P.E.R.C. No. 90-102

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

-and-

OLD BRIDGE PBA, LOCAL NO. 127,

Docket No. CO-H-89-32

Charging Party,

-and-

JERRY PALUMBO,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Old Bridge violated the New Jersey Employer-Employee Relations Act by transferring an employee in retaliation for filing a grievance, denying an employee representation at a disciplinary interview, and unilaterally discontinuing emergency vacation leave. The unfair practice charge was filed by the Old Bridge PBA, Local 127.

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Charging Party,

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JERRY PALUMBO,

Intervenor.

Appearances:

For the Respondent, Savage & Serio, attorneys (Thomas J. Savage & Dawn A. Serio, of counsel) and Cleary & Madden, attorneys (Melanie Achaves, of counsel)

For the Charging Party, S.M. Bosco Associates (Simon M. Bosco, Labor Consultant)

For the Intervenor, Yacker & Granata, attorneys (Louis E. Granata, of counsel)

DECISION AND ORDER

On July 26, 1988, Old Bridge PBA, Local No. 127 filed an unfair practice charge against the Township of Old Bridge. The charge alleges that the employer violated subsections 5.4(a)(1) through (6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) dominating or

Footnote Continued on Next Page

34:13A-1 et seq. The charge generally alleges that the employer, through the chief of police and other superior officers, denied union representation at disciplinary interviews; retaliated against employees filing grievances; harassed the PBA's president with threats and reprimands; unilaterally changed past practices; discriminatorily transferred employees; recognized a minority organization; refused to supply information necessary to enforce the collective agreement; and refused to abide by the negotiated grievance procedure.[2/]

On March 10, 1989, a Complaint and Notice of Hearing issued. The Township filed an Answer denying that it had engaged in any anti-union activity and noting that the police chief had claimed a right under N.J.S.A. 40A:14-118 to decide daily assignments.

On July 18, 1989, Hearing Examiner Alan R. Howe adjourned a hearing scheduled to begin that day. He directed that the police

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1/ Footnote Continued From Previous Page

interfering with the formation, existence or administration of any employee organization; (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; (4) discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (6) refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ The Hearing Examiner's report (H.E. at 1-3) details the charge's numerous allegations.

chief, Jerry Palumbo, be given the opportunity to intervene. On July 21, the Hearing Examiner permitted the chief to intervene for the purpose of presenting legal argument about his rights under N.J.S.A. 40A:14-118. The chief did not seek to be named as a respondent.

On August 21, 22 and 23, 1989, the Hearing Examiner conducted a hearing on the merits. He granted the PBA's motion to amend the Complaint to allege a continuous pattern of harassment of the PBA's president and a de facto recognition of Fraternal Order of Police Lodge No. 32, a minority organization, as representative of police officers; but denied a motion to add a third allegation. The employer and the PBA examined witnesses and introduced exhibits. The chief subpoenaed two witnesses, but the Hearing Examiner granted the employer's motion to quash the subpoenas and rejected the intervenor's offer of proof. The parties and the intervenor filed post-hearing briefs by January 18, 1990.

On March 5, 1990, the Hearing Examiner issued his report. H.E. No. 90-39, ___ NJPER ___ (¶_____ 1990). He recommended dismissal of several allegations, but found that these violations occurred: Officer Grossman was transferred from the detective bureau to the patrol division in retaliation for filing a grievance; Officer Kanig was transferred from the detective bureau to the patrol division after being denied union representation at a disciplinary interview; new rules and regulations were unilaterally promulgated; emergency vacation leave was unilaterally discontinued; and a job vacancy notice with a unilateral change in work schedules was posted.

The employer did not file exceptions. The PBA excepted to the finding that a change in outside employment practices did not violate the Act, but accepted the report in all other respects. The chief filed exceptions asking for full intervention rights and a new hearing.[3/]

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 6-26) are generally accurate. We incorporate them, with the following changes and additions.

We add to finding no. 6 that after receiving the reprimand, Grossman met with Captain Hatfield and protested that he hadn't done anything wrong (2T43). Hatfield responded that the chief had guaranteed that Grossman would not be transferred back to road patrol if he accepted the reprimand (2T43).

