H.E. NO. 98-25

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

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and- Docket No. CI-H-96-63

KIMBERLEY ANN BAMDAS,

Charging Party.

Appearances:

For the Respondent, Matthew J. Scola, Municipal Attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attys. (Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 29, 1996, Kimberley Ann Bamdas ("Charging Party") filed an unfair practice charge (C-1) with the New Jersey Public Employment Relations Commission alleging that the Township of West Orange violated paragraphs 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq.[1/] The Charging Party alleged that the Township harassed her,

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

selectively enforced a residency ordinance against her, and constructively discharged her on December 18, 1995 because she attempted to organize communication operators with FMBA, Local 428.

The Charging Party further alleged that the Township's actions resulted in a wrongful discharge pursuant to Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 59 (1980). Finally the Charging Party alleged that the Township retaliated against her in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. (CEPA) because she provided information to the Commission and an official from the Department of Personnel (DOP) concerning the activities of Sgt. Michael Rogers who she claimed was involved in providing false information to DOP.

The Charging Party seeks a cease and desist order, back pay, front pay, interest, punitive damages, consequential damage, damage for suffering and humiliation, and attorney fees.[2/]

A Complaint and Notice of Hearing was issued on July 9, 1996 (C-1). The Township filed an Answer (C-2) on July 29, 1996, denying it violated the Act or CEPA. It asserted as an affirmative defense that the Charging Party voluntarily resigned.

2/ The Charging Party defined back pay to cover the time from the alleged constructive discharge until reinstatement if successful; front pay as covering salary from the time of my decision forward to a certain point, but acknowledged that front pay was an alternative to back pay and would only apply if there were no reinstatement; and consequential damages were defined as out of pocket losses (1T16-1T17).

The Charging Party also argued she was entitled to attorney fees, punitive damages, reinstatement and back pay as remedies arising under CEPA (1T14-1T15).

Hearings were held on October 30 and November 22, 1996, and June 16 and 25, 1997.[3/] The Charging Party filed a post-hearing brief on October 15, 1997.[4/]

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Kimberley Ann (Perez) Bamdas was first employed by the Township as a communication operator (dispatcher) in March 1989. In 1990, Bamdas joined AFSCME, the union representing the dispatchers and other Township employees.

On August 19, 1991, Bamdas filed a grievance (CP-1) which, in part, challenged the assignment to her of computer back up and computer entry work. She claimed she never received a written reply to the grievance (2T28). On September 11, 1991,

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3/ Transcripts will be referred to as 1T (October 30, 1996), 2T (November 22, 1996), 3T (June 16, 1997), and 4T (June 25, 1997).

4/ By letter of July 23, 1997, I notified the parties that post-hearing briefs were due by October 15, 1997, and reply briefs by October 31, 1997. The Charging Party submitted its brief on October 15. By letter of October 21, 1997, the Respondent requested additional time, until November 1, 1997, to submit a brief. By letter of October 27, 1997, I notified the Respondent that it was already out of time, but I neither granted nor denied the request noting that if he submitted a brief I would accept it absent objection by the Charging Party. The Respondent made no further request and did not submit a brief by November 1. On January 8, 1998, Respondent filed a post hearing brief. By letter of January 12, 1998, the Charging Party objected to my considering the brief. Since the Respondent's brief was unreasonably late, and the Charging Party objected to its consideration, I did not consider the brief.

Captain Cavanaugh issued a decision (R-1) in response to CP-1, finding for Bamdas, holding she should not receive the additional work unless she received some additional compensation. Cavanaugh gave R-1 to then Deputy Chief Spina, but did not send Bamdas a copy, nor did he know whether she ever received a copy (4T25-4T26). Bamdas claimed she wasn't relieved of the work, nor did she receive additional compensation (2T94).

2. By memorandum of April 22, 1992 (R-6) Deputy Chief Spina inquired of Captain Cavanaugh why Bamdas had been required or allowed to work through her lunch hour and accrue compensatory time between April 1 and April 22, 1992.

4. Jack Case is the Township's senior communications operator and had more seniority in that position than Bamdas when she worked for the Township. Case had also been vice president of the AFSCME local that represented the operators.

By letters of June 24, 1992, Case resigned his union position (CP-26) and withdraw his voluntary dues deduction and membership with AFSCME (CP-27) because he felt AFSCME was not adequately representing the operators interests. By a letter sent to other employees on or about the same time as CP-26 and CP-27, Case explained his reasons for withdrawing from the union (CP-28).

5. The Evette Solomon Incident

In mid-1993 Bamdas was completing her training of Evette Solomon, a new communications operator. One day Bamdas felt Solomon did not properly gather enough information on an emergency

call. Bamdas informed Sgt. Rogers that she (Bamdas) did not believe Solomon was correctly performing the operators job, and Rogers told her to document her complaint (4T174).

Bamdas then prepared a report for Chief Palardy outlining her complaint. Palardy asked Rogers and Sgt. Baronne to investigate. Sgt. Rogers listened to the audio tapes and concluded that both Solomon and Bamdas shared some culpability in the way the incident was handled. He said Solomon was inexperienced, but Bamdas should have known better. Nothing more was done on the matter (1T38-1T40; 4T55-4T56; 4T133-4T136; 4T173-4T174).

By memorandum of September 1, 1993 (R-16), Case asked Chief Palardy if Bamdas was now evaluating the competency of other communication officers, and whether he could do the same. He concluded R-16 by saying that there was a movement by some telecommunicators to join a union, but that neither he nor Solomon opted to join.

6. Residency Requirement

By memorandum of October 15, 1993 (R-12), the Township notified all of its non-uniformed employees of Residency Ordinance Chapter 4-15 which required all full-time (non-uniformed) employees to be Township residents (3T27-3T29).[5/] Bamdas was not a Township resident at that time.

5/ R-12 was distributed with pay checks (3T50), but Bamdas claimed she did not receive it, yet she did receive subsequent notices of the residency requirement.

By memorandum of July 27, 1994 (CP-12), Bamdas, and other employees, were notified to retrieve and sign for a letter in the business office. That same day, Bamdas retrieved a letter dated July 22, 1994 (CP-10) notifying her of the residency requirement and that she had until October 31, 1994 to become a Township resident or be terminated. Bamdas was one of seventeen employees who signed a form (R-13) acknowledging receipt of CP-10.

Bamdas, and many of the other employees who received CP-10, wrote an appeal of the residency requirement (1T78). Thereafter, Bamdas spoke to an attorney representing the Fireman's Mutual Benevolent Association (FMBA), a union Bamdas was hoping would represent communication operators, about the Township's residency requirement. On August 17, 1994, the FMBA attorney sent the following letter (CP-11) to the Township's attorney:

> Herewith is a copy of a letter which I sent to you on July 11.
>
> I would appreciate receiving a reply.
>
> We have been advised by our client that West Orange has provided her with a notice that unless she becomes a resident on December 31, 1994, her employment will be terminated.
>
> I am advised that there are at least 20 employees in West Orange who are non-residents. However, only three appear to have been selected for termination unless they reside in the municipality.
>
> We view this as an unfair, improper and illegal singling out of Mrs. Bamdas and ask, therefore, that this notice to her be rescinded or, at the least, if you feel there is a basis for the notice, you provide us with your position.

There was no reply to CP-11 (1T79).

On August 25, 1994, the Township sent Bamdas, and the other employees who received CP-10, a letter (CP-13) notifying them that the deadline for moving into the Township had been extended until December 31, 1994 (3T34).

Between August and December 1994, the list of Township employees subject to the residency requirement decreased from seventeen to fifteen employees. The difference had either moved into the Township or were no longer employed (3T35).

By letter of December 30, 1994 (CP-14), the fifteen remaining non-resident Township employees subject to the residency requirement, including Bamdas, were notified that the deadline for moving into the Township had been extended to January 1, 1997. All fifteen employees, including communication operators Bamdas and Ellen Sanders, signed an acknowledgment (R-14) for receipt of CP-14. Bamdas moved into the Township in May 1995, but would not have moved there had she not been subject to the residency requirement (1T81-1T82; 2T95). Some of the other fifteen employees who received CP-14 moved into the Township, some left employment (2T25).

