P.E.R.C. No. 99-76

STATE OF NEW JERSEY
BEFORE 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.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Township of West Orange. The Complaint was based on an unfair practice charge filed by Kimberley Ann Bamdas. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by harassing her, selectively enforcing a residency ordinance against her, and constructively discharging her on December 18, 1995. The charge further alleges that the Township retaliated against her because she attempted to organize a separate negotiations unit of communication operators to be represented by the Firemen's Mutual Benevolent Association, Local 428, and that the Township wrongfully discharged her and retaliated against her in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., for providing information to the Commission and the Department of Personnel. The Commission finds that although there are a number of incidents on the record that evidence hostility or tension between Bamdas and her superior officers, it is not compelled to infer that all of those problems between Bambdas and the superior officers were as a result of her protected activity. The Commission finds that her resignation was not planned by the Township nor was it a foreseeable consequence of any retaliatory conduct.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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KIMBERLEY ANN BAMDAS,

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Appearances:

For the Respondent, Matthew J. Scola, Municipal Attorney

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

DECISION

On March 29, 1996, Kimberley Ann Bamdas filed an unfair practice charge against the Township of West Orange. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] by harassing her, selectively enforcing a residency ordinance against her, and constructively discharging her on December 18, 1995. The charge further alleges that the Township retaliated against her because she attempted to organize a separate

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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."

negotiations unit of communication operators to be represented by the Firemens' Mutual Benevolent Association, Local 428, and that the Township wrongfully discharged her and retaliated against her in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. (CEPA), for providing information to the Commission and the Department of Personnel.

On July 9, 1996, a Complaint and Notice of Hearing issued. On July 29, the Township filed an Answer denying it violated the Act or CEPA and asserting that Bamdas voluntarily resigned.

On October 30 and November 22, 1996 and June 16 and 25, 1997, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument. The charging party submitted a post-hearing brief.

On March 4, 1998, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-25, 24 NJPER 188 (¶29091 1998). He concluded that Bamdas had voluntarily resigned and that the Township had not violated the Act or CEPA.

On March 11, 1998, the charging party filed exceptions. The Township did not respond.

On July 31, 1998, we remanded the case to the Hearing Examiner for a supplemental opinion. West Orange Tp., P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998). We sought clarification on the probative value of the evidence concerning events that occurred more than six months before the filing of the charge.

On November 9, 1998, the Hearing Examiner issued a supplemental report. H.E. No. 99-10, 25 NJPER 24 (¶30009 1998). He found that Bamdas' resignation was voluntary and was not caused by any unlawful action. He renewed his recommendation that the Complaint be dismissed.

On November 23, 1998, the charging party filed exceptions to the supplemental report and renewed its exceptions to H.E. 98-25. The Township has not responded.

The charging party's exceptions predominantly challenge the weight placed by the Hearing Examiner on certain events and the inferences and conclusions he drew from them, particularly those involving Sergeant Michael Rogers. The charging party asserts that Rogers was hostile to her efforts to have the dispatchers choose the FMBA as their representative. The exceptions also assert that the Hearing Examiner applied the wrong standard in determining whether Bamdas was constructively discharged.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. No. 98-25 at 3-35; H.E. No. 99-10 at 3-10).

In Morris Cty., P.E.R.C. No. 82-28, 7 NJPER 578 (¶12259 1981), we 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.

This analysis first requires a determination whether the Township retaliated against the charging party by imposing onerous working conditions. In re Bridgewater Tp., 95 N.J. 235 (1984), establishes the standards for determining whether the Township unlawfully discriminated against the charging party in retaliation for his protected activity. If the Township retaliated against Bamdas by imposing certain working conditions, the next question is whether her resignation was a planned or foreseeable consequence of those working conditions.

Under Bridgewater, 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 another motive 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 an employer's 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 employer's action. Conflicting proofs concerning the employer's motives are for us to resolve.

It is undisputed that the charging party engaged in protected activity and that the employer was aware of that activity. The Hearing Examiner found hostility to protected activity in two remarks over the span of a year. In late 1994, after Bambas filed the representation petition, a deputy chief asked Bamdas if she was going to stop her union activity and said that her family was more important and that she should "stop this crap." The Hearing Examiner found that the remark was not part of a pattern of conduct and that it was too remote in time to reasonably constitute a basis for finding a constructive discharge. In October 1995 at a meeting to discuss a schedule change, a captain warned that no person was going to bring in an outside agency to tell him how to run the department. The Hearing Examiner found that the remark was not a part of any pattern to harass or remove Bamdas and that her resignation in late November was not a foreseeable consequence of the October remark. We agree with his determinations.