We add to finding no. 8 that after Grossman learned of his transfer, he and PBA president Carullo met with Chief Palumbo. They asked why Grossman had been transferred; Palumbo responded that he didn't need a reason because he was the chief. Grossman then asked if there was any problem with his work performance. The chief said no (2T54).

We reject finding no. 12. In his testimony, PBA grievance chairperson Fricks initially confused two grievances--a June 3 grievance protesting Grossman's reprimand and a June 21 grievance protesting Grossman's transfer. At first he testified that he handed

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3/ The chief also requested oral argument. We deny that request.

the reprimand grievance to Hatfield on June 21 (2T71). Later he clarified that he handed the reprimand grievance to Hatfield on June 3, 1988, and that the conversation with Hatfield described in finding no. 12 and corroborated by Officer Moser then ensued (2T73-2T74). After Fricks handed Hatfield the grievance, Hatfield said: "What's this?" He stopped, read it, turned beet red and said: "He's dead. He's fucking dead." (2T72). Hatfield then walked off. After giving Hatfield 15 minutes to cool off, Fricks found Hatfield outside the captain and chief's room (2T72-2T73). Hatfield was still red and very upset. Hatfield loudly told Fricks he didn't care and that he and Grossman had had a deal. He then repeated "He's dead. He's finished." (2T73-2T74).

We add to finding no. 18 that Carullo received some of the information that he had requested concerning schooling and bereavement leaves. He was told the computer was broken (2T152; 4T95).

We modify finding no. 24 to reflect that officers seeking emergency vacation leave had to notify the chief in advance, even if at the last minute (4T47-4T49). The chief would thus have the opportunity to ensure that minimum staffing levels were met.

We add to finding no. 25 that before the job posting for the narcotics unit position, work schedules had often been changed to respond to narcotics unit needs (4T122). The posting therefore accurately noted that the work hours could vary with short notice (CP-23). In the past, employees whose work hours were changed were usually compensated at overtime rates (4T122). Carullo worried that

the chief was trying to change that practice, but the job posting gives no such indication and no one has been appointed yet (4T122-4T123).

We add to finding no. 26 that the chief did not speak during the time Carullo was present at the October 26, 1987 meeting (4T112).

We add these facts to finding no. 32. Officers may be disciplined for leaking sensitive information (3T121). On April 12, 1988, Officer Kanig was advised by his immediate superior on the task force that he should call Sergeant Leslie in the police department, that "there was some trouble down there and [Kanig] was in the thick of it." (3T109).

At the April 14 meeting, Leslie pressed Kanig to "come clean" and admit leaking information about the electronic surveillance equipment (2T113; 2T129). Leslie told Kanig that if he didn't explain the matter, he would be transferred because he couldn't be trusted. Kanig responded that he hadn't given anybody any information (2T113; 2T130). Kanig and Moscaritolo later met with the chief. The meeting was cordial. The chief told them he wasn't going to make an immediate decision about transferring Kanig (2T114) and that Leslie would have to determine whether he could be trusted (2T131).

We add to finding no. 36 that Leo has been the acting Public Safety Director since June 1988 (4T139-4T140).

We add to finding no. 37 that the mayor tried to change rules and regulations affecting the police department's structure and organization (4T136). No evidence suggests that the mayor tried to change regulations governing working conditions.

We first consider whether the hearing should be reopened to permit the chief to call and cross-examine witnesses. The Hearing Examiner properly limited the chief's intervention to legal argument on the application of N.J.S.A. 40A:14-118.

N.J.S.A. 34:13A-5.4(a) prohibits "public employers" from committing specified unfair practices. N.J.S.A. 34:13A-3(c) states that the term "public employers" shall mean the State of New Jersey, or the several counties and municipalities thereof...." For purposes of collective negotiations and these unfair practice proceedings, then, the Township, not the chief, is the public employer. The chief properly objected to being made a party.

