the year until certain other personnel moves were made in accordance with the long range plan (2T33, 2T39, 2T40). There was also a shortage of supervision within the patrol division, and the administration was looking for ways to better utilize the existing command staff (2T33). On January 13, 2012, Dennis issued a memorandum indicating 27 transfers, assignments and reassignments within the organization of the department, including two captains (2T31; J-2). As a result of the memorandum, Tucker was reassigned to Patrol, Commander (Nights), effective January 23, 2012 (1T19, 1T22; J-2).

12. Prior to being transferred, Tucker had been assigned to the department's CSI (Crime Scene Investigation) unit since its

inception in 2002 (1T19). CSI is part of the patrol division (3T69). The function of the CSI unit is to respond to any of sixteen municipalities which request the unit's assistance in processing crime scenes. Members of the unit include experts in fingerprinting, shooting reconstruction, and blood spatter (1T20). The CSI assignment is a plainclothes position and emoluments include additional educational training, a department vehicle for responding to crime scenes as well as personal use, and overtime opportunities (1T20, 1T22). In the CSI assignment, Tucker was known as detective-captain and the officers he supervised were titled detectives (1T21). Tucker also received a five percent salary differential (apparently non-contractual) (1T21, 1T22, 1T56)^{7/}. While assigned to CSI, Tucker supervised a staff of up to 12 employees "in its heyday" plus some civilians (1T66).

^{7/} Article 9 of the parties' collective agreement, Night Differential, provides that employees working on shifts whose working hours fall between 3:00 PM and 7:00 AM [second and third shift] shall receive in addition to their regular pay, an additional ten (10%) percent of their base salary which shall be incorporated in the base pay...An additional ten (10%) may also be paid to employees who do not strictly fall into the above categories if their responsibilities sometimes call for odd hours, and if authorized by the Sheriff or his designated representative (1T56).

Tucker testified that of the five active captains, only he and Captain Lori Mambelli, who is also a union representative, do not receive some sort of differential pay. Mambelli works in the identification bureau and supervises only civilians (1T68, 2T29, 3T63).

13. Dennis was involved in the decision to move Tucker from CSI to patrol as part of the transfer list, but believes that someone other than Dunlop was chief at the time the decisions concerning Tucker's assignments were made (2T31, 3T79; J-2). Dennis testified that a typical supervisory assignment for a captain would be to oversee one to several lieutenants, who would oversee one or several sergeants who oversee the sheriff's officers themselves (2T32). At the time Tucker was transferred from CSI to patrol, he was overseeing approximately five officers in that division; according to Dennis, Tucker should supervise one or more lieutenants, who in turn would supervise sergeants (2T32). Dennis testified that putting Tucker in the patrol division increased Tucker's supervisory capacities by placing him in supervision of an appropriate number of lieutenants, sergeants and officers (3T33). Dennis is aware of Tucker's role as SOA president (2T30). Dennis felt that Tucker's CSI experience would be beneficial to the patrol division (3T64). I credit Dennis' testimony.

14. As a result of the transfer, Tucker's schedule changed from day shift (7:30 - 3:30) to second shift (3:00 - 11:00) (1T22)^{8/}.

^{8/} Article 5 of the parties' collective agreement, Work Week - Hours of Work, specifies a four days on, two days off schedule with the following shifts: 7:00AM - 3:00 PM, 3:00-11:00 PM, 11:00 PM 7:00AM. The agreement also specifies a five days on, two days off schedule for those assigned to work 8:00 AM - 4:00 PM, and an 8:15 AM to 4:15 PM for
(continued...)

Tucker testified that he was no longer able to see his children after school (1T23). Tucker gained an additional five percent shift differential as a result of the shift change, for a total of ten percent, but no longer had the use of a department vehicle and also had to purchase uniforms (1T22, 1T23). Financially, Tucker felt the assignment was about the same, but that the prestige of the patrol assignment was far less than in CSI (1T21, 1T22, 1T24). Tucker testified that in the viewpoint of department members and Tucker's own opinion, CSI is the most prestigious assignment, "patrol is lower than that, and being in the courthouse would be the bottom assignment" (1T51). The CSI assignment was viewed as prestigious and desirable because of the car, the five percent salary differential, the overtime, and the reputation of the unit (1T21 - 1T22).

15. At the time of the transfer (to patrol), Tucker was one of six captains and tied for number two in seniority (1T25). Tucker testified that he was told that the reason for the transfer was that the department was going in a different direction, and someone of his experience was needed (1T48 -1T49). Tucker didn't believe that reasoning(1T50). Tucker considered his patrol experience, which at that time was four months as a sergeant in

8/ (...continued)
officers assigned to the courthouse, and that employees must be available to work any and all shifts as needed to maintain the efficient operation of the office.

2000-2001, to be limited and believed that other captains had more experience (1T49, 1T50). I credit Tucker's testimony concerning his belief of the relative prestige of various assignments and that he was skeptical of the reasons he was given for his reassignment.

The PBA Mini Convention

16. For approximately 20 years, there has been an issue between sheriff's officers and corrections officers being assigned to the sheriff's Street Enforcement Team (SET), which the sheriff's department members view as exclusively their unit work (1T29, 3T38 - 3T39).