Bamdas knew she was not the only non-resident Township employee who received the residency deadline letters (2T22), she testified no one was "picked on" (2T25), and that she was not singled out to receive those letters (3T36). Nevertheless, on cross-examination she testified that she was the cause of all the

employees receiving the residency notice. She further testified that Township administrative clerk, Bonnie Leskanic, told her that she was one of three employees the Township no longer wanted to employ (2T22-2T24). Leskanic denied ever having such a conversation with Bamdas (3T11).

I credit Leskanic's testimony. It was not challenged on cross-examination, and Bamdas' assertion that she was the cause for everyone getting a residency letter is too broad an assertion to be reliable, and it was inconsistent with her testimony that she was not being picked on to receive a notice.

7. Organizing Meeting 1993

The communication operators were generally unhappy with the quality of the representation they received from AFSCME, thus, they were interested in considering other unions. All of the police officers and police superior officers the operators worked with were represented by police unions. Bamdas spoke to different officers about organizing the operators and those officers, including Sgt. Rogers, encouraged her efforts (2T7-2T8).

Bamdas contacted Case and other operators about getting another union to represent them. They discussed getting all of the operators together to discuss the problems and concerns and the different organizations that might be able to represent operators (4T45-4T46). The meeting was held in November 1993 in the office of Detective Sergeant Laing, and attended by communication operators Bamdas, Case, Babinski, Sanders, Solomon, Cassidy, Harris, John

Case, Jr., and Dillon, in addition to Laing and Tom Pelaia, a representative from the FMBA (1T32-1T33; 2T9; 4T171).

Bamdas had arranged to bring Pelaia to the meeting, but not every operator knew that he would be the only union representative to attend (2T126; 4T45-4T50; 4T166, 4T171). The majority of the operators decided to pursue representation with the FMBA, but Case was opposed to that union (1T35; 4T92; 4T166-4T167).

Because of her persistence in trying to form a new union for the operators, Bamdas was occasionally referred to as "Norma Ray" (the movie about a union organizer) by many Township employees, including her supervisors and other communication operators. The remark was not intended to be degrading; it was more humorous in nature (2T121, 2T124-2T125).

8. Smoking Incident

In January 1994 communication operators Bamdas and Babinski were caught smoking cigarettes in the building despite knowing such conduct was prohibited (2T83). Bamdas did not deny the incident, and Deputy Chief Spina issued a written report of the incident (R-5).

9. Union Survey

In the spring of 1993, Case, Bamdas and Babinski had sent a report to police administration noting their unhappiness over certain matters. Sgt. Rogers was directed to meet with them and discovered their concerns were about working conditions (4T119-4T120). Shortly thereafter, Rogers saw Babinski and suggested now was the time for the operators to form a union.

Rogers had been a union officer and was in favor of the operators forming a union because it would make his own job easier by allowing him to deal with only one party when complaints were raised (4T75, 4T120, 4T124).

After Rogers spoke to Babinski, Case told Rogers that the communication operators were going to meet to discuss their concerns and union organizing. Rogers thought that was "great", and recommended Case find out what their grievances were and he suggested the administration might be able to resolve them. Since Rogers and the administration knew about the scheduled November meeting, they arranged for police officers to staff the operators stations so all the operators could attend the meeting (4T74, 4T121).

A few days later Rogers asked Case about the meeting. Case told him that the operators wanted a union but that some people, Case in particular, were unhappy that an FMBA representative was there and handed out cards. Case told Rogers he (Case) walked out of the meeting and that the operators would have to meet again to make a decision (4T74-4T75, 4T78, 4T121).

Rogers told the Deputy Chief the results of his conversation with Case, and soon thereafter, the Chief suggested Rogers look into whether the operators wanted a union. Rogers contacted Case and suggested he poll the operators to see if they wanted a union, and he said the administration would go along with the majority (4T78-4T79, 4T73, 4T122).

Pursuant to Rogers' request, Case sent a memorandum (CP-2) to the operators on Township letterhead on February 17, 1994 and attached a survey form he had prepared listing three questions. The memorandum said:

> As the Senior Communications Operator in this Police Department I have been asked by the Office of Police Administration to conduct the attached survey among all Civilian Communications Operators.
>
> At the present time two (2) Communications Operators have requested to join a Labor Union namely, the F.M.B.A. as associate members. All of the other Communications Operators have requested to have their grievances or suggestions heard by the Mayor and Council thru the Office of Police Administration. That is the purpose of the attached survey.
>
> Please fill out your survey, sign in the appropriate space, and return them to me no later than February 25, 1994.
>
> If you have any questions relative to this matter you can reach me at night at the Desk, or you can contact me during the day ....

Case prepared the survey form attached to CP-2. Rogers had only suggested the third question, Case decided the other questions on his own (4T79). The survey read as follows:

> A. Are you Interested in Joining the F.M.B.A. as an Associate Member?
>
> Yes: ____ No: ____
>
> NOTE: YOU ARE JOINING THIS UNION AS AN ASSOCIATE MEMBER, YOU DO NOT RECEIVE THE SAME RIGHTS AND BENEFITS AS A REGULAR MEMBER.
>
> B. Please list five problems or gripes that you currently may have in reference to your job.

> C. Please list any suggestions that you may have relative to a smoother operation in the Communications Center:

At hearing, Bamdas expressed her concern that the survey was issued because of the union meeting she organized. At one point she testified she did not believe it was a form of retaliation against her exercise of union activities (2T35-2T36), but she also testified she thought CP-2 was done in retaliation for her attempting to form a union (1T40). I cannot draw any reliable conclusions from her conflicting testimony.

Bamdas showed CP-2 to Pelaia which resulted in the FMBA's attorney sending a letter (CP-3) to Case on February 24, 1994, in which the attorney objected to the survey, argued it violated the law, and noted the union might pursue legal action. A copy of CP-3 was sent to Deputy Chief Webb (1T40-1T41).

In response to CP-3, Case, also on February 24, 1994, sent Deputy Chief Webb a report (R-15) attacking statements in CP-3 (4T53, 4T81-4T82). Case noted that only two of eleven communication operators wanted to join the FMBA, he did not care what the FMBA thought about what he did, he noted he would hire an attorney if the "harassment" (by the FMBA) against him continued, and he made the following statement which he intended as a reference to Bamdas (4T82-4T84).

> As usual, this entire matter has been blown out of proportion by the same unhappy, constantly whining employee who creates 99% of the problems in the Communications Center, and I am sure you know who this unhappy person is. Perhaps it is

> time for someone in this Police Department to tell this unhappy person that the doors to this building do open from the inside and they can just walk out the door and leave if they are unhappy with their employment here. (R-15)

After the survey from CP-2 was completed, Case conveyed to Rogers that the majority of operators did not want to join the FMBA (4T123-4T124). No further action was taken regarding CP-2 or CP-3.

10. Transportation Survey

On or about May 1, 1994, the Township received a letter from the New Jersey Department of Transportation (R-11) concerning the implementation of the State Employer Trip Reduction Program (3T21). The letter explained to the Township how it was to gather the information which included the completion of employee transportation survey forms which were enclosed. The trip reduction program was required by the State to reduce congestion during peak periods in the morning and afternoon. A survey was required of certain employees (3T7-3T8).

On June 16, 1994, the Business Administrator sent a memorandum (R-1O) and survey forms to department heads which had to be completed by specific employees. The survey form (CP-7) noted that the survey was being conducted to comply with the New Jersey Employer Trip Reduction Program, and its first section asked for information from employees scheduled to report to work between 6:00 a.m. and 10:00 a.m. (inclusive).

Since the survey was targeting employees who reported to work between 6 and 10 a.m., the Township prepared a list of 98

employees required to complete the survey (R-10 Attachment). Bamdas was the only communications operator to receive CP-7 because she was the only operator reporting to work during the targeted time frame (3T8; 4T126).

After R-10 was sent to the department heads on June 16, 1994, Bamdas was given a copy of CP-7 to complete (1T61-1T62). Since she was confused as to what CP-7 was or what it was for, she made inquiries of other people regarding the form but did not complete the document (1T64-1T66). By late June 1994, Bonnie Leskanic, the administrative clerk responsible for coordinating the trip reduction program and collecting the survey forms notified Sgt. Rogers that she had not received a completed form from Bamdas and needed her completed survey form since a 100% response was required (3T9-3T10).