Instead of being an employer, a police chief is an agent of the employer. N.J.S.A. 34:13A-5.3 excludes managerial executives from the Act's protections. Managerial executives are those "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices...." N.J.S.A. 34:13A-3(f); see also Montvale Bor., P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980). After N.J.S.A. 40A:14-118 was amended, we held that by law all police chiefs must be considered managerial executives. Egg Harbor Tp., P.E.R.C. No. 85-46, 10 NJPER 632 (¶15304 1984). Given that police chiefs are statutory agents of their employers, we will not ask whether a chief's unfair practice was authorized in a particular instance. Contrast Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 85-110, 11 NJPER 307 (¶16109 1985).

Two conclusions follow from our determination that the Township is the public employer and the police chief is its agent. First, the Township controls the defense of unfair practice proceedings. Second, the Township is responsible for unfair practices attributable to the chief. We will not permit unfair practice proceedings and statutory rights to be held hostage to disputes within the employer's ranks. Compare Bloomfield Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd App. Div. Dkt. Nos. A-1521-87T1, A-3091-87T1 and A-3090-87T1 (10/26/89), certif. den., ___ N.J. ___ (1990) (in case of fire chief's alleged discrimination in denying a promotion, fire officers granted intervention to argue that remedy violated Civil Service statutes, but not to contest factual merits).

Police Chief Palumbo was permitted to intervene to make legal arguments about his rights under N.J.S.A. 40A:14-118. That statute does not require that he also be granted co-control over the defense of these proceedings. Instead, that statute accords with our Act in making clear that the Township, not the chief, is the public employer.

N.J.S.A. 40A:14-118 provides that a municipality's governing body may enact an ordinance creating a police force. This ordinance must provide for a line of authority relating to the police function and for the adoption by the appropriate authority[4/] of rules and

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4/ The appropriate authority means the mayor, manager, or other executive or administrative officer or designee of the governing body. N.J.S.A. 40A:14-118(e). It does not mean the police chief. In re Baldinger, 220 N.J. Super. 267 (Law Div. 1987).

regulations for the government and discipline of the police force. The ordinance may provide for the appointment of a chief of police and other officers, the determination of their terms of office, the fixing of their compensation, and the prescription of their powers, functions and duties, "all as the governing body shall deem necessary for the effective government of the force."

If a chief is appointed, N.J.S.A. 40A:14-118 requires that the chief be the head of the force, directly responsible to the appropriate authority for its efficiency and routine day-to-day operations. Pursuant to policies established by the appropriate authority, the chief must exercise certain other powers, including administering and enforcing rules, regulations and emergency directives for the disposition and discipline of the force and prescribing the duties and assignments of all subordinates and other personnel. N.J.S.A. 40A:14-118(a) and (c). The chief therefore has a statutory right to make assignments without political interference. Gauntt v. Mayor and Council of City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984); Quaglietta v. Bor. of Haledon, 182 N.J. Super. 136 (Law Div. 1981). But the chief does not have a statutory right to make appointments or promotions or to conduct disciplinary proceedings. Falcone v. De Furia, 103 N.J. 219 (1986); Gauntt; Grasso v. Glassboro Bor. Council, 205 N.J. Super. 18 (App. Div. 1985); Baldinger.

Reading N.J.S.A. 40A:14-118 as a whole, we believe that it, like our Act, views the governing body as the public employer for

purposes of determining employment conditions and the police chief as the managerial executive for purposes of implementing these conditions. Whether municipal officials have unduly interfered with the chief's responsibilities under that statute is not for us to decide and is irrelevant to determining whether an unfair practice has been committed. The forum for alleged violations of N.J.S.A. 40A:14-118 is the trial division of the Superior Court. Quaglietta; Baldinger.[5/]

The chief also argues that he is entitled to full intervention under an unpublished opinion of Judge Conley of the Chancery Division of the Superior Court. Old Bridge PBA v. Old Bridge Tp., Dkt. No. C-17714-88 (7/28/89), app. pending App. Div. Dkt. No. A-425-89T1. We disagree.