There are a number of incidents on this record that evidence hostility or tension between Bamdas and her superior

officers. For example, a sergeant accused Bamdas of insubordination when she brought her lunch to the dispatching console. However we are not compelled, as the charging party suggests, to infer that all of those problems between Bamdas and the superior officers were a result of her protected activity.2/ The record does not bear out such a broad inference.

The charging party's resignation was not planned by the employer nor was it a foreseeable consequence of any retaliatory conduct. Her resignation surprised Captain Cavanaugh, who sought to reassure her that he valued her employment and offered to adjust her hours to convince her to stay. Accordingly, we adopt the Hearing Examiner's recommendation to dismiss the Complaint.3/

2/ Even if we were to infer that Sergeant Rogers was hostile to Bamdas because of her protected activity, we would not conclude that her resignation was prompted by that hostility.

3/ The charging party argues that a constructive discharge should be found when an employer deliberately causes or allows the employee's working conditions to become so intolerable that the employee is forced into an involuntary resignation. It relies on Kass v. Brown Boveri Corp., 199 N.J. Super. 42 (App. Div. 1985). Private sector labor relations cases that apply a similar test require that the employer intentionally have made the working conditions intolerable because of the employee's union activities. See, e.g., NLRB v. Grand Canyon Mining Co., ___ F.3d ___, 155 LRRM 2691, 2698 (4th Cir. 1997). The record does not support a finding that the charging party's working conditions were so intolerable that she was forced to resign. The charging party acknowledges that dismissing the

Footnote Continued on Next Page

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: February 25, 1999
Trenton, New Jersey
ISSUED: February 26, 1999

3/ Footnote Continued From Previous Page

Complaint moots its exception addressing whether it is necessary to make multiple administrative filings to litigate alleged violations of more than one statutory scheme. In light of our holding, we need not address the "entire controversy doctrine," any alleged wrongful discharge pursuant to Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 59 (1980), or any alleged CEPA violation.

H.E. NO. 99-10

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.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission submits a supplemental report in response to a Commission remand seeking the Hearing Examiner's position on the probative value of certain evidence. The Hearing Examiner reviewed the evidence and renewed his recommendation to dismiss the complaint.

H.E. NO. 99-10

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

In the Matter of

TOWNSHIP OF WEST ORANGE,

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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 SUPPLEMENTAL REPORT AND RECOMMENDED DECISION

On March 4, 1998, I issued a Hearing Examiner's Report in the above matter, Twp. of West Orange, H.E. No. 98-25, 24 NJPER 188 (¶29091 1998), recommending dismissal of the underlying unfair practice charge. On July 31, 1998, the Commission issued a decision, Twp. of West Orange, P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998), remanding this matter to me for a supplemental opinion on certain issues and evidence.

The Charging Party alleged that she was constructively discharged. To prove her case she relied on evidence of events that occurred both inside and outside the six month statute of limitations provided in the Act. I found that the requirements for a constructive discharge were not met.

In its decision, the Commission, citing a number of cases, noted that although events occurring outside the limitations period could not constitute unfair practices, those events could be considered as evidence of a discriminatory motive leading to the employees' separation from employment within the statutory period. A similar legal conclusion relying on the same lead case was cited in my report, 24 NJPER at 196. The Commission also explained that the evidence of those events outside the limitations period could be tested for relevance and probative value, but should not be discounted simply because of when they occurred.

The Commission stated that my report did not make clear "the distinction between considering the evidence at all and judging its probative value." 24 NJPER at 430. By example, the Commission referred to a passage in my report where I wrote that there was no pattern of harassment within the statutory period that could form the basis for a constructive discharge.