17. In March 2012, the PBA held a "mini-convention" in Atlantic City which SOA representatives attended (1T28).

18. Lisa Washington is an Undersheriff with the Passaic County Sheriff's Office (2T7). She has been Undersheriff since approximately 2011 and with the Sheriff's office for 24 years (2T8). As Undersheriff, she oversees the jail and the courthouse (2T8). She has known Tucker since he joined the Sheriff's office, is aware that he is SOA President, and considers him a friend (2T9).

In the spring of 2012, Washington had temporarily been appointed acting sheriff because both Berdnik and Dennis were out of town on vacation (2T12). Washington was aware that Tucker and other PBA members were attending a PBA mini-conference in

Atlantic City (2T9, 2T10). Washington received several phone calls from different people over the course of two days alleging "inappropriate" behavior of sheriff's officers at the hotel where the mini-conference was taking place (2T10-2T11, 2T13). She was not sure who called, but she received the first call at 6:00 or 7:00 PM in the evening and two more calls the following day (2T14, 2T20).

Washington's understanding from the phone calls was that sheriff's officers, corrections officers and PBA members were drinking, and that their behavior became adversarial such that they were "exchanging unpleasantries and they were not acting professional" (2T11, 2T15, 2T20). Washington was not sure of the content of the conversation, or whom specifically was drinking, but wanted the officers to "knock it off" to avoid embarrassing the department by "making a fool out of themselves in Atlantic City." (2T11, 2T15-2T16, 2T20, 2T24) Washington was aware of an issue between the sheriff's officers and corrections officers related to the SET issue (2T17, 2T18, 2T21). Washington was not concerned about the content of the discussions, just the behavior (2T24). Washington felt that as acting sheriff, she had the right to address the officers' behavior because she believed they still represented the Passaic County Sheriff's Department whether or not they were at a PBA convention or meeting (2T24, 2T26).

She felt that she could not forbid them to discuss an issue, but she could tell them to be mindful of their behavior (2T26).

19. Washington called Dunlop, told Dunlop that disparaging remarks were being made about the SET, specifically by Captain Tucker and SOA vice president (Sergeant) Ed Shanley, and directed him to call and relay a message to Tucker as SOA President on Washington's behalf (1T32, 2T18-2T19, 2T22, 2T25, 3T26). Washington did not specifically allege that either Tucker, Shanley or any other department members were drinking and/or fighting (3T38). Washington requested Dunlop to tell Tucker:

(to) knock it off, whatever they are doing down there, because I am receiving numerous phone calls, and all I want them to do is conduct themselves in a professional manner. That's it.

(2T19). Washington did not ask Dunlop to call the PBA rank and file president or the PBA delegate, who were also attending the mini-convention (2T23).

20. Tucker received a text from Chief Dunlop stating "call me" and immediately called Dunlop, with Shanley present (1T29, 1T82).

21. Dunlop told Tucker that he was uncomfortable with the conversation he was about to have with Tucker, but that he had been ordered to do so by Washington (1T29, 3T52). Dunlop continued:

[L]isten, somebody is down there, whether they are correct or incorrect, they are calling the Undersheriff for somebody up here...saying you're making disparaging

comments about the SET team and who's being assigned to it and everything else. I said be careful who you're talking to because whoever you're talking to whether they're portraying the truth or making up stuff, the information is coming back here.

(3T27,3T39,3T40). Dunlop stated he did not tell Tucker not to talk about the issue, but that someone could be manipulating Tucker's words (3T40). Dunlop's understanding was that Washington wanted the members to know that "she is getting information back up North" (3T40).

Dunlop's intent was just to deliver the message:

because there was really nothing else for me to say to them. Who they talk to and what they talk about is their business, their time, and everything else. I was just trying to basically relay the message, hey, be careful who you talk to.

(3T27). Dunlop testified that he "did not care" about the substance of the conversation (3T44).

22. Tucker testified that Dunlop said Washington had "heard" that Tucker and other sheriff's department members were talking about the SET issue (1T29). Tucker testified that Dunlop said Washington said he had "better stop it or else" and that Tucker should also instruct Shanley to "knock off" the discussion (1T28-1T29, 3T47). Tucker responded to Dunlop that he would represent his men as he saw best (1T30). After Tucker spoke with Shanley, Shanley called Dunlop himself and denied that they were discussing the SET, calling it a "dead issue" (1T31, 1T85).

23. Tucker denied that either Tucker, Shanley or any of the sheriff's department members were discussing the SET issue (1T30). Tucker stated that several other unions from other police departments in Passaic County approached the sheriff's department members about the SET issue, questioning "how can you put these people out there?" and Tucker and Shanley responded, "we have nothing to do with that, call up to the sheriff" (3T48). Tucker told Dunlop that they weren't talking about the SET matter but were "referring people to Wayne to headquarters because we have no information on that." (3T53) Tucker also told Dunlop that he did not have a right to tell the members what could and could not be discussed at a PBA meeting (3T54). Dunlop said, "he understood," but he was ordered and was extremely uncomfortable with the conversation (3T54). Tucker took Dunlop's statement as not a friendly suggestion, but as an order to "stop talking" (3T53).

24. Dunlop told Washington that he did call Tucker (2T19).

I generally credit Washington, Dunlop and Tucker's testimony on this issue. The respective testimony was consistent as to the subject matter of their conversations between Washington and Dunlop, and Dunlop and Tucker. However, I find that Tucker and Shanley were, in fact talking about the SET issue while at the mini-convention insofar as telling fellow attendees that they could "call up to the sheriff" if they had questions about the

SET issue. These comments may have led to the telephone calls Washington received. I further find that Dunlop understood Washington's request that he call Tucker as an order, and Tucker understood Dunlop's instructions to him concerning the alleged conversations as an order not to discuss the SET issue.