That opinion vacated an arbitration award which had set aside the transfer of Officer Grossman from the detective bureau to the patrol division. The arbitrator held that the transfer violated contractual clauses guaranteeing seniority rights and prohibiting unjust discipline, but Judge Conley held that the grievance was not contractually arbitrable. She suggested in dictum that the chief might have standing to contest the arbitration award, but refrained

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5/ We take no position on whether the Township or the chief has the better of this dispute. We reject the assertion that this dispute entitles the chief to try the case as well as to argue the law. This employer must decide what is its best litigation strategy. Here it made a reasonable choice to defend on the grounds that municipal officials had not committed any unfair practices and had cured or tried to cure those committed by the chief.

from deciding that issue. At no point did she suggest that the chief had a right to reopen the arbitration proceeding and submit evidence. Her opinion provides no support for reopening this unfair practice hearing to permit a non-party, non-employer to submit evidence.[6/]

Even if the chief had a statutory right to intervene on the factual merits as well as the law, we would still not reopen the hearing. We have reviewed his offer of proof. His allegations, if proved, would not change any of three unfair practice findings we make below.

The Hearing Examiner found that subsections 5.4(a)(1) and (3) were violated when Officer Grossman was transferred from the detective bureau to the patrol division in retaliation for grieving a reprimand. Applying the standards in In re Bridgewater Tp., 95 N.J. 235 (1984), we agree. We base this finding on the testimony of Fricks and Moser concerning Captain Hatfield's heated and threatening response to the June 3 grievance. We also note that Sergeant Ruszulla, carrying out the chief's order, tried to prevent Grossman from appearing at a grievance hearing.

The chief's offer of proof does not assert any facts which would contradict our findings. The offer asserts only that Judge Conley had upheld the chief's power to transfer Grossman. But Judge Conley held only that the transfer was not contractually arbitrable. She did not and could not consider whether the transfer was an unfair

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6/ Judge Conley also stated that she believed the Township, not the chief, was the employer under our Act.

practice within our exclusive power under N.J.S.A. 34:13A-5.4(c). Jefferson Tp. Bd. of Ed. v. Jefferson Tp. Ed. Ass'n, 188 N.J. Super 411 (App. Div. 1982). Her order vacating the arbitration award thus does not conflict with our order rescinding the illegally-motivated transfer.[7/]

We next consider whether subsection 5.4(a)(1) was violated when Sergeant Leslie refused to permit a PBA representative to attend his disciplinary interview with Officer Kanig. We hold it was.[8/] But we will not rescind Kanig's transfer. Kanig was transferred based on information received before the interview, not on information

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7/ Judge Conley also observed, again in dictum, that she did not believe that any transfers were negotiable or legally arbitrable. While Ridgefield Park Bd. of Ed. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), generally precludes binding arbitration over transfer decisions, the discipline amendment to N.J.S.A. 34:13A-5.3 permits public employers to agree to submit disciplinary disputes to binding arbitration, absent an alternate statutory appeal procedure, and the facts of a particular case may demonstrate that a transfer was disciplinary. See, e.g., Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1988). The Legislature recently confirmed that some transfers may be considered disciplinary when it prohibited school boards from making disciplinary transfers between worksites. L. 1990, c. 269, to be codified at N.J.S.A. 34:13A-25. We do not develop this point because even assuming the employer had a prerogative to transfer Grossman, it did not have a right to discriminate against him for reasons of anti-union animus. Cf. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983)(appointment decision allegedly infected by racial discrimination may be submitted to advisory arbitration, but only agency entrusted with deciding discrimination issues may issue binding decision).

8/ The intervenor's offer of proof is that Leslie would testify that Kanig had violated the security of the narcotics squad and that he discussed this violation with Kanig. This offer, if proved, would simply confirm the disciplinary nature of the interview and Kanig's right to representation at it.

received at the interview. Nor is there any indication that Kanig's request for representation played any role in his transfer. Under these circumstances, the proper remedy is an order requiring the employer to stop denying PBA representation at future disciplinary interviews.

We next consider whether subsection 5.4(a)(5) was violated by the unilateral adoption of rules and regulations on October 23, 1987. N.J.S.A. 5.4(c) provides that no Complaint shall issue based upon any unfair practice occurring more than six months before a charge was filed. This charge was not filed until nine months after the alleged violation; no evidence explains that delay. Accordingly, we dismiss these allegations.[9/]

The statute of limitations also bars basing an unfair practice finding on the alleged unilateral change in practices governing outside employment. That change occurred more than seven months before the charge was filed. No evidence explains that delay. Accordingly, we dismiss that allegation.[10/]

The statute of limitations also requires dismissal of the allegations of superior officer interference with a PBA meeting in April 1987 and retaliation against Carullo in 1987. We further

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9/ The revisions Mayor Haney sought in 1988 were tied to the police department's structure and organization, not to employment conditions.