On or about June 29, 1994, Rogers gave Bamdas another survey form to complete. Bamdas expressed her unhappiness over the form, thinking she was being picked on as part of her residency problem. Rogers told her she had to fill it out and return it to him that day (4T127-4T128).

Later that day Bamdas brought her completed survey form, CP-7, to Rogers office, threw it on his desk and turned to walk out. Rogers stopped her. He was upset with the manner in which she "deposited" CP-7 on his desk, and what he believed was her failure to complete the form the first time. He recounted the conversation he had with her in his office:

> Later on that day she came up to my office, I was having lunch and I had walked in and she just threw it on my desk and turned around and walked out. I said no, wait a minute. You just don't come up to my office and throw something on my desk and we launched Kimberley you've been here a long time, you know what it's like to follow instructions. I don't have to explain all the instructions to you. You're just required to obey orders. You were given an order, you failed to obey and threw it out and now you throw it on my desk, that is not the behavior of an employee. You are to follow my orders. If you have a question, you can question it. You have no right to throw it away. You were told to do it and you'll do it. And after she left, I made sure I put it on paper (4T128-4T129).

As a result of the incident in his office, Rogers wrote the following memorandum (CP-8) to Bamdas on June 29, 1994.

> This letter will serve to document our earlier conversation regarding the completion of the NJDOT Employee Transportation Survey.
>
> So there is no misunderstanding, you do not have the option to decide what staff work you may or may not wish to complete. When you were given the form to complete and return to Mrs. DeRosa in the Chief's office, you weren't given a choice whether to do it or not. Any request by Mrs. DeRosa can be construed as being a direct order from the Chief of Police. Any questions regarding any order or assignment are to be directed to your immediate supervisor, and then, if necessary, to any member of this office. The office of the Business Administrator is not within your chain of command.
>
> Further, any order given to you, whether it is direct, implied or inferred, does not have to be explained to your satisfaction in order for you to obey it. You are just required to do it.
>
> Your conduct in this matter was grossly insubordinate and this letter will serve as a stern warning that this type of conduct will not be tolerated.

A copy of CP-8 was sent to the Chief and Deputy Chief.

Rogers explained that he issued CP-8 because he felt Bamdas' behavior regarding the transportation survey was insubordinate. He said:

> Again, she had--when she was given the original survey, she just didn't complete. She just tossed it away. The second time she was given it, it was given to her, she had a comment on it that she didn't think it was right and I explained to her no, you'll do it, you have to do this. And I felt that that was insubordinate. She doesn't have any right in a police agency to decide what order she wants to obey. As long as it's a lawful order, she needs to obey. I[t] absolutely require that of everybody that works underneath me (4T130).

Bamdas denied she threw CP-7 on Rogers desk (2T18-2T19; 2T92-2T93), but she neither confirmed nor denied she threw out the first transportation form given to her.

I credit Rogers' testimony. I believe that the act of "placing", "dropping" or "throwing" a lightweight two page document on a desk may be subject to each individuals perception. In that context I accept Bamdas' testimony that she did not believe she threw CP-7. But Rogers' recollection of that incident was very clear and more comprehensive and detailed than Bamdas'. Generally, I felt Rogers had a better recollection and command of the facts, thus, I found his testimony very reliable.

11. Tardiness

On June 6, 1994, all of the communication operators received a memorandum from Deputy Chief Webb concerning tardiness

(CP-4). Webb noted he had received complaints from some operators that other operators relieving them arrived late. The memo was mostly intended for those workers who were chronically late, and warned that corrective action would be taken in such instances.

On June 14, 1994, Bamdas received a memorandum from Webb dated June 13, 1994 that the Chief had notified him that she had demonstrated a pattern of tardiness (CP-5). He warned her that such continued conduct would be dealt with severely. That same day Webb sent a similar memorandum to Bamdas' immediate supervisor, Lt. Isakson, that he would be held accountable if Bamdas continued a pattern of tardiness (CP-6).

Bamdas spoke to her immediate supervisors, Lt. Isakson and Sgt. Yankowski, on June 14, about CP-5, but they were not aware she had a lateness problem and did not know what led to CP-5's issuance (1T53-1T54). That same day Bamdas went to the office of police administration and spoke to Sgt. Rogers. She asked Rogers to allow her to speak to Deputy Chief Webb about CP-5. Rogers told her Webb was unavailable and that he (Rogers) had no involvement with CP-5, but he suggested she speak to Chief Palardy about CP-5 since he had directed Webb to issue the memo (1T55, 2T45, 2T47).

Bamdas spoke to Palardy that day, and told him that any complaint that she was tardy was unjustified. Palardy told her the complaint came from a "higher authority" but that he did not believe it either, and that she should not worry about it. No action was taken against Bamdas regarding the memo, and that matter was concluded (1T56-1T59; 2T45-2T47).

On July 11, 1994, the FMBA's attorney sent a letter (CP-9) to the Township's attorney about the allegations of Bamdas' tardiness, and about CP-8, the written reprimand Bamdas received regarding the transportation survey incident. In CP-9 the FMBA's attorney asks that CP-8 be withdrawn or that it (CP-9) be considered a grievance; and it (CP-9) renewed a request that communication operators be represented by the FMBA. There was no response to CP-9, CP-8 was not withdrawn, and Bamdas heard nothing more regarding these matters (1T71-1T73).

12. DOP Matter

In September 1994, Bamdas had a conversation with Lora Lavasky, the secretary to a director at the DOP. Bamdas was aware that employment applications had been filed with the Township for positions requiring radio transmission experience. Bamdas told Lavasky that some of those applicants did not have radio experience, but that Sgt. Rogers had told them to note that they had worked for the West Orange First Aid Squad which, presumably, would satisfy the radio requirement even though they never worked there (1T103-1T105).[6/]

6/ Although I credit Bamdas' testimony that she told Lavasky that Rogers had told the applicants to list First Aid Squad experience, I do not accept that testimony to prove that Rogers actually coached the applicants. I need not reach that issue in this case.

Bamdas testified that she believed that Rogers was assisting

Footnote Continued on Next Page

Subsequent to that conversation, Lavasky telephoned Bamdas at work, identifying herself on a taped line that could be obtained by other Township employees. Bamdas quickly transferred the call to what she believed was an untaped line. Bamdas did not explain what they discussed during that telephone conversation. After that telephone conversation, Bamdas had no other conversations with Lavasky or anyone else regarding the issue (1T105).

Bamdas subsequently learned that three of the new applicants were not granted the civil service position, but she was unaware of any subsequent occurrence (1T106).

There was no evidence that Sgt. Rogers, the Chief, or anyone else knew of Lavasky's conversations with Bamdas, or that any action was taken against Rogers based on what Bamdas reported to Lavasky.

13. The FMBA Representation Petition

On September 30, 1994, Bamdas, as President of FMBA Local 428, filed a representation petition with the Commission (Docket No. RO-95-51, CP-15), seeking to represent all regularly employed dispatchers employed by the Township. By letter of October 12, 1994 (CP-16), the Township notified the Commission that it objected to

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6/ Footnote Continued From Previous Page

the new applicants because those people would have voted against the FMBA if it went to an election (1T104). While Bamdas may have believed that scenario, I cannot rely on that testimony to prove that Rogers had such a motive. Bamdas' testimony on this issue is unreliable. It is based upon information someone from the FMBA told her, not based on her own knowledge.

the petition, that the dispatchers were currently included in a broader unit of Township employees, and it was opposed to the creation of a separate unit of dispatchers.

A conference was held with the parties and a Commission agent on October 31, 1994. The Township explained the reason for its opposition to the petition (1T89; 3T38-3T40). Bamdas conceeded that the Township had a reasonable right to object to the petition, she thought the Township's position was offered in good faith, and she did not believe the Township's position was a form of retaliation against her exercise of union activities (2T51-2T52).

But Bamdas also testified that during that time period (apparently during her pregnancy) Deputy Chief Webb asked her if she was going to stop her union activity, he said her family was more important and that she should "stop this crap" (1T154-1T155). The Township did not deny the remark, thus, I credit Bamdas' testimony.

The petition was pending when Bamdas resigned in late 1995, and was formally withdrawn by a State FMBA representative on May 9, 1996.[7/] The Commission approved the withdrawal on May 9 (R-2).