The reference in my report that there was no pattern of harassment within the statutory period that could form the basis for a constructive discharge meant only that I did not find that the events occurring within the statute of limitations period were part of a pattern of conduct by the Township. Neither, however, did I find that the events occurring outside the statutory period were part of a pattern of conduct motivated by the Charging Party's exercise of protected activity. No event was discounted

merely because it occurred outside the statutory period. I considered the probative value of each event occurring both inside and outside the statutory period in assessing whether a discriminatory motive existed that could have reasonably or foreseeably led to Bamdas' resignation. Those events were discussed in the analysis section of my report. 24 NJPER at 197-198.

The Commission in its decision asked me to state explicitly the probative value of the evidence concerning each event before the limitations period. 24 NJPER at 430.

Probative evidence is evidence that tends to prove or actually proves certain facts. Black's Law Dictionary, 4th Ed. (1968). Since the charge was filed on March 29, 1996, the statute of limitations period extended back to September 29, 1995. The value of the evidence of the events that occurred before that time follows.

1. The grievance filed in 1991 was, itself, the exercise of protected activity, but it was unrelated to Bamdas' efforts to organize the dispatchers from 1993 to 1995. Since there was no showing of animus related to its processing, and since it occurred well before the organizing efforts here, that event had no probative value in this case.

2. The Evette Solomon incident established that the start of Bamdas' poor relationship with Rogers and Case began before her attempt to organize the operators. The evidence showed

that Rogers faulted the way Bamdas handled the incident and that Case resented Bamdas' involvement in reviewing the competency of other communication officers, all of which was unrelated to her organizing activities. I stated in my report that this incident:

> ...did not involve the exercise of protected activity by Bamdas, nor was the outcome of that incident evidence of union animus against her. 24 NJPER at 197.

Thus, this event did not tend to prove elements of the Charging Party's case.

3. As a result of the residency requirement facts I concluded that it was not reasonable to relate the fear Bamdas felt over that event to the Township's action. The evidence does not show any connection between the Township's decision to adopt and enforce a residency requirement and Bamdas' exercise of protected activity. She had not been singled out to receive the residency notice. Bamdas' testimony that she was the cause of all the employees receiving the residency notice was self-serving, without corroboration, and struck me as imagined, and unreliable. From this event I began to question whether her testimony was believable and her actions reasonably based. Consequently, this event had no probative value toward establishing the Charging Party's case.

4. The organizing activity and meeting conducted in late 1995 showed that Case opposed Bamdas' organizing efforts. Although I inferred that Case's opposition to her organizing efforts heightened Bamdas' fears about engaging in protected activity, since

Case was Bamdas' colleague, and not a supervisor, I found her fears in that regard were not reasonably related to any action by the Township. Thus, I did not consider this a probative event for the Charging Party.

The "Norma Ray" remarks had no probative value. The record does not show which supervisor(s) may have made the remark(s) or that Bamdas felt threatened by them.

5. The smoking incident in January 1994 was not denied by Bamdas, and there is no evidence it was related to her exercise of protected activity. Consequently, I find it had no probative value in this case.

6. The evidence surrounding the union survey highlighted the deteriorating relationship between Case and Bamdas, and it acted as a basis for Bamdas' renewed fear for engaging in protected activity. Bamdas' renewed fear was directly related to Case's memorandum explaining the survey (CP-2), but that memorandum and survey were not retaliation by the Township, nor even by Case. The evidence shows that neither Rogers nor the Chief were opposed to the organizing efforts for the communication operators. Their suggestion for the poll/survey was to give the operators the opportunity to choose what they wanted. While that suggestion could have constituted a(1) interference had such a charge been filed, their action was not an act of retaliation by the Township against Bamdas' organizing efforts, it was an attempt to afford the employees the opportunity to exercise their preference.

On direct examination, Bamdas explained that after learning about the survey she was shocked and upset that the office of police administration knew of her activities and those of the other operators, and she said she "was fearful for retaliation" (1T40). I do not believe that Bamdas did not know that the administration was aware of the organizing meeting. It was held in a sergeants office, and Rogers had arranged for police officers to staff the operator desks so all operators could attend the meeting (4T121).

When Bamdas was asked on direct examination why she feared retaliation she said it had to do with the grievance she filed in 1991, some unspecified incident that occurred to another communications operator, and because she felt she "could be forced to do something that was unfair or unjust" (1T40). I found that response lacking in substance and reliability. The grievance was too remote in time to be related to her organizing efforts, and the unknown incident involving another operator, and her own feelings of being asked to do something, are too vague to reasonably constitute a basis for arguing that the fears resulted from Township action.