10/ There is no evidence that the deputy chief's regulation of racetrack employment was inconsistent with the new policy. We do not consider the legality of any outside employment practices.

dismiss those allegations which were not addressed in the post-hearing brief and the exceptions.

We next consider whether subsection 5.4(a)(5) was violated when all emergency vacation leave was discontinued. We hold it was. N.J.S.A. 34:13A-5.3 requires that an employer negotiate in good faith until impasse before changing an existing rule governing working conditions. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 323, 338 (1989). We further note that officers must continue giving advance notice so that minimum staffing levels may be satisfied.[11/] We order the employer to rescind the June 30, 1988 memorandum on emergency vacation leave.

We next consider whether subsection 5.4(a)(5) was violated by the posting of a notice of a job vacancy in the narcotics unit. We hold it was not. The notice accurately stated that the work hours of this position may be changed on short notice because of the needs of the narcotics unit. The notice did not state that employees whose hours were changed would be denied overtime compensation and the position has not yet been filled. Under these circumstances, we cannot find any change in an employment condition. We dismiss that allegation.

11/ The offer of proof, if accepted, would not change our conclusion. The factual offer is that emergency leave was discretionary. We have found that advance notice was required and that the chief could reject a leave if staffing levels would be compromised. Our opinion preserves that right. But the chief unilaterally denied all emergency vacation leaves. Such a blanket denial is an unfair practice. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4586-81T3 (3/24/84).

We finally consider whether subsection 5.4(a)(2) was violated by the alleged support given by the chief and other superior officers to the FOP. Absent exceptions on this point and given the isolated instances of alleged support within the statute of limitations, we hold it was not. We dismiss these allegations.

ORDER

The Township of Old Bridge is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by: transferring employees such as John T. Grossman in retaliation for filing a grievance; denying employees such as David Kanig PBA representation at disciplinary interviews; and unilaterally discontinuing emergency vacation leaves.

B. Discriminating in regard to terms and conditions of employment, in particular by transferring employees such as John T. Grossman in retaliation for filing a grievance.

C. Refusing to negotiate in good faith with the majority representative of police officers concerning their terms and conditions of employment, in particular by unilaterally discontinuing all emergency vacation leave.

II. Take these actions:

A. Rescind the transfer of John T. Grossman from the detective bureau to the patrol bureau and reinstate him to his prior position in the detective bureau.

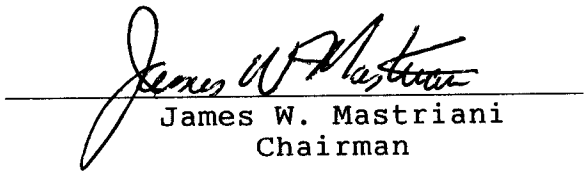
B. Rescind the June 30, 1988 directive on emergency vacation leave and negotiate in good faith with PBA representatives over any proposals to change emergency vacation leave.

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

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: May 14, 1990
Trenton, New Jersey
ISSUED: May 15, 1990

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act by: transferring employees such as John T. Grossman in retaliation for filing a grievance; denying employees such as David Kanig PBA representation at disciplinary interviews; and unilaterally discontinuing emergency vacation leaves.

WE WILL cease and desist from discriminating in regard to terms and conditions of employment, in particular by transferring employees such as John T. Grossman in retaliation for filing a grievance.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of police officers concerning their terms and conditions of employment, in particular by unilaterally discontinuing all emergency vacation leave.

WE WILL rescind the transfer of John T. Grossman from the detective bureau to the patrol bureau and reinstate him to his prior position in the detective bureau.

WE WILL rescind the June 30, 1988 directive on emergency vacation leave and negotiate in good faith with PBA representatives over any proposals to change emergency vacation leave.