The Traffic Vehicle Incident

25. In September 2012, Undersheriff Dennis directed Dunlop to be sure that only certain cars were used for traffic, rather than patrol, duties (3T22; CP-1).

25. Serafino "Fino" Caporuscio is a Captain in the Law Enforcement Division of the sheriff's office as a patrol supervisor (3T5). He has been employed by the Sheriff's department for 23 years (3T5).

27. On or about September 19th, Dunlop verbally ordered Tucker and Caporuscio to communicate Dennis' order to the tour (shift) commanders (1T33).

Tucker testified that after speaking with Dunlop, Tucker "immediately went outside" and relayed the order to all of the tour commanders who were present (1T33). One officer, Lt. Barsbay, was not present that day because he was on vacation (1T34). Tucker and Caporuscio's responsibility to supervise Barsbay "overlapped" but Tucker was at least partially responsible for informing Barsbay (3T57, 3T59). Tucker also

informed Sergeant Shanley, who was under Barsbay's supervision (1T34, 3T56).

Caporuscio was to send a follow-up email to the relevant staff confirming Tucker's verbal order but Tucker is not sure if it was ever sent (1T32, 1T33, 3T57).

28. On September 24, Dunlop advised Tucker that Lt. Barsbay had improperly assigned a traffic vehicle to a non-traffic patrol officer, and the vehicle had been in an accident over the weekend. Dunlop ordered Tucker to write a report (1T58; CP-1).

Because Tucker could not give Dunlop a "yes or no" answer as whether Lt. Barsbay knew about the order, Dunlop concluded that Tucker had not communicated the order (3T23). Dunlop gave Tucker a verbal reprimand (1T58, 3T21). Neither Caporuscio nor Barsbay were disciplined (1T33, 1T58, 3T57, 3T59). On December 4, 2012, Dunlop verbally reprimanded another superior officer, Lieutenant Miuccio, for assigning an improper unit to an administrative road job (3T23-3T24; R-2).

I credit both Tucker and Dunlop's testimony on this issue. Tucker admitted in his testimony that the officer who violated the order was not present at the time Tucker communicated it. Based upon Tucker's own testimony it did not appear unreasonable for Dunlop to conclude that Tucker had not clearly communicated the order to Barsbay and to decide to issue a verbal reprimand.

The DeLoreto/Casasanta Overtime Grievances

29. Between November 30 and December 3, 2012, Chief Dunlop sent several emails concerning a two-day supervisor training (3T14). The emails were to Caporuscio, Tucker, and two other superior officers indicating that each would provide training to several new supervisors, including Sergeant Ronald Deloreto and Nicholas Casasanta, on December 5, 2012 (J-1). Both Deloreto and Casasanta had been promoted within the previous 12 months and were assigned to Patrol (3T14; J-1, J-4). Caporuscio is Deloreto's supervisor (1T36). Caporuscio was ordered to bring in both sergeants for training (1T37).

Both Deloreto and Casasanta were scheduled to be off on the date of the training. Both told Caporuscio that if they had to come in for training on their day off, they intended to request cash overtime (1T43). According to Caporuscio, it is assumed that training overtime is compensatory time rather than cash (3T6, 3T14, 3T29, 3T33)^{9/}.

On December 5, 2012, DeLoreto and Casasanta submitted cash payment overtime requests for the time spent in training to Caporuscio (3T6, 3T7, 3T14; CP-2, CP-3). Caporuscio approved the

^{9/} Article 6 of the parties' collective agreement provides that if an employee is scheduled to work on a day normally scheduled as his/her day off and has otherwise worked a regular schedule during the work week, such employee shall be paid at the rate of time and one half his/her base pay. Compensatory time, or comp-time while not defined in the agreement, is commonly understood to mean that the employee is compensated with time equivalent to the amount of overtime pay earned.

overtime requests, attaching a note to Deloreto's request corroborating that Caporuscio was told to direct Deloreto to attend supervisor training on Deloreto's day off (3T7, 3T28).

30. The requests moved on to Chief Dunlop, who denied them and returned them to Caporuscio (3T8). According to Dunlop, training is typically scheduled to accommodate the most people who are scheduled to work, which is difficult with sergeants. If training cannot be scheduled on a working day, management either gives compensatory time or allows the sergeants to switch days (3T14). The overtime request was not typical, as it is not the practice to pay overtime for officers who attend training (3T14, 3T29, 3T33). Dunlop told Caporuscio "we don't pay for training like this" but he would give the officers compensatory time if they wanted it (3T15).

31. Caporuscio advised the sergeants of Dunlop's denial and they insisted on cash pay (3T8).

Caporuscio returned the overtime requests to Dunlop. On the afternoon of January 3, 2013, Chief Dunlop, Tucker and Caporuscio met to discuss personnel matters, including Deloreto and Casasanta's overtime requests (1T35-1T36). Tucker's position was that the men should be entitled to their choice of compensatory time or overtime "for the heart beats that they spent for the department" (1T43). Dunlop told them to grieve it to their tour commander; Tucker said that was unfair, that the men had never

been told they could not request cash overtime, and that they were entitled to payment (1T39, 1T43). Tucker testified that Dunlop said he didn't care (1T44). The three men had a "heated" discussion; they were all "angry" (3T9-3T10).