When the matter was pursued on cross-examination, Bamdas said she did not believe the survey was a form of retaliation for her union activities (2T35). Rather, she said she objected to the survey because she thought the operators completing it might be retaliated against (2T36), then she said she thought she would be retaliated against by union members of the police force who would retaliate against her for attempting to organize the operators

(2T37). She did not suggest she thought she would be retaliated against by the Township or the police administration.

As a result of Bamdas' testimony, I inferred that while her fear of retaliation was real to her, it was self-generated. There was no reasonable basis to conclude that she might be retaliated against by the Township or even by fellow employees. Consequently, this event did not tend to prove elements of the Charging Party's case.

7. The facts regarding the transportation survey demonstrated that the breakdown in the relationship between Rogers and Bamdas was directly related to Bamdas' inappropriate attitude and behavior. There was no evidence that Bamdas was given or required to complete the survey because of her organizing activity. She received it only because her work day began during the targeted time period. Her distaste for having to complete the survey resulted in the inappropriate way she delivered it to Rogers. I found Rogers' language in CP-8, and the remarks he made to Bamdas over CP-7, were in direct reaction to her questionable conduct, and completely unrelated to her exercise of protected activity. From the circumstances surrounding this event and others, I inferred that Bamdas frequently challenged authority, and resented doing things she did not want to do. I found Rogers to be a more trustworthy witness. His conclusion that Bamdas was insubordinate to him was reasonable and not part of any plan to punish or harass her for her organizing efforts. Therefore, this event lacked probative value toward proving the Charging Party's case.

8. Deputy Chief Webb's tardiness memorandum to Bamdas in June 1994 (CP-5) did not prove elements of a constructive discharge. On its face, the memorandum seemed legitimate, but when juxtaposed with Webb's remark to Bamdas in late 1994 (Item 12 herein), animus could be inferred. But even if such an inference were drawn, I find more significant the fact that Bamdas' immediate supervisors and Chief Palardy reassured her that they did not believe she had a tardiness problem. Palardy essentially disavowed any negative actions by Webb, Bamdas seemed satisfied with Palardy's assurances, and she did not seem to be intimidated by the event. Additionally, the timing of this event was too far removed from Bamdas' resignation announcement to consider the resignation a forseeable consequence of Webb's memorandum.

9. The letter from the FMBA's attorney to the Township's attorney about the tardiness memorandum and the transportation survey had no probative value in this case. It did not establish improper conduct by the Township, nor prove a pattern of harassment toward Bamdas.

10. The DOP/Lora Lavasky event had no probative value in this case. It was not related to Bamdas' attempts to organize the communication operators nor to her decision to resign in December 1995. There was insufficient evidence that any Township official or police superior officer had any knowledge of Bamdas' conversation with Lavasky, or that any action was taken as a result of that conversation.

11. The evidence regarding the representation petition Bamdas filed in September 1994 had no probative value in this case. Although the petition proved Bamdas engaged in protected activity and that the Township was aware of that activity, the Township's rejection of the petition did not tend to prove animus towards Bamdas or the union. The Township opposed the petition in good faith.

12. Deputy Chief Webb's remark to Bamdas in late 1994 after she filed the representation petition showed his animus toward her for exercising protected activity. But I did not find that remark tended to prove the alleged violation. The remark was not part of any pattern of conduct pursued by the Township, and since it was made more than a year before Bamdas' resignation, I find it was too remote in time to reasonably constitute a basis for proving a constructive discharge. I do not believe Bamdas would have moved into the Township in May 1995, or returned from her maternity leave in June 1995 if she truly felt threatened by or in fear of Webb's remark. Thus, I cannot conclude her resignation in December 1995 was a forseeable consequence of that remark.

13. The circumstances surrounding Bamdas' leave time in mid-1995 had no probative value. There was no nexus between her leave time calculation and her exercise of protected activity. The evidence did not show that Bamdas' leave time was handled differently than for any other similarly situated employee.