Docket No. CO-H-89-32 TOWNSHIP OF OLD BRIDGE
(Public Employer)

Dated: _____ By: _____

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

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

APPENDIX "A"

H.E. NO. 90-39

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

In the Matter of

TOWNSHIP OF OLD BRIDGE,

Respondent,

-and- Docket No. CO-H-89-32

OLD BRIDGE PBA, LOCAL NO. 127,

Charging Party,

and-

JERRY PALUMBO,

Intervenor.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated Sections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when its Chief of Police transferred two employees from assignments in the Detective Bureau to the Patrol Division, one of the employees having been retaliated against for the filing of grievances and the other employee having been retaliated against for exercising his Weingarten right to representation at an investigatory interview. It was also recommended that the Commission find that the Township violated Sections 5.4(a)(1) and (5) of the Act when its Chief of Police unilaterally promulgated new rules and regulations and discontinued emergency vacation leave. The Chief also posted a job vacancy, which contained "Qualifications" that unilaterally altered the contractual work schedule. All of these actions were undertaken without first negotiating with the Charging Party.

The Hearing Examiner also found that the Respondent Township did not violate its obligation to negotiate when the Chief sought to reclaim his managerial prerogative to control outside employment of police personnel. Likewise, it was found that the Respondent Township did not violate Sections 5.4(a)(1) and (2) by the conduct of its Chief and Deputy Chief in having sent copies of his memoranda to a rival organization (the FOP).

By way of remedy, the Hearing Examiner recommended that the two illegal transfers be rescinded and the employees restored to their former positions in the Detective Bureau. The Hearing Examiner also ordered that the status quo ante be restored with respect to the unilateral emergency vacation leave change and the posting of a job vacancy where the "Qualifications" unilaterally altered the contractual work schedule. Finally, the Respondent Township was ordered to negotiate, upon demand, with respect to any proposed future changes in the rules and regulations of the Police Department, the grant of emergency vacation leave and/or alterations in job qualifications, which unilaterally altered contractual work schedule.

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

H.E. NO. 90-39

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Appearances:

For the Respondent, Savage & Serio, Esqs.
(Thomas J. Savage & Dawn A. Serio, of counsel)

For the Respondent, Cleary & Madden, Esqs.
(Melanie Achaves, of counsel)

For the Charging Party, S. M. Bosco Associates
(Simon M. Bosco, Labor Consultant)

For the Intervenor, Yacker & Granata, Esqs.
(Louis E. Granata, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 26, 1988, by the Old Bridge PBA, Local No. 127 ("Charging Party" or "PBA") alleging that the Township of Old Bridge ("Respondent" or "Township") has engaged in unfair practices within the meaning of

the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on June 30, 1988, the Chief of Police, Jerry Palumbo, distributed a directive, which discontinued a longstanding practice of permitting emergency vacation leave and established a two-officer limit per squad for granting vacation time off; on June 22, 1988, the Chief sent a memorandum to the PBA President threatening discipline for his failure to adhere to proper procedures; on June 30, 1988, the Chief posted two openings for positions, which were never negotiated with the PBA; in or around April or May 1988, Deputy Chief Joseph Napoli gave "psuedo-recognition" to a rival organization, Fraternal Order of Police Lodge No. 32 ("FOP"), by copying them in matters relating to the PBA; on June 3, 1988, the PBA President notified the Chief that the mail of the PBA was being tampered with; on May 5, 1988, John Grossman, who had been assigned to the Detective Bureau, was given a letter of reprimand and on June 3rd Grossman filed a grievance and, upon seeing the grievance, Capt. William Hatfield, Grossman's supervisor, stated that Grossman was "dead" and on June 20, 1988, Grossman was transferred "...back into uniform..." effective July 1, 1988; on April 12, 1988, David Kanig was accused by the Chief of having given certain information to Deputy Chief Theodore Young, who is viewed by the Chief as a "member of the opposition..."; on April 14, 1988, Kanig reported to the Township Police Headquarters to meet with Sgt. James Leslie where Kanig had reason to believe that he was in apprehension of discipline and, therefore, Kanig requested PBA