32. Tucker recorded his notes of the conversation on his office computer 15 minutes after the meeting ended (1T39, 1T41, 1T44; CP-4).

Tucker's notes read, in their entirety:

Chief Dunlop stated that he would not sign (the overtime slips) unless they put in for comp-time. I remind Chief Dunlop that under the law we cannot order them to take comp-time and that this time was worked before the Sheriff requested the moratorium on overtime. Furthermore, both sergeants were called in on their day off. The Chief stated that he wasn't going to sign them again. I reminded him that the time was worked and that they have chosen their compensation and that the law is clear on this matter. The Chief then stated the following:

Chief: "I will get them for this."

CT (Charles Tucker): "Chief there will be no intimidation of them. It is against the law and you will be charged."

Chief: "I'm not afraid of law suits".

CT: Chief you put me in a rough position. Not only do I have to represent them but I also represent you. You have just stated that (you) are going to take actions against fellow members for utilizing their rights under the law. I am telling you as that representative that you are breaking the law and you will not do that."

Chief: "I don't need the PBA. I will take away their range privilege, and yes this is retaliation against them which I can do."

Captain Caporuscio: No you won't and you're just going to sign the slip and end this. Comp-time and overtime is the same thing. Why don't you understand that?"

Chief: (Casasanta) must be mad to push this button and he could be demoted for it.

CT: "Chief, last time, there will be no retaliation against these officers and if you say anything else regarding that you may be charged accordingly."

Chief: Please verify that this is what they want?

CT: "(Casasanta) is out injured, Deloreto has already spoken to me on this matter and he wants the overtime."

Chief: "They should have been rescheduled."

Captain Caporuscio: "You never ordered that."

Chief "You're (CT) wrong I can retaliate against them."

CT: "One last time, do not mention that again."

(CP-4) Tucker alleges Dunlop made the statement that he could retaliate against the officers for putting in for the money while looking Tucker directly in the eye (1T39, 1T41, 1T44, 1T45). Tucker took Dunlop's statement to apply to the entire union (1T44). Caporuscio testified that Tucker's written account of the meeting is "fairly accurate" (3T9).

Dunlop denies that the conversation took place in the way Tucker recorded it, but acknowledges:

I might have said I'm not afraid of lawsuits. I've said that before to people. I'm not afraid of grievances. It's the way I operate. I can't be - I shouldn't say, intimidated, but I also can't worry about it. I have to do the best I can to make sure the law enforcement division operates correctly. I can't be worried about if someone is going to claim a lawsuit. As for the other charges, no, I do not remember that.

(3T16). Dunlop denied threatening any retaliation over the issue.

I credit Tucker and Caporuscio's testimony. Their testimony was credible and their version of events was partially corroborated by Dunlop. I also credit Tucker's contemporaneous notes as an accurate account of the conversation because Dunlop acknowledged his statement about lawsuits as likely, and those remarks are in context with the account in Tucker's contemporaneous notes, therefore supporting an inference that Dunlop likely made the remainder of the statements attributed to him in Tucker's written account.

33. Later that afternoon, Tucker met with Deloreto, who stated to Tucker that Deloreto had been told he could request overtime rather than compensatory time if he attended the training and that Deloreto wanted the overtime. That evening, Tucker found the two overtime slips in his mailbox with notes from Dunlop

attached stating "have them grieve this to the T/C" (tour commanders) (1T38).^{10/} Tucker added notes on the later conversations to his document (1T63, 1T70; CP-4). Tucker subsequently spoke with Dunlop about the note and told him that he was going to lose the grievance and that it wasn't fair; Tucker said Dunlop's response was "grieve it" (1T39).

Dunlop told the officers to grieve the overtime request because

I wanted to know...that they were doing this. That they had a real problem with this and everything else....After they grieved it, I pulled in one of the sergeants, I told him listen, that's fine, we're going to pay you the overtime for it, but we will - I hate to say - never do this again...Any more time there's a training, now training issues that some up, either switch days, we will give you comp, but that will be known.

(3T18)

34. On January 4, Deloreto and Casasanta filed grievances seeking the overtime. On January 16, Dunlop approved the overtime requests at the third step, resolving both grievances (J-1, J-4; 3T10, 3T18). Dunlop testified that he thought management would lose the grievance if it went any further, and I infer that Dunlop suggested the men grieve the issue so that he

^{10/} Article 3 of the parties' collective agreement, the grievance procedure, provides the shift/tour commander as the first step, with the division head (i.e. chief) as the second step, with the Sheriff or designee third step, and the fourth and final step is binding arbitration (1T60).

could take the opportunity to clarify the issue so that it would not arise again (3T37).

Tucker's Second Transfer^{11/}

35. On February 26, 2013, Tucker was again reassigned from the patrol division to the courthouse (1T46). According to Dennis, at the time Tucker was moved, there was a shortage of command staff at the court house, with only a chief and one lieutenant supervising the staff; the position of captain was left vacant when a Captain Ernst was moved from the position to commander of the special investigations division (SID). That captain position remained vacant for a year because of the pressing need to first address the supervisory shortage in the patrol division, which was accomplished through the long term plan, including Tucker's first transfer (3T75). After the promotions were made and the new supervisors had gained the necessary experience, there was ample supervision in the patrol division and a need to replace the missing captain at the courthouse, so Dennis recommended to the Sheriff to move Tucker to that position (3T34, 3T74; J-3). Tucker's first officer assignment had been to the courthouse in January 1991 and he also served in the courthouse after being promoted to sergeant, between 1995 and 2001 (1T51, 3T35). In the

^{11/} Although the facts concerning Tucker's second transfer were not specifically pled in the charge, the facts were fully and fairly litigated and are analyzed for the clarity of the record.

court house assignment, Tucker now supervises seventy to eighty people and no longer reports to Dunlop (1T52, 1T53, 1T66).