14. The facts concerning Sgt. Stocks order to Bamdas on July 10, 1995 that she eat at her console showed that the poor relationship between Rogers and Bamdas was based on Rogers belief that Bamdas too frequently challenged authority. There was no evidence connecting Sgt. Stock's order with any animus toward Bamdas for attempting to organize the operators, and I do not infer that the order was illegally motivated. When Bamdas questioned the order in CP-17 it obviously ignited Rogers frustration toward her in CP-19 for once again questioning orders of a superior officer. I find that Rogers language in CP-19 was not ignited by, nor at all related to, Bamdas' exercise of protected activity. It was related to his perception of her inability or intent not to follow orders. Rogers in CP-19 referred to Bamdas as having a problem assuming the responsibility to follow orders; he referred to her "temper tantrums", and he reminded her that orders to her did not have to be explained. Those elements in CP-19 were not motivated by Bamdas' protected activity, they were more a reflection of her work attitude. Consequently, I did not find this event tended to prove elements of the Charging Party's case.

Bamdas resigned, I believe, primarily because she did not want to change her work day to conform with the requirement to take her lunch at a normal time, which was intended to prevent her from eating at her console, rather than take "lunch" at the end of her

shift. There was no dispute that Bamdas ate at her console. She may have considered Cavanaugh's requirement that she eat her lunch during her contractual lunch hour as onerous, but since his requirement was in accordance with the contract and was a reasonable way to prevent Bamdas from repeatedly having this problem, I do not consider it onerous. It was not in reaction to or punishment for engaging in proteced activity.

In fact, I believe Bamdas' resignation announcement on November 28 surprised Cavanaugh, and I found he genuinely attempted to convince her of her value to the Township and his desire to continue her employment. After Bamdas formally submitted her resignation on November 30 (CP-24), Cavanaugh again sought to reassure her he valued her employment and he offered to adjust her hours to convince her to stay. Those were not the actions of an employer with a plan to force resignation.

Cavanaugh's "a person" remark in October 1995 was not part of any pattern to harass or remove Bamdas, and her resignation announcement on November 28, and again on November 30, was not a forseeable consequence of that remark made on October 26. I did not think it reasonable that Bamdas would have decided to resign over that remark but wait a month to make the announcement.

In sum, I found that Bamdas' resignation decision was not reasonably based on any unlawful action by the Township. I believe Cavanaugh's persistent reassurance to Bamdas that he valued her work and wanted her employment to continue overcame any negative

connotations created by the few a(1) remarks. Consequently, I renew my recommendation to dismiss the complaint.

In a footnote at the end of its decision, 24 NJPER at 430, the Commission referred to a case cited in my report, Kelly v. Sayreville, 927 F.Supp. 797 (D.N.J. 1996), concerning the entire controversy doctrine. The Commission, citing the Third Circuit, noted that Kelly was probably not good law with respect to the doctrine. That case and the entire controversy doctrine were not related to the issues raised by the Commission in its remand.

The Kelly District Court case was cited in the last paragraph of the Charging Party's post-hearing brief in support of other arguments raised in the complaint. The Charging Party asserted that the Township's actions resulted in Bamdas' wrongful discharge pursuant to Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 59 (1980), and that the Township retaliated against Bamdas in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq (CEPA), allegedly because she provided information to the Commission, and to the Department of Personnel (DOP) concerning Sgt. Rogers.

The Charging Party apparently relied upon the entire controversy doctrine and Kelly as the means to support its argument that the Commission had jurisdiction over the Pierce and CEPA

claims. I did not address the Third Circuit's handling of the entire controversy doctrine in Kelly, 107 F.3d 1073, 154 LRRM 2748, 2752-2753 (1997). Rather, for analysis purposes, I merely assumed the doctrine applied to the Commission yet recommended that those claims be dismissed. I concluded that the Pierce claim should have been initiated in court. Notwithstanding that procedural requirement I note that the evidence here did not, in my estimation, establish a wrongful discharge.

CEPA claims are governed by the statute. N.J.S.A. 34:19-5 requires that such claims be initiated in "...a court of competent jurisdiction, within one year...." I found that the CEPA claim here did not meet those requirements. I also note, however, that the facts concerning the Lavasky matter were insufficient to constitute a CEPA violation.

Accordingly, I renew my recommendation to dismiss the Pierce and CEPA claims.

Respectfully submitted,

Arnold H. Zudick
Senior Hearing Examiner

Dated: November 9, 1998
Trenton, New Jersey