14. Bamdas Leave Time

Bamdas was due to give birth to a child in March 1995 (1T107). Her intent was to work until the day she gave birth, but she eventually left two weeks before the birth (1T112-1T113). In anticipation of her leave Bamdas intended to use all of her sick,

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7/ Pursuant to N.J.A.C. 19:4-6.6, I took administrative notice of certain facts from the file in RO-95-51.

vacation and personal time before she came back. She was anticipating using most of the sick and vacation time credited to her for 1995 (1T109-1T110, 4T138).

The Township, not unlike the State and other government employers, had a practice of crediting employees with a full year of sick and vacation leave time in January, but technically, their policy was that time was earned on a prorated amount per month (2T58-2T59; 4T138-4T139). Sgt. Rogers knew of that policy, and when he learned of Bamdas' intent to use all of her credited 1995 time he explained to her she could only use the time she earned in 1995 (1T108-1T109; 4T138-4T139).

Bamdas was told of the Township prorating policy and that it applied to all employees, but she thought employee Edrie Daniels had gotten a better deal when she had her maternity leave (2T59-2T60). No facts were presented, however, regarding Daniels' maternity leaves.

Bamdas' son was born on March 13, 1995 (1T107). On or about March 31, 1995, Capt. Cavanaugh sent Bamdas a letter (R-3) notifying her that her leave time would expire on May 3, 1995. Bamdas denied receiving R-3, but acknowledged it listed her correct address (2T62-2T63).

Bamdas returned from her maternity leave on or about Monday, June 12, 1995. On the Thursday following her return she was not given a pay check. She complained to Capt. Cavanaugh who called the Township's Business Administrator and resolved the problem. She

received her check the following day, and was satisfied with the results (1T113-1T115; 2T61-2T62).

15. Eating at Console

On April 26, 1995, Capt. Cavanaugh issued a memorandum (CP-18) to all communications personnel prohibiting the consumption of food in the communications center, but permitting beverages in covered travel mugs. Cavanaugh noted that food and drink had been dropped or spilled damaging some of the computer equipment, and he wanted to avoid those incidents (4T12). Bamdas received and was aware of CP-18.

Bamdas' work hours were actually 8:00 a.m. to 4:00 p.m., which included one hour for lunch. However, the Township had approved Bamdas' request to schedule her lunch hour from 3:00 p.m. to 4:00 p.m. to allow her to leave early. That effectively resulted in her work day being from 8:00 a.m. to 3:00 p.m. without a formal lunch hour. The Township, nevertheless, permitted Bamdas to take a short lunch break away from her console. When other operators took their one hour meal break, the Township covered their console, usually with a police officer. But when Bamdas took her short lunch break there was no additional coverage at her console.

On July 10, 1995, Bamdas was about to leave her work console to eat her lunch when her immediate supervisor, Sgt. Stock, ordered her to eat at her console despite his awareness of CP-18. Stock obtained the consent of the Township employee responsible for the computers, and Bamdas obeyed his order, but told him she would submit a report to Capt. Cavanaugh (1T116-1T119).

Later on July 10, Bamdas prepared a miscellaneous report for Cavanaugh regarding the incident (CP-17). That report provided:

> I hereby request clarification on your April 26, 1995 notice ref: "The consumption of food in any part of the communication center is prohibited."
>
> On this date I was told to eat "up front" by Sgt. Stock, who when reminded of notice "got the O.K." from Rhonda Edwards.
>
> What I would like to know is will I be charged with insubordination if I go to the lunch room or do I follow the order of my immediate supervisor (desk officer) and stay.
>
> I am regretful if this appears to be a nuisance but I am confused in this matter and your response would be appreciated.

On July 11, 1995, Sgt. Rogers issued a written response to CP-17 (CP-19). That response provides:

> The memorandum dated April 26, 1995, concerning Consumption of Beverages in the Communications Center has not been altered in any way.
>
> As indicated in the last line, "The consumption of food in any part of the communications center is still prohibited."
>
> I find it disturbing that, even after six years of service with this department, you have not yet grasped the basic tenets of being a subordinate, and your responsibility when given an order. If a communications supervisor knowingly tells you to consume food in the communications center, contrary to the Chief's orders, then that supervisor has assumed all responsibility for this breach in policy. Your leaving the communications center, contrary to his direct order to stay, will be treated as the grossest form of insubordination.
>
> As we have discussed in the past, you have neither the privilege nor the right to pick and choose which orders you wish to follow. You are

required to obey ALL lawful orders from a superior. With your labor acumen, you should know this. If you think an order is unfair, you must follow it and grieve it afterwards. If the order in itself is unlawful, then you would not be required to obey it, nor face disciplinary action for not obeying it. (Unlawful denotes being contrary to statute, ordinance, etc.)

As for meal breaks, there are only two full time operators who are entitled to breaks under contract. They opt to take their hourly breaks at the end of their shifts. Everyone else can take breaks, at the discretion of the duty communications supervisor. If and when the workload permits, the communications supervisor will provide for breaks. Coverage will not be compromised because someone is hungry.

If you or any member of the communications staff has a better way to provide for meals and breaks, then by all means formulate a recommendation and forward it through the chain of command for review and approval by the Chief of Police.

To further amplify the concerns about breaks, I must reiterate the fact that you have an hourly break provided by your contract. You choose to take the hourly break at the end of your shift. In fact, you insisted that you take this break at the end of your shift, and this department accommodated you. There are no state or federal laws mandating break intervals for you or any other employee here. Breaks are permitted at the sole discretion of the on-duty supervisor. This applies to all divisions and offices, not just the communications center.

Also, Administrative Events should not be entered without the knowledge of on-duty supervisor, nor should a miscellaneous report be submitted without a supervisor's review and approval. The report should have been submitted through a supervisor, whether it be the day supervisor or the afternoon supervisor. These administrative events should not be used to promulgate your temper tantrums.

Be advised that this is not the first time that the taking of orders from your supervisors has

> had to be explained to you. Again, orders do not have to be explained to your satisfaction in order for you to obey them. You work in a quasi-military organization, with a chain of command. It's high time that you fully understand this basic tenet of taking orders.
>
> Also, be on notice that any insolent or insubordinate behavior will be dealt with swiftly and severely by this administration. A copy of this letter will remain in your file for possible future use.[8/]

Cavanaugh did not consider Bamdas' submission of CP-17 an act of insubordination, and said there was nothing wrong with her requesting clarification (4T26-4T27). Nevertheless, when he was shown CP-19, he did not require any changes because he felt it was between Bamdas and Rogers (4T27-4T28, 4T31).

Bamdas did not meet with Sgt. Rogers concerning CP-19 (1T120), but on July 12, 1995 she submitted a response (CP-20). CP-20 provides:

> As a result of your letter dated July 7, 1995, which will remain in my personnel file, I feel I should reply.
>
> You stated that if I think an Order is unfair I must follow it and grieve it afterwards. However, due to Union problems (which you or the Office of Administration may not be aware of) I

8/ CP-19 refers to Bamdas taking her contractual lunch break at the end of her shift rather than midway through it. She began her day at 8:00 a.m. and worked until 3:00 p.m. Her "lunch" break was technically taken from 3:00 p.m. to 4:00 p.m. (1T123). I infer that what Rogers meant from his reference to Bamdas' break in CP-19 is that having chosen to take her lunch at the end of the shift she is not necessarily entitled to any other time away from her console to eat her lunch (4T144).

> have no possible way to file a grievance. So, I'm limited to a Miscellaneous Report. As stated in my report, I'm regretful if this appears to be a nuisance, but by no means was it meant to "be used to promulgate my temper tantrums."
>
> As in the past and with the incident with Sergeat Stock, I always obey the Orders from the Superiors. But, I was under the impression that if an Order was broken, for any reason, it should be documented.
>
> Should you not be aware, I did infact notify and was told it was okay by Sgt. Stock, that I request clarification. Failure on my part to have the Miscellaneous completed before Sgt. Stock reported off duty and to assume it was not the responsibility of the afternoon Desk Officer were errors on my part.
>
> Also, in your letter you stated that I insisted on taking my hourly break at the end of my shift. This is not true, I am greatful with the Department accommodating me. However, as I expressed to Captain Cavanaugh, I fully understand management rights, and also understand if my hours off should be rescheduled. This hour off is not insisted upon my part.
>
> As a subordinate and because of conversation we have had in the past I thought a request for clarification would not be inconvenient. I regret troubling you.