36. As a result of the reassignment from patrol to the courthouse, Tucker no longer receives the ten percent night differential (around \$14,000 a year) (1T46, 1T47, 1T52).

Tucker alleges that the transfer did not comport with his seniority, as the second most senior captain (1T48, 1T55).

Tucker asked Dennis, with Dunlop present, if he could discuss his reassignment to the court house and his seniority with Berdnik, but Dennis declined Tucker's request (1T55).

ANALYSIS

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation

without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission, to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). Hostility is established by reviewing the entirety of the evidence. Warren Hills Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2005).

The SOA has proved the first two parts of the Bridgewater test - it is undisputed that Tucker engaged in protected activity through his position as Association President since 2009, and that upper management in the Sheriff's department knew of this

activity. Dennis and Washington were specifically aware that Tucker was SOA President, and Dunlop, Tucker's immediate supervisor in the CSI and patrol shift commander assignments, acknowledged having interacted with Tucker in his role as SOA President.

The inquiry turns to the last component of the Bridgewater test - whether the County, through its Sheriff, was hostile to Tucker's protected activity.

Sheriff's Department Decision Makers were Not Generally Hostile to Tucker's Protected Activities.

This case turns on the credibility of the witnesses as well as the nexus between the alleged adverse action and the protected activity. Analysis of the facts presented as direct and/or circumstantial evidence of animus, surrounding each of the incidents presented by the SOA, does not support a conclusion that sheriff's office upper management was hostile to Tucker.

These consolidated charges recount a series of events which took place over a period of some 25 months between June 2011 and February 2013^{12/}. The SOA presents the following sequential evidence of hostility: a general change in the labor relations

^{12/} The Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred (the "operative date"). N.J.S.A. 34:13A-5.4c. Therefore, the most relevant time periods for the analysis are events occurring within the six months preceding the filing of each charge.

climate in the department after Berdnik became Sheriff in January 2011; a conversation Tucker had with his supervisor, Chief Michael Dunlop, about a winter uniform jacket in January 2012; Tucker's transfer to a night shift patrol position in January 2012; events around a PBA mini-conference in March 2012; an incident involving the assignment of a traffic vehicle in September 2012, events around two overtime grievances from November 2012 into January 2013, and finally, Tucker's second transfer in February 2013. The SOA cites each of these incidents as proof of animus in and of themselves or having resulted from Tucker's protected activity as SOA president. Specifically, the SOA alleges that both transfers were in retaliation for Tucker's union activity as SOA president.

Tucker was Reassigned as Part of the Department's Long Range Staffing Plan and Supervisory Needs

While the labor relations climate and the relationship between the SOA and Sheriff's office upper management may have changed in what the SOA considered a negative way after Berdnik became sheriff, the record reflects that none of the cited incidents influenced the decision to transfer Tucker, but those decisions were part of the department's long range staffing plan and its determination to provide appropriate supervisory coverage. Therefore, I find that Tucker was transferred for legitimate business reasons unrelated to his protected activity.

The SOA alleges that when Sheriff Berdnik took office in January 2011, the labor relations climate in the Sheriff's Department changed in a negative way, and that these incidents are evidence of a general atmosphere of union animus which developed and was exemplified by the actions of certain members of Berdnik's administration.

The SOA argues:

(a)s far as showing that the employer was hostile, that is evident from the employer's actions. The Sheriff essentially refused to meet with not only Tucker, but all of the union representatives. Even when management knew it was wrong on the issue, it still forced the union to file grievances to correct the contractual violations. The testimony clearly established that after Sheriff Berdnik came into office, there was open hostility toward the unions.

The SOA also alleges that Berdnik's administration directly manifested this animus against Tucker, when Tucker was transferred twice during this time period, saying:

(t)he actions of the employer represent a concerted effort to retaliate against the President of the SOA because of his union activities...[which] undermines the SOA's ability to represent its membership.

Charging Party's brief at 12.

While certain of the events can support a finding of a change in the labor relations climate and an inference of some generalized animus, the SOA did not prove that any of the incidents it cited as affecting Tucker were as a result of union

animus, or were related to the administration's decisions to reassign him.

Among the earliest incidents presented as direct evidence of animus against Tucker is a conversation in January 2012 in which Tucker's direct supervisor, Dunlop, "ordered" Tucker to purchase the department's newly designated winter jacket. The respondent County argues that orders related to uniform purchases do not indicate union animus, and that the record reflects that other SOA officials, and even Dunlop was required to buy the new jacket. Respondent's brief at 18.

Although I have credited that Tucker perceived that Dunlop ordered him to purchase the jacket, I don't have sufficient additional context for this conversation to support an inference of union animus. The record is unclear as to whether this conversation took place before or after Tucker was transferred from CSI, which also occurred in January 2012. If the conversation took place after Tucker's first transfer from a plainclothes to a uniformed assignment, it stands to reason that the jacket was part of the uniform he was now required to have in the new patrol assignment, and that could have been why Dunlop raised the issue. Without more information, the SOA did not prove that this incident was proof of union animus.