representation but this was effectively denied; on February 24, 1988, Deputy Chief Napoli issued a directive concerning the use of sick time in 1987 and when certain officers objected to the change, and requested PBA representation, Napoli refused their request; during the fall of 1987, the Chief developed new Rules and Regulations which were never negotiated with the PBA and when the PBA requested negotiations, the Chief refused, notwithstanding that the Township's Business Administrator, Joseph Leo, was willing to meet with the PBA on the matter of changes in the Rules and Regulations; the PBA has requested on a number of occasions a copy of the Township's Health and Hospitalization Insurance Plan Master Policy, but, as of the date of filing of the instant Unfair Practice Charge, the PBA has yet to receive the requested policy; on May 25, 1988, the PBA President received a threatening letter from the Chief for contacting an outside vendor, who has for the past ten years utilized off-duty police officers for crowd control; the Chief has created a "special training detail," the purpose of which is to avoid availability on the "overtime rotation list"; on April 1, 1987, the PBA called a special closed meeting regarding testing but the Chief announced that the meeting was over, notwithstanding that the meeting was later permitted to continue; certain "friends" of the Chief, who are members of the FOP, have received preferential treatment by way of special assignments to the Detective Bureau,

etc.; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) through (6) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 10, 1989. Pursuant to the Complaint and Notice of Hearing, hearings were held on July 18, August 21, August 22 and August 23, 1989, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.

Following the first day of hearing on July 18,1989, the Hearing Examiner sua sponte granted the previously denied motion of Chief of Police, Jerry Palumbo, to intervene[2/] in the instant proceeding by Order dated July 21, 1989 [C-3]. However, this

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ Hereinafter "Intervenor" or "Palumbo."

intervention was limited to Palumbo's appearance at the hearings beginning August 21, 1989, "...and there to present legal argument with respect to the application and effect in this proceeding of Title 40A:14-118, as amended, August 24, 1981, and as construed by the Appellate Division in Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984)..." Further, the Hearing Examiner stated that his Order allowing intervention was not to be construed as barring either of the original parties to this proceeding from calling Palumbo as a witness on its behalf.

Thereafter, on August 21, 1989, Palumbo sought to subpoena two witnesses as if he was a litigating party in this proceeding. A timely Motion to Quash Subpoenas was filed by the Township on August 23rd, which was joined in by the Charging Party, and the Motion was granted on August 30, 1989 [C-4]. Upon leave, counsel for Palumbo submitted to the Hearing Examiner a detailed offer of proof under date of October 20, 1989, as to what the two witnesses subpoenaed by Palumbo would have testified to [C-5]. The Hearing Examiner rejected the Intervenor's offer of proof on November 9, 1989 and at the same time set a date for the filing of post-hearing briefs.[3/] Post-hearing briefs on behalf of the Charging Party and the Township were filed by January 8, 1990. Neither the Charging Party nor the

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3/ The fourth and final hearing date, August 23, 1989, concluded with direct examination of the Township's only witness, Joseph P. Leo, the Business Administrator (4 Tr 157). In lieu of reconvening, the parties stipulated what Leo would have testified to on cross-examination (R-6).

Respondent has requested oral argument. A post-hearing brief on behalf of the Intervenor was received on January 18, 1990.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Old Bridge is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Old Bridge PBA, Local No. 127 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Jerry Palumbo is the Chief of Police of the Township of Old Bridge, and has been granted intervenor status in this proceeding, supra.

JOHN T. GROSSMAN

4. Grossman has been employed by the Township for 19 years in its Police Department and was, at the time of the hearing, a Patrolman (2 Tr 13). However, of these 19 years, Grossman has served 14 years in the Detective Bureau, just recently having been placed back "on the road" as a Patrolman (2 Tr 13). Grossman has

never been disciplined as a Detective nor has he ever been formally evaluated (2 Tr 14).

5. On March 21, 1988, Grossman was assigned to a stolen car case, which also involved another Patrolman, Charles Spinola, Jr.. He was later requested by Patrolman, Ross Moltisanti, to look into the matter further since "...there was something wrong with the case..." [2 Tr 16, 18, 19]. Moltisanti told Grossman that he thought there was the possibility of a cover-up and when the case was formally assigned to Grossman a few days later he spoke to Deputy Chief Theodore Young, who had Grossman review "...the tape of the chase..." (2 Tr 19, 20). Several days later Grossman was called into the office of Capt. William. Hatfield where Sgt. William Lynch, Grossman's immediate supervisor, Sgt. Jeffrey Robbins and Sgt. Charles Spinola, Sr. were present. Sgt. Spinola, the father of Spinola, Jr., supra, accused Grossman of "...trying to get his son for political purposes...," following which Grossman asked to be removed from the case. [2 Tr 20-23].