After CP-20 issued nothing more occurred regarding that incident (1T126).

16. Seminar Approval

By memorandum of October 12, 1995 (R-8), Bamdas requested from Chief Spina that she be allowed to attend a seminar on critical incident communication in Pennsylvania on November 12, 1995. Spina approved the request (2T87).

17. Schedule Changes

On October 16, 1995, Bamdas received a memorandum from Captain Cavanaugh (CP-21) notifying her that her hours were being changed from 8:00 a.m.-3:00 p.m. to 7:00 a.m.-2:00 p.m. effective October 30, 1995.[9/] Cavanaugh noted that the existing schedule was inefficient and resulted in high overtime costs. All but one of the communication operators received the same memorandum adjusting their own hours of employment. Case was the only operator whose hours were not scheduled to change (1T132-1T133; 4T91-4T92, 4T162).

The communication operators objected to the proposed schedule change. Bamdas, in particular, believed it would make it more difficult for her to arrange child care for her son (2T70). As a result of those objections, Cavanaugh, by memorandum of October 18, 1995 (CP-22), notified the operators he would hold a meeting on the proposed change on October 26, 1995. In CP-22, Cavanaugh noted that the changes were only tentative, and he sought the operators suggestions.

The meeting took place as scheduled on October 26. Communication operators Bamdas, Babinski, Case, Sanders, Harris and Solomon were present, as well as Cavanaugh, Rogers, Sgt. Laing, and police officers Yantorn and Brennan (1T138). No AFSCME or FMBA representative was at the meeting (1T134-1T138).

9/ Since Bamdas took her lunch hour at the end of her shift, her work day was really 8:00 a.m. to 4:00 p.m., thus, her new hours would have been 7:00 a.m. to 3:00 p.m.

The meeting resulted in Cavanaugh announcing that he would make no change in the day and afternoon shifts until sometime in 1996. Therefore, there was no change in Bamdas' schedule (1T141-1T142; 2T71).

Bamdas claimed, however, that when Cavanaugh opened the meeting he made a remark that "a person felt they could run his department", and that there was "no way this person was going to get away with it", and that if the person continued their activities "he was going to make certain that their life was a living hell" (1T139). Bamdas concluded that Cavanaugh was referring to her because he also said he objected to "this person bringing in an outside source" (1T140).

Cavanaugh did not recall directing any remarks to Bamdas or any other individual, but thought he might have responded to a negative remark by Babinski about using light duty police officers as communication officers instead of bringing operators in on overtime (4T19-4T20). Babinski claimed he too heard Cavanaugh make a remark that "if any person...was going to bring in an outside agency to tell him how to run his...department, ...that wasn't going to happen", and thought he was referring to Bamdas (4T169, 4T172). Officer Brennan and operator Sanders did not recall Cavanaugh making any comments about a certain person attempting to run his department (2T118, 2T129-2T130), and Sanders did not recall talking to Bamdas about what Cavanaugh said (2T119). Bamdas claimed Sanders remarked to her after the meeting that "your ass is in the sling" (1T141).

I credit Bamdas and Babinski that Cavanaugh made remarks about "a person" and about that person bringing in either an outside person or outside agency and that they both (Bamdas and Babinski) inferred that person was Bamdas. Cavanaugh, Sanders and Brennan did not recall such remarks but that is not a denial they were made.

I do not, however, credit Bamdas' testimony that Cavanaugh said he would make that person's life a "living hell". Babinski did not corroborate that testimony and I often found Bamdas' recollection uncertain. I credit Babinski's testimony about what Cavanaugh said, and infer he must have been referring to Bamdas.

18. Resignation

As early as April 26, 1995 when Cavanaugh issued CP-18 (Finding of Fact No. 15), communication operators were on notice that eating at their consoles was forbidden. An area had been set aside for them to eat away from their consoles (2T142).

Despite the prior notice, on November 15, 1995, Lt. Drylie observed Bamdas eating at her console at approximately 2:00 p.m. (4T98), and asked her immediate supervisor, Sgt. Cali, to prepare a report of the incident. Bamdas explained that on November 15, while Sgt. Cali was out of the area attending to prisoners, she was eating her lunch in the designated eating area when she noticed operator Sanders was getting overwhelmed with 911 calls. Bamdas said she ran to her console, without putting down her sandwich, to assist Sanders in answering calls. While she was on the phone, with her sandwich in one hand, Lt. Drylie came through the room (1T143-1T144). Sanders confirmed Bamdas' account of the incident (2T120).

When Cali returned he told Bamdas that Drylie ordered him to prepare a report regarding the incident. Bamdas explained the incident to Cali, he verified that there were numerous 911 calls at that time and that he would write the report, but that he had no problem with what occurred (1T144-1T145).

Cali issued his report to Drylie on the day of the incident (R-9). He explained the incident as Bamdas had, noted that she inadvertently removed her lunch, said she performs an exemplary job and went back to her console to assist during a hectic time, and concluded that Bamdas told him it would not happen again.

On November 18, 1995, Lt. Drylie issued a memorandum (R-17) to his supervisor, Capt. Abbott, regarding the incident. Drylie characterized Bamdas' food as an "entire meal", he said Bamdas had been warned not to do it, he thought there was no exception to the rule, and he asked Abbott for guidance. Drylie had no further involvement in the matter (4T99).

Drylie did not contest that the incident occurred as Bamdas described, he simply believed that whether Bamdas acted inadvertently or not, there were no exceptions to the policy forbidding food at the console (4T108-4T110).

On November 24, 1995, Sgt. Rogers served Bamdas with a memorandum (CP-23) directing her to submit a report about the November 15 incident by Tuesday, November 28, 1995. Bamdas complied with his request and was giving him the report on November 28 when she was directed to report to Capt. Cavanaugh's office.

Officer Brennan, a liaison between the operators and the office of administration was in Cavanaugh's office when Bamdas arrived (1T147).

Cavanaugh told Bamdas that Drylie was upset over her eating at the console and he (Cavanaugh) told her she would be disciplined. The "discipline" was an order requiring Bamdas to take her lunch hour during the work day rather than leave an hour early (2T131-2T132; 4T33).

Bamdas said Cavanaugh initially gave her two choices of discipline, a civil service hearing or she would have to work through her lunch for a period of time without pay or compensation, and then said she could not have a civil service hearing (1T148-1T149). Cavanaugh testified that the disciplinary action he took was Bamdas had to take her lunch hour during her work day instead of leaving early (4T33), he did not recall any civil service discussion, and did not file formal charges against Bamdas that would trigger a civil service hearing (4T40). Officer Brennan corroborated Cavanaugh saying Bamdas was being required to take her lunch hour during the work day, and noted a second option was taking an hour off at the end of the day but not being allowed to eat her lunch. He did not recall a discussion about a civil service hearing (2T131-2T132, 2T137).

I credit Cavanaugh's testimony which Brennan corroborated that the discipline he talked about was just requiring Bamdas to take her lunch hour during the work day. I believe there was a

discussion about a civil service hearing, but it was raised by Bamdas not Cavanaugh. Bamdas was not formally charged with a notice of discipline, thus, there was no basis for a civil service hearing. On rebuttal examination Bamdas said she brought up the discussion of a civil service hearing (4T176). I credit her testimony that Cavanaugh told her she couldn't have it, and find he said that because he had not taken any formal discipline against her. If Bamdas had been formally charged, she could have filed for a hearing regardless of Cavanaugh's position.

Additionally, Bamdas was never told she would have to work without compensation. She was told she had take her lunch hour during the work day like most people, rather than leave an hour early. She was paid for the lunch hour either way.

Bamdas questioned Cavanaugh about the discipline and he told her that was something she had to do (1T148). Bamdas lost her composure at that point and began crying (1T149; 2T68). She told Cavanaugh she was being harassed because of her union activities (1T151). Cavanaugh tried to calm her down. He told her that she was his best dispatcher; there would be no mention of this in her personnel file; it was nothing to worry about; just work through it (1T149-1T151).