Another incident presented by the SOA as evidence of animus specifically directed against Tucker is a verbal reprimand he

received from Dunlop in connection with a traffic vehicle being improperly assigned to a non-traffic officer. The SOA points out that Caporuscio, another captain connected to the incident who was also engaged in union activity as SOA vice president, was not reprimanded. The County argues the reprimand was for legitimate reasons. Respondent's brief at 15.

Tucker's own testimony shows that he had not directly given the information to the lieutenant in question, and that at least one other officer was verbally reprimanded in a similar incident. There appears to be a factual basis for the reprimand and Tucker was not the only Superior Officer cited for this type of incident. Thus, I find that the SOA did not prove that this incident between Tucker and Dunlop was evidence of, or motivated by, union animus.

In January 2012 Tucker was transferred from a command position in the department's CSI unit, to a command position in a different section of the patrol division. Tucker's transfer is the crux of the SOA's Complaint; it argues that Tucker's transfer was motivated by animus on the part of the Sheriff's administration, and Dunlop, toward Tucker's activities as SOA president. The County asserts that Tucker was transferred in order to establish a wider range of supervision in that area of the patrol division, increasing the range of his supervisory

authority from five officers to between seventy and eighty officers (2T32, 2T15, 2T66; J-2)

I find that the record reflects that Tucker was reassigned for a legitimate, non-discriminatory reason - as part of a long range staffing plan within the Sheriff's department aimed at ensuring that its supervisory staff was appropriately assigned and aligned for the supervision of lower ranks within the chain of command, and that the SOA did not prove that Tucker's reassignment was motivated by animus. See New Jersey Department of Corrections, P.E.R.C. No. 94-109, 20 NJPER 237 (¶25117 1994) (charge dismissed where there was no evidence in the record suggesting that superintendent of corrections harbored any hostility toward protected activity).

The decision to reassign Tucker, among others, appears to have been initiated by Dennis with reference to the long range staffing plan he spearheaded for anticipated supervisory staffing needs. Dennis credibly testified to the County's long term staffing plans and how Tucker was assigned based on his supervisory experience and capacity. Dennis testified that upper management, including Chiefs, generally participated in staffing decisions, but the record is clear that Dennis was the primary architect of the staffing and transfer recommendations. However, the record is unclear as to whether anyone other than Dennis was the final decision maker as to Tucker's transfers. The

recommendation was made to the Sheriff by Dennis and there was no establishment of animus on the part of Dennis as a decision maker. See Rutgers University and CWA, 28 NJPER 466 (¶33171 2002) (complaint dismissed where evidence failed to show that decision makers knew of, or were hostile to, laid-off employees' union activities). Though Berdnik as Sheriff ultimately approved all recommendations, no evidence in the record suggests what role Berdnik or Dunlop played in the chain of events which led to Tucker's transfers. In fact, Dennis testified that he believed that someone other than Dunlop was Chief at the time the decisions concerning Tucker were made, which suggests it was unlikely that Dunlop played any significant part in those decisions. See Township of Washington, H.E. No. 98-27, 24 NJPER 281 (¶29133 1998) (charge dismissed where Mayor, as final decision maker, had no more than a tangential involvement in identifying employees to be laid off). Dennis, as the primary decision maker was not shown to have any hostility toward Tucker. Washington, supra.

These proofs do not support an inference of hostility.

Therefore, I find that, even assuming a negative change in the labor relations climate after Berdnik became Sheriff, the County would have transferred Tucker even in the absence of his protected activity. See Wood-Ridge Board of Education, P.E.R.C. No. 2004-12, 29 NJPER 400 (¶129 2003) (no violation found where,

despite Board's dual motives, record showed that it would not have renewed custodian's contract even without his protected conduct); State of New Jersey (Judiciary), P.E.R.C. No. 2003-41, 28 NJPER 588 (¶33183 2002) (mere fact that union representative is transferred is not automatic evidence of hostility); Newark Housing Authority, H.E. No. 96-24, 22 NJPER 289 (¶27157 1996), adopted by silence, 2003 (Board had a managerial prerogative to transfer union president for legitimate business reasons); West Paterson Board of Education, P.E.R.C. No. 83-22, 8 NJPER 545 (¶13250 1982) (board demonstrated that transfer of outspoken union president was motivated by educational policy rather than animus).

The SOA argues:

In the period of time since Chief Berdnik came to office, Tucker went from the most prestigious position for a captain to the least prestigious. . . The assignment change for Tucker moved him to a less desirable post while others were moved to more desirable positions.

Charging Party's brief at 7, 9. Thus, the SOA appears to argue that Tucker's personal feelings about the characteristics of his new assignments and the personal circumstances the transfers created for him, amounted to per se adverse actions within the meaning of Bridgewater. The SOA argues that as a result of the January 2012 transfer, Tucker "lost" a day shift, car, plainclothes, and perceived prestige; but became eligible for a

contractual night shift differential in the amount of \$14,000 added to his base salary. The SOA also argues that Tucker's first transfer:

created a situation where Tucker was no longer able to see his family from Monday to Friday even though he was one of the highest ranking members of the department and one of the most senior members as well.

Charging Party's brief at 13. Upon Tucker's second transfer to a day shift at the courthouse, Tucker "lost" the night shift differential, in that, by being reassigned to a day shift, he was no longer eligible for the differential by contract.

Accepting Tucker's perception (and that of his fellow officers) of the relative prestige of the assignments does not necessarily support a conclusion that the actions Tucker experienced were adverse. See Rutgers, supra (charging party suffered no adverse personnel action from staff reorganization where her title, salary and benefits remained the same). See Seaside Heights and Joel Marasco, P.E.R.C. No. 99-67, 125 NJPER 96 (¶30042 1999) (no violation found where lifeguard considered bay assignment less desirable and prestigious, as well as a punishment and demotion, but suffered no loss in pay). But see Township of Wayne, P.E.R.C. 78-10 (1977) (charging party was discriminatorily transferred from detective bureau to less prestigious patrol position, which fellow officers considered a demotion). Here, the SOA did not prove, merely by asserting that

Tucker considered his shift change and assignment to be less desirable, and that he experienced the unfortunate consequence of less time with his family, that such constituted per se adverse employment actions. Moreover, prestige may be subjective. Arguably, an officer could prefer a night shift over a day shift, or a supervisor could consider an assignment with increased supervisory responsibility for more individuals to be more prestigious than supervising fewer individuals. These facts are not sufficient to support a conclusion that Tucker's transfers were motivated by union animus.

Further, the SOA's proofs did not establish that Tucker's seniority was a required consideration in the reassignment decisions, and even if so, that issue would be a contract dispute appropriately presented and resolved through the parties' grievance procedure. State of New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. Newark Housing Authority and Skilled Trades Association, P.E.R.C. No. 2014-70, 40 NJPER 509 (¶163 2014); Warren Hills, supra; Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999); Essex Cty. Sheriff's Department, P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498

(¶18183 1987); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). In many cases where the timing of a personnel action establishes hostility toward protected activity, the personnel action is unanticipated and takes place at a time or in a manner inconsistent with the ordinary course of business. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985), Bridgewater.

The assessment of the relevance of timing is a fact-specific inquiry. Here, the SOA has not established sufficient independent evidence of hostility that any of the County's actions concerning Tucker, including his transfers, were motivated by animus toward his protected activity. See Warren Hills, supra (hostility inferred and violation found where decisions to explore subcontracting and to subcontract school bus services were made immediately after superintendent learned of organizing effort, and after drivers voted in favor of union representation); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd. 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. 149 N.J. 35 (1997) (issuance of reprimand 8 months after union representative called superintendent "lying scuzzball" evinces hostility); Camden Cty. Sheriff, H.E. No. 2001-013, 27 NJPER 71 (¶32031 2000), aff'd. on other grounds P.E.R.C. No. 2001-055, 27 NJPER 184 (¶32060 2001) (No hostility

inferred in Sheriff's transfer of union representative; alleged pretext not proven).

The proximity of timing of events in this case appears to be the strongest, albeit circumstantial, evidence that Tucker's protected activity motivated his reassignments. However, I cannot infer from the timing in this matter that protected activity motivated the County's decision to transfer or reassign Tucker in either 2012 or 2013. The SOA did not establish any factual nexus between Tucker's transfer and the incidents it cites as proof of the employer's animus.

This case is similar to State of New Jersey (Judiciary), P.E.R.C. No. 2003-41, 28 NJPER 588 (¶33183 2002). In that case, the Commission found that the union did not prove that the state judiciary system reassigned probation officers, who were also union officials, to different divisions in retaliation for their protected activity. In 1995, the Judiciary engaged in a strategic planning process which in 1998 culminated in a report recommending, in part, the use of employee teams. To implement the team concept, a vicinage policy team decided to reassign three senior probation officers from each of its three divisions for the purpose of cross-training. The Commission adopted the Hearing Examiner's finding that the Judiciary implemented this reassignment/transfer program "for legitimate business reasons devoid of hostility or discriminatory motives" toward the union

or the nine affected employees. 28 NJPER at 589. Cf. Camden Board of Ed, P.E.R.C. No. 2003-77, 29 NJPER 233 (¶68 2003) (Commission found that the timing of a transfer, together with the "shifting reasons" offered to justify it, supported an inference of hostility; Commission further identified a nexus between the charging party's filing of an acting pay grievance on her own behalf and her transfer as a vice principal to a position at another school). Unlike Camden, here, the employer offered one consistent reason for Tucker's reassignments - his suitability for roles required by its long term staffing plan. An examination of the totality of the circumstances, as the Commission required in Camden, leads to the conclusion that there was insufficient nexus between Tucker's protected activity and his reassignment to support an inference of hostility.

The mere fact that an employee is a union activist or officer is not, without more, sufficient to show that there is a nexus between union activity and subsequent employer action. "To suggest that nexus automatically exists is to infer that those who participate in union activity are entitled to greater protection than any other employee." Warren County Prosecutor's Office, P.E.R.C. No 2000-88, 26 NJPER 223 (¶31091 2000).

I therefore find that the County did not violate N.J.S.A. 34:13A-5.4a(3) and derivatively 5.4a(1) when it transferred

Tucker in January 2012 and February 2013, and dismiss those allegations of the Complaint.

The County independently violated 5.4a(1) by its conduct concerning the overtime grievances and PBA mini-convention

I next consider whether the Board independently violated 5.4a(1) by examining the facts surrounding Dunlop, Tucker and Caporuscio's conversation concerning the cash overtime requests, as well as the interaction initiated when Washington had Dunlop call Tucker while Tucker was attending the PBA mini-convention.