As Cavanaugh continued talking to Bamdas she told him she had had enough and intended to resign. Cavanaugh told her she was his best dispatcher, he did not want to lose her, and he did not want to accept her resignation (1T150, 1T152; 2T68-2T69; 4T22,

4T177). He suggested she take a couple of days to think about it, and suggested she talk to Officer Brennan about operators that weren't performing their duties and that Brennan would try to make things fair. Bamdas agreed to take a couple of days to think about her resignation (1T150-1T151).

Immediately after that meeting with Cavanaugh and Brennan on November 28, Bamdas met alone with Brennan (1T150-1T151; 2T69, 2T135). He tried to talk her out of resigning, he told her she was a good employee and "everyone" wanted her to stay (2T135-2T136). Bamdas said she told Brennan she could not report on other operators (1T151).

After Bamdas went home that day she and her husband discussed the matter and agreed she would resign (1T152). On November 30, 1995, Bamdas submitted her resignation (CP-24) to Cavanaugh, it said:

> As you know, I have been with the department for nearly seven years. In that time I have always prided myself as being a dependable employee willing to meet all challenges. The many excellent evaluations, commendations and the praise I've received have proven my dedication to the department.
>
> However, these achievements, accomplishments and the self dedication to my position is not shared by management. The undo stress and selected enforcement of policy and/or ordinance that have been put upon me, has caused me to reevaluate my career with the West Orange Police Department. After much deep thought and careful consideration, with regret, I hereby submit my resignation, effective December 18, 1995.

Cavanaugh called Bamdas into his office after receiving CP-24. He thought Bamdas was "burning out". Since he did not want to lose her he told her he would adjust her hours so she could spend more time at home with her baby; he told her she could work part-time instead of full time, and that he would talk to the Mayor about a leave of absence, but he felt she had made up her mind and wanted to leave (4T21-4T22).

Bamdas denies meeting with Cavanaugh again, but admitted he had told her not to resign (4T177). I credit Cavanaugh; he had a clear recollection of the meeting and it is logical he would talk to her after she sent him CP-24.

Bamdas did recall meeting with Sgt. Laing after she submitted CP-24. He asked her to reconsider her decision and told her she was a good and needed employee (2T72).

After her discussion with Laing, Bamdas thought about trying to work things out, but she said she:

> ...went back to [her] original decision and decided the best thing to do was to resign. (1T158).

I find that Bamdas did not act hastily in deciding to resign. It appears she carefully considered the matter, and freely chose the action she preferred.

After submitting CP-24 Bamdas felt confused and slighted because no one from the Township's business office contacted her to acknowledge her resignation and finalize documents related to her separation from service (2T74-2T76). Consequently, on December 11,

1995, Bamdas sent a letter to the Township Business Administrator requesting a meeting by December 15, 1995 (CP-25).

As a result of CP-25, Bamdas met with the Administrator's secretary on December 12, 1995 and signed papers regarding her resignation (1T156-1T157).

On her last day of work Cavanaugh attended a little party for Bamdas and asked her if he could arrange something to keep her. She responded she had to do what she was doing (4T38). Bamdas admitted Cavanaugh was at the party but said only employee Michael Vale, not Cavanaugh, spoke to her about changing her mind (4T178).

While I credit Bamdas that Vale spoke to her about changing her mind, I credit Cavanaugh that he asked Bamdas if he could arrange something for her. Bamdas said Cavanaugh was at the party and I find it makes sense he would have spoken to her. Perhaps Bamdas did not associate his request to arrange something for her with an attempt at changing her mind.

19. After December 18, 1995, Bamdas worked in private employment on a part-time basis until June 1996 (2T91). From June 2, 1996 until November 3, 1996, Bamdas worked as a dispatcher for the Township of Maplewood on a part-time basis. She assumed a full time dispatcher position with Maplewood effective November 4, 1996 (1T159-1T160).

ANALYSIS

The primary issue in this case is whether Bamdas was constructively discharged. That is, whether her resignation

occurred as part of a plan by the Township, or was a foreseeable consequence of any harassment the Township may have imposed.

In order to find that Bamdas' resignation was a discharge, I must find that the Township violated section 5.4a(3) of the Act. The standard for finding a(3) violations is set forth in In re Bridgewater Tp., 95 N.J. 235 (1985). But in constructive discharge cases, the Bridgewater standard must be applied in conjunction with the constructive discharge standard established by the Commission in Morris County, P.E.R.C. No. 82-28, 7 NJPER 578 (¶12259 1981). Morris County said that a constructive discharge occurs:

> "where the facts reveal that an employee resigned due to an employer's unfair practice or following an employer's imposition of 'onerous working conditions' after the employee's exercise of a protected activity . For an employer to be held legally responsible, it must be alleged and shown that the termination involved was the culmination of a plan on the employer's part to force such action, or the foreseeable consequence of earlier harassment." ID. at 580.

See also, Essex County Sheriff's Department, P.E.R.C. No. 88-75, 14 NJPER 185 (¶19071 1988); Essex Co. Sheriff's Department, P.E.R.C. No. 86-144, 12 NJPER 524 (¶17196 1986).

While this charge was not about whether the individual instances involving Bamdas violated the Act, analyzing a constructive discharge first requires a determination whether the employer discriminated against the affected employee in retaliation for engaging in protected activity, and then a determination whether the resignation was a planned or foreseeable consequence. Essex Co. Sheriff Dept., 14 NJPER at 191.

Bridgewater set the standard for determining whether an employer engaged in such discrimination. In that case, the Court held that no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity. Id. at 246.

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

In considering whether the various incidents that were alleged here were evidence of discrimination against Bamdas, I must distinguish between those incidents that occurred outside the six-month statute of limitations established by the Act, N.J.S.A. 34:13A-5.4(c), and those incidents that occurred within the six month period. Those incidents outside the statutory period cannot be the basis of a violation. But they can be considered to determine whether the employer engaged in a pattern of conduct, and used as an aid in interpreting the events within the statutory period. See State of New Jersey, P.E.R.C. No. 93-116, 19 NJPER 347, 351 (¶24157 1993).

The standard for determining an a(3) constructive discharge is different from the standard finding an independent 5.4a(1) violation. The finding of an independent a(1) violation, however, does not necessarily establish an a(3) violation. 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. New Jersey College of Medicine and Dentistry, P.E.R.C No. 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (Note 1) (¶10285 1979). Generally, however, an independent a(1) violation will not be found unless it has been specifically pled in the charge. State of N.J. and CWA, P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), aff'd. NJPER Supp. 2d 162 (¶143 App. Div. 1986); Ocean Co. College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982). No independent a(1) allegations were pled in the charge.

The Merits

This charge was filed on March 29, 1996, therefore, the six-month statutory period extends back to September 29, 1995. The only events occurring after September 29 were 1) the October 1995 approval for Bamdas to attend a seminar, 2) the October 1995 schedule change meeting affecting most operators at which Cavanaugh made certain remarks, 3) the events in November 1995 leading up to and just after Bamdas' resignation; and 4) the May 1996 withdrawal of the representation petition which occurred months after Bamdas separated from Township employment.

While the evidence shows that Bamdas engaged in protected activity and that her superiors knew of that activity, the Charging Party did not prove that the Township discriminated against her because of protected activity she engaged in which, for the most part, occurred many months prior to the events leading to her resignation. The record, however, did contain evidence of independent a(1) violations by the Township. Two of those incidents; Rogers asking Case to survey the employees as to their union interest, and Webb's apparent statement to Bamdas to stop her organizing activity, occurred outside the statutorty period. One incident; Cavanaugh's "a person" remarks about Bamdas at the October 1995 scheduling meeting, occurred within the statutory period. But since the Charging Party did not allege any of those incidents as independent a(1) allegations in the charge, they will not support the finding of a violation. State of N.J. and CWA; Ocean Co. College.

Throughout her testimony Bamdas claimed she felt threatened by many of the incidents that occurred, and/or was afraid she would be retaliated against because of her attempt to organize the operators (1T40, 1T69-1T70, 1T124, 1T128; 2T20, 2T23, 2T35-2T38). I believe that Bamdas' feelings in that regard were genuine, but her perceptions of the incidents are insufficient to establish that they were in retaliation for her exercise of protected activity. Several of the incidents that she "felt threatened" by, such as the transportation survey, the residency letters, and the leave time incidents, were devoid of any unlawful motive by the Township and were not part of a pattern of harassment against Bamdas. The following is a review of each incident.

The grievance Bamdas filed in 1991 was based on an isolated incident, far too remote in time to the events between 1993 and 1995 to be considered part of a pattern of conduct. The evidence shows Bamdas received a favorable decision from Cavanaugh, and if Bamdas hadn't received a timely response to the grievance she should have moved the grievance to the next step at that time. There was no showing of animus related to that matter.

The Evette Solomon incident did not involve the exercise of protected activity by Bamdas, nor was the outcome of that incident evidence of union animus against her. What that incident showed was that Rogers was already critical of the way Bamdas performed her job, and Case was already critical of Bamdas' interest in organizing the operators. The evidence shows that neither of them particularly liked Bamdas, and their criticism of her continued.

The residency requirement which led Bamdas to move into the Township was not initiated--and was not pursued--because Bamdas engaged in protected activity. The Township, through R-12, notified non-uniformed non-residents of the residency requirement in October 1993, prior to the November meeting with the FMBA representative. Whether Bamdas received R-12, or not, the Township sent that letter before it knew of Bamdas' organizing efforts. The record shows that Bamdas was one of several employees affected by the residency ordinance and there was no showing that the ordinance was applied to her in a different manner than similarly situated employees. Thus, I conclude that even though much of the residency facts occurred after Bamdas began her organizing activity, there was no nexus between the two; their coexistence was merely coincidental.

The organizing meeting Bamdas held in November 1993, standing alone, was not evidence of any improper conduct by any Township official. The most notable fact that eminated from that meeting was that Case was openly opposed to pursuing representation with the FMBA and he told Rogers the results of the meeting. That was not a basis for finding improper conduct.

The smoking incident was an isolated event affecting both Bamdas and Babinski, the facts were not contested, and no significant action was taken against either employee. I find it was not part of a pattern of conduct against Bamdas.

The union survey Case conducted was inappropriate only because Rogers suggested it. As a supervisor of the communication

operators Rogers should not have prompted Case to perform the survey. Such conduct--had it been part of a timely filed charge and independently alleged--may have constituted interference under the Act. But Bamdas' assertion that the survey was done in retaliation for her attempting to organize the operators was not established. Neither Rogers nor Case were anti-union; if anything, they were anti-Bamdas. They did not like her style and her personality.

While the union survey should not have been conducted, it was Case, not Rogers, who was steadfastly opposed to the FMBA, and it was Case, not Rogers, who in R-15 referred to Bamdas as an unhappy and constantly whining employee who created most of the problems. Finally, it was Case in R-15, and not Rogers or Cavanaugh, who first suggested that Bamdas leave her job if she was so unhappy. Bamdas may have felt threatened or intimidated by Case's comments, but since Case was neither Bamdas' supervisor nor an agent of the Township in relationship to Bamdas, his conduct cannot be attributed to the Township, and cannot be relied upon to establish a pattern of conduct by the Township.

The facts surrounding the transportation survey did not establish that Bamdas was given the survey in response to her attempts to organize operators. In its post-hearing brief the Charging Party argued that the survey, CP-7, did not indicate it was from the State Department of Transportation (DOT), that there was no indication it was mandatory, and further, it sought a negative inference from the fact that Bamdas was the only operator to receive it. I reject the argument and any such inference.

While CP-7 did not, on its face, indicate it was from the DOT and that a response was mandatory, the record established as much, and the Charging Party did not produce contradictory evidence. Similarly, the record shows that Bamdas was the only operator to receive CP-7 because she was the only operator who reported to work during the time period targeted by DOT. There is no contrary evidence, thus, no basis for me to draw a negative inference therefrom.

The "throwing" incident involving Rogers and Bamdas regarding CP-7 did not occur because Bamdas had engaged in protected activity. It occurred because of the manner in which Bamdas delivered CP-7 to Rogers. I credited Rogers testimony that Bamdas had thrown CP-7 on his desk. Rogers was angry about Bamdas' attitude, and angry that she had thrown away the first form she received and that prompted his tone and language in CP-8.

Given Rogers' prior dislike for Bamdas, it is not surprising that her handling of CP-7 caused his stern response in CP-8. In view of that relationship I find no nexus between Bamdas's organizing efforts and the way in which the transportation survey matters were handled.

The tardiness memo Bamdas received on June 14, 1994 (CP-5) was a perplexing matter. Her immediate supervisors were not aware of any problem nor had she been warned about a specific incident. Standing alone, one might infer that memo was intended to intimidate Bamdas. But I do not reach that level. CP-5 was sent by Deputy

Chief Webb not Chief Palardy. When Bamdas spoke to Palardy he assured her that he did not believe the complaint, she should not worry about it, and nothing more occurred regarding the matter. Bamdas seemed satisfied with Palardy's reassurance and I do not conclude she was intimidated by the result.

Additionally, there was no allegation that CP-5 constituted an independent 5.4a(1) violation, and even if there had been, it was outside the statutory period.

The evidence adduced regarding Bamdas' conversations with Lora Lavasky was intended to support the Charging Party's claim of a CEPA violation. But that evidence only showed Bamdas had conversations with Lavasky about what she believed was improper behavior by Rogers. There was no showing that Rogers or Cavanaugh, or anyone else at the Township, had any knowledge of Bamdas' conversations with Lavasky, and there was no evidence that Lavasky or DOP took any action against Rogers or the Township. Consequently, this "incident" was not proof of a CEPA violation, or of a violation of the Act. Thus, I dismiss the CEPA claim.

The Township's opposition to a separate unit of dispatchers as petitioned by the FMBA was based upon legitimate governmental policy considerations. It was not merely in reaction to Bamdas' filing the representation petition (CP-15). Bamdas conceeded that the Township's opposition to the petition was not in retaliation for her filing the petition, thus, I cannot consider the Township's actions to be part of a pattern of conduct against her.

Although Webb's remarks to Bamdas about her union activity after filing the representation petition was technically unlawful, it was an isolated incident, it was not part of any pattern of conduct by the Township, it was not specifically alleged as an independent 5.4a(1) violation, and it was too far outside the statutory period to form the basis of a violation under the Act.

The facts regarding Bamdas' leave time during her maternity leave do not show any inappropriate conduct by the Township. The Charging Party did not prove that her leave time was calculated differently than the leave time for any other employee.

The incident arising from Sgt. Stock's order to Bamdas to eat her lunch at her console on July 10, 1995, was not evidence of Rogers' hostility toward Bamdas because of her exercise of protected activity: it was evidence of Rogers' hostility to Bamdas because she questioned Stock's order. Whether Rogers acted fairly or appropriately by issuing CP-19, his acidic rebuke of Bamdas, is not before me.

I do not defend Rogers actions, but I find they were not unlawfully based. The tepid relationship between Bamdas and Rogers had existed for some time. Rogers' stern letter to Bamdas on June 29, 1994 about the transportation survey (CP-8) certainly set the stage for the tone of his letter in CP-19 issued on July 11, 1995, and neither letter was in reaction to Bamdas' exercise of protected activity.

Cavanaugh did not issue the schedule change letters (CP-21) on October 16, 1995, or conduct the schedule change meeting on October 26, 1995 because Bamdas engaged in protected activity. The Charging Party did not offer any evidence to dispute Cavanaugh's assertion that the changes were needed to improve efficiency.

The problem raised by the schedule change meeting was Cavanaugh's remarks about Bamdas bringing in an outside agency. Those remarks had the tendency to interfere with Bamdas' exercise of protected activity, but I am not finding an a(1) violation because no specific allegations of independent a(1) violations were pled in the charge.

The final incident leading to Bamdas' resignation and whether there was a constructive discharge began with the events of November 15, 1995 when Lt. Drylie saw Bamdas eating at her console, and continued with the meetings between Cavanaugh and Bamdas on November 28 and 30, concluding with their discussion on December 18, 1995. While individuals may differ as to whether Bamdas' eating at her console on November 15 should have been excused because of the influx of 911 calls, is not the issue before me. Bamdas did not deny eating at her console.

The issue here is why did Cavanaugh require Bamdas to take her lunch hour during the work day; did that impose on her an "onerous working condition" as discussed in Morris County; was her subsequent resignation the culmination of a Township plan, and/or, was her resignation the foreseeable consequence of any earlier Township action that may have been considered harassment?