A public employer independently violates section 5.4a(1) of the Act if its actions tend to interfere with an employee's exercise of protected activity. N.J. Dept. of Human Services, P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (n. 1) (¶10285 1979); New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422 (¶4189 1978). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Mine Hill Tp.

The Commission has held that a public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of

governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal; but the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. Black Horse Pike Regional Board of Education and Black Horse Pike Education Association, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).

I credited Tucker and Caporuscio's testimony concerning their exchange with Dunlop about the overtime grievances in January 2013. That finding is supported by their credible testimony and buttressed by Tucker's written memorandum which contemporaneously recorded the conversation. See N.J. Public Defender and CWA (Cole), P.E.R.C. No. 2011-66, 37 NJPER 133 (¶39 2011) citing H.E. No. 2010-9, 36 NJPER 169 (¶63 2010) (hearing examiner assessed testimony as credible based on contemporaneous, independent memorandum and demeanor and presentation on witness stand); see also Camden Bd. of Ed. and Camden Ed. Assn., P.E.R.C. No. 2007-19, 32 NJPER 328, ¶136 2006), citing H.E. No. 2006-10, 32 NJPER 208 (¶91 2006).

Though Black Horse Pike does not require a finding of intent, I find that Dunlop's speech suggested a desire and intent to take retaliatory action against SOA members, at least in that moment - due to his frustration during a very heated discussion. Dunlop specifically used words and terms during that discussion including the words "I'll get them for this" and reiterated what he considered his right to "retaliate" for the SOA members' grievance activity. Such comments "inevitably (have) the tendency to intimidate any employee from engaging in such activity." See Willingboro Tp. Bd. of Ed. and Employees Ass'n of the Willingboro Schools and Joann Phelps, P.E.R.C. No. 98-113, 24 NJPER 171, 173 (¶29085 1998); aff'd and rem'd on remedy, 25 NJPER 322 (¶30138 App. Div. 1999).

The series of events whereby Undersheriff Washington initiated communication with Tucker and other SOA members about conversations she understood were taking place at the mini-conference necessitate a similar finding. Washington directed Dunlop to call Tucker, which made Dunlop uncomfortable, but which he clearly understood as an order. Tucker, in turn, understood Dunlop's direction as an order, not a suggestion, to "stop talking" about the SET issue. I infer that both individuals reasonably perceived that if they failed to follow Washington's orders, they faced consequences.

The Commission has held that speech related to protected activity is not without limits. See State of N.J. (Treasury) and CWA (Glover), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001) (union representative's conduct lost protection when it became confrontational and threatening toward supervisor); State of N.J. (Human Services) and CWA (Garlanqer), P.E.R.C. 2001-52, 27 NJPER 177 (¶32057 2001) (union representative's conduct lost protection when he physically intimidated supervisor and was absent from work area for an extended period without authorization).

There is no indication in this record that, even accepting that the SOA members were discussing the SET issue as Washington suggested, that such conduct would have caused their speech to lose its 5.4a(1) protection.

I reiterate that neither the overtime conversation nor the mini-conference conversations, while direct evidence of an 5.4 a(1) violation, appear to have any nexus to Tucker's transfer(s). Both incidents took place after Tucker's January 2012 transfer (in March 2012 and January 2013 respectively), and as I have previously found, none of the facts in the record link Dunlop's influence to the decision making process on either of Tucker's transfers, but specifically not Tucker's second transfer in February 2013. Finally, the second transfer occurred almost 14 months after the March 2012 mini-conference discussion, which I find is too remote in time to support an inference that set of

events was causally related to the February 2013 transfer. See Kearny Bd. of Ed., H.E. No. 2008-003, 33 NJPER 303 (¶115 2007) (timing does not support inference of hostility where decision to reduce work hours was too remote - 18 months - after filing of representation petition). Thus I do not consider them direct evidence within the meaning of Bridgewater and 5.4a(3).

Therefore, I conclude that the County's conduct, through its representatives' conduct during the overtime grievance and mini-conference conversations, independently violated N.J.S.A. 34:13A-5.4a(1) of the Act. I recommend this violation be remedied by an appropriate posting.

CONCLUSION AND RECOMMENDED ORDER

The County of Passaic did not violate N.J.S.A. 34:13A-5.4a(3) and derivatively 5.4a(1) when it changed the assignment and shift of PBA Local 286 (SOA) President, Captain Charles Tucker, in January 2012 and February 2013.

The County of Passaic independently violated N.J.S.A. 34:13A-5.4a(1) of the Act, through its representatives' conduct in connection with a PBA mini-conference in March 2012, and during conversations concerning an overtime grievance in January 2013.

I recommend the Commission **ORDER** that:

A. The County of Passaic cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by its representatives' conduct in connection with a PBA mini-conference in March 2012, and during conversations concerning an overtime grievance in January 2013.

B. That the County take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

/s/ Patricia T. Todd
Patricia T. Todd
Hearing Examiner

DATED: July 29, 2015
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 August 11, 2015.



RECOMMENDED



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by its representatives' conduct in connection with a PBA mini-conference in March 2012, and during conversations concerning an overtime grievance in January 2013.

WE WILL take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Docket No. CO-2012-294
CO-2013-310

PASSAIC COUNTY SHERIFF'S OFFICE

(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372