Normally, when operators take their "lunch hour" sometime during the middle of their shift, they are relieved by a police officer, who covers their console. But that was not the case when Bamdas ate her lunch. Since she used her lunch hour at the end of her shift to leave early, no one covered her console when she took a break to eat her lunch in the break area.

I find that the incident on November 15 convinced Cavanaugh that if Bamdas was relieved to eat her lunch during her contractual lunch hour it would alleviate, or at least diminish, the potential for her to eat at her console. That was the reason he required her to use her lunch hour during the work day. Cavanaugh said she couldn't have a civil service hearing only because the Township had not filed a DOP notice of disciplinary action against her. There was no evidence Bamdas was denied any civil service rights.

Although Bamdas may have construed the requirement to use her lunch hour during her work day rather than leave an hour early as an "onerous working condition", since there was both a legitimate business and contractual basis for the requirement I cannot conclude it was onerous. Obviously, Bamdas' use of her lunch hour during the work day would require her to leave work an hour later and could impact on her child care arrangements. But Cavanaugh was entitled to take reasonable action to avoid placing Bamdas in a situation where she may again eat at her console. At their November 30th meeting Cavanaugh offered to adjust her hours to address her concerns.

Finally, the evidence did not establish that the Township engaged in a plan to entice Bamdas' resignation, nor did it engage in any earlier harassment of her which might justify a finding of constructive discharge under Morris County. I do not consider Cavanaugh's "a person" remarks to constitute harassment for purposes of deciding whether there was a constructive discharge. First, it was not pled in the charge, and second, Bamdas' resignation in late November was not a foreseeable consequence of Cavanaugh's remarks made in late October. The events surrounding Bamdas' resignation demonstrate the Township was not seeking her resignation, and Cavanaugh's offer to make changes presented to her viable alternatives to resignation.

A comparison of the facts here with those in Morris County and Essex Co. Sheriff help demonstrate why Bamdas' resignation was not a constructive discharge.

In Morris County, an employee filed a Civil Service complaint to the County's reduction of her position from full to part time status. After her successful challenge to the reduction, the County harassed her by assigning her to unfavorable shifts, terminated her overtime assignments, and further reduced her hours. Due to the cumulative effects of the County's negative actions, the employee resigned. The Commission, applying the standard noted above, concluded the employee had been constructively discharged.

In Essex Co. Sheriff, employee Denver had filed a grievance over a particular assignment. In response to that grievance, Denver

was reassigned to what he considered to be a more onerous assignment. As a result of that reassignment Denver suggested to both his employer and union leaders that he would resign, all vehemently objected. Although he had alternatives to quitting, Denver resigned. The Commission found that the Sheriff's reassignment of Denver violated the Act, nevertheless, it found that his resignation was not a constructive discharge. The Commission concluded that Denver's resignation was not a foreseeable consequence of the underlying unfair practice.

Unlike Morris County, here there was no pattern of harassment within the statutory period that could form the basis for a constructive discharge. Additionally, no action was taken against Bamdas for engaging in protected activity.

A comparison with Essex Co. Sheriff is even more telling. There, despite finding an a(3) unfair practice, the Commission held there was no constructive discharge because, it concluded, resignation was not a foreseeable consequence of that unfair practice. Here, there was no finding of an underlying unfair practice, and even if Cavanaugh's "a person" remarks constituted an independent a(1) violation, the resignation in November was not a foreseeable consequence of the October remarks.

But the most compelling reason for me to dismiss this case was that Bamdas knew that Cavanaugh, and others, did not want her to resign, she knew Cavanaugh had offered to change her hours, but after discussion with her husband, and "deep thought and careful

consideration" (CP-24), she resigned. She made that conscious decision after evaluating her career in West Orange, after hearing Cavanaugh and others ask her to reconsider her decision, and after almost changing her mind. I find her decision was voluntary, consequently, the charge should be dismissed.

Procedure

Despite having dismissed the charge on its merits, the Charging Party's Pierce and CEPA claims raised procedural issues that I feel should be addressed. The Charging Party raised the Pierce and CEPA claims here based upon its interpretation of New Jersey's Entire Controversy Doctrine, R. 4:30A. Generally, the Doctrine is intended to prevent litigation in more than one forum over different legal claims arising from a single controversy. The Doctrine requires that all claims and defenses arising from a single controversy be litigated in only one court. Failure to raise claims between parties already in litigation could bar subsequent proceedings. Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989); Circle Chevrolet v. Giordano, Halleran & Ciesla, 142 N.J. 280 (1995).

The Charging Party apparently believed it had to allege its Pierce and CEPA claim here to meet the intent of the Doctrine. To my knowledge, R. 4:30A does not address, and the New Jersey Supreme Court has not yet ruled on how the Doctrine applies to actions initiated in both an administrative agency and in court.

But in Hackensack v. Winner, 82 N.J. 1, 35, 37-38 (1980), the Court applied a similar doctrine in matters arising in more than one administrative agency when it held that there should be only one administrative hearing over matters arising from the same controversy. That led to the implementation of the predominant interest rules, N.J.A.C. 1:1-17.1 et seq., designed to determine which administrative agency should hear the matters in controversy.

In Kelly v. Borough of Sayerville, 927 F.Supp. 797 (DC NJ 5/10/96), 153 LRRM 2059 (1996), the Court applied the Doctrine in a matter arising before the Commission in which the charging party in that case also raised certain constitutional claims. The Commission did not address the constitutional claims and the charging party subsequently filed a federal §1983 action. The Court applied the Doctrine because it believed the charging party had a fair opportunity to have litigated its claims before the Commission. But the Court explained that the Federal Court could have entertained both the §1983 action and the unfair practice charge and that the charging party should have selected the forum with the widest possible relief. Having chosen to present its claims before the Commission, the Court said the charging party was limited to the relief granted by the Commission. 153 LRRM at 2062, 2063.

Based upon the above, I will assume the Doctrine applies to matters before the Commission, but that does not answer how matters normally outside our jurisdiction should be brought to the Commission.

Here, I find the Charging Party did not bring the Pierce and CEPA claims to the Commission in a proper manner, thus, I would dismiss those matters for lack of jurisdiction.

The Court in Pierce explained that an employee who is wrongfully discharged may maintain a cause of action in contract or tort or both. Id. at 84 N.J. 72. Both of those actions contemplated the initiation of proceedings in court. Similarly, the CEPA statute, N.J.S.A. 34:19-1 et seq., specifically states that an aggrieved employee may institute a civil action "in a court of competent jurisdiction within one year", N.J.S.A. 34:19-5.

The Charging Party's mere allegation in this charge of a Pierce and CEPA violation does not satisfy the requirement to initiate such proceedings in a competent court. If the Charging Party wanted those matters heard by the Commission, I find it should have filed those allegations in court, then moved before the court to have those matters transferred to the Commission. It did not do that. Actually, pursuant to Kelly v. Borough of Sayreville, the Charging Party should have filed the Pierce and CEPA claims in court, filed the charge here, then moved before the court to have all three matters--including the charge--merged before one court, rather than the Commission, because the court would have been the forum with the widest possible relief. Kelly. If the Charging Party moved to have all the matters placed before the Commission it would bear the risk of being in a forum that provides more limited relief.

Compare the procedure I have outlined above with the procedure for matters arising out of one controversy exclusively in the administrative forum. Parties cannot initiate a Department of Education claim under N.J.S.A. 18A:1-1 et seq., or a Department of Personnel claim under N.J.A.C. 4A:1-1 et seq. before the Commission with a related unfair practice charge. They must initiate the other claims before those respective departments and then seek to have them merged for one hearing with the charge through the predominant interest procedures.

The CEPA claim was dismissable not only because it was not initiated in court as the statute required, but it was not initiated within one year. The facts showed that Bamdas spoke to Lavasky in September 1994, and Lavasky telephoned Bamdas at work soon after that conversation. I infer all of that interaction occurred within a short period of time in late 1994. The charge here was filed on March 29, 1996, well more than a year from when the relevant events occurred. The Charging Party did not prove any CEPA related facts within a year prior to the filing of the charge. Thus, that claim should be dismissed.

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

Conclusions of Law

The Township did not violate the Act or the CEPA in relationship to the resignation of Kimberley Bamdas.

Recommendation

I recommend that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: March 4, 1998
Trenton, New Jersey