6. By April 19, 1988, it appeared that Grossman was under investigation (2 Tr 30) and after Grossman sent a memorandum to Capt. Hatfield on April 20, 1988 (CP-2) Sgt. Lynch threatened to transfer Grossman for writing to Hatfield (2 Tr 31, 32). After Grossman spoke to Mayor Arthur M. Haney on an unrelated matter he was told by Sgt. Robbins that he had been seen talking to the Mayor and that the Chief of Police, Jerry Palumbo, had ordered that he not speak to the Mayor while on duty (2 Tr 32-34). There then followed

the matter of Grossman's having been asked "...to look up a plate...," which followed Grossman's allegedly having gone to the Prosecutor's Office without authorization (CP-4, CP-5; 2 Tr 35-39, 43-46). This resulted in a written reprimand under date of May 4, 1988, from Capt. Hatfield (CP-7; 2 Tr 42-45).

7. On June 3, 1988, Grossman filed a grievance with respect to his reprimand of May 4, 1988, supra, and the grievance was denied by the Chief on June 13, 1988 (CP-8, CP-9, CP-10; 2 Tr 46-52).

8. Grossman was transferred from the Detective Bureau to the Patrol Division, effective July 1, 1988, after having been notified of this in or around June 20, 1988 (2 Tr 52-54). Grossman immediately sought the assistance of PBA President Arthur Carullo on June 20th and they met with the Chief on the same day to no avail (2 Tr 53, 54). A grievance was filed by the PBA on Grossman's transfer on June 21, 1988 (CP-11; 2 Tr 56, 63).

9. Subsequent to the filing of the two grievances, supra, Grossman appeared at a hearing on July 7, 1988, before the Township's Business Administrator, Joseph P. Leo,[4/] who sustained both grievances (R-1, 2 Tr 57). Thus, Leo overruled the Chief as to

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4/ On July 6, 1988, Grossman received a telephone call from Sgt. Gary Ruszalla, in which Ruszalla advised Grossman that he should not appear before Leo on July 7th, Ruszalla, adding that he was speaking for the Chief (2 Tr 58). Ruszalla also said that the Chief felt that Grossman's matters were not grievable (2 Tr 59).

the reprimand of Grossman[5/] and Grossman's transfer.[6/] Thereafter, the PBA took Grossman's grievances to arbitration (2 Tr 60).[7/] The arbitrator on September 14, 1988, found in Grossman's favor and ordered that he be placed back in the Detective Bureau and that the reprimand be expunged (R-2, p. 4; 2 Tr 60-62). However, a Judge of the Superior Court vacated the arbitrator's award under date of August 1, 1989, which decision has been appealed by the PBA (I-1; 2 Tr 64-66).

TERRY L. FRICKS

10. Fricks had been employed in the Township's Police Department for 14-1/2 years prior to his having retired on disability as of August 31, 1988 (2 Tr 67, 68). In his capacity as PBA Grievance Chairman he was acquainted with Grossman's reprimand grievance (CP-8) and his transfer grievance (CP-11) [2 Tr 68-75].

11. Fricks recalled a special meeting of the PBA sometime in the spring of 1987 to discuss pending litigation regarding promotional changes. Lt. Dennis Cronin came to the door and called PBA President Carullo out to the hallway to speak to him. In the presence of Fricks and others, Cronin told Carullo that he had been

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5/ The reprimand was removed from Grossman's personnel file (2 Tr 57).

6/ Grossman was ordered back to the Detective Bureau (R-1; 2 Tr 58).

7/ The record does not disclose why the PBA, which prevailed before Leo, was compelled to take the Grossman grievances to arbitration.

advised by the Chief to stop the meeting since they did not have permission to use Police Headquarters. [2 Tr 75, 76]. The meeting was stopped and the PBA representatives, including Fricks, proceeded to the office of Robert R. Shupin, the Business Administrator at that time. The PBA representatives argued that they had never needed a request to hold a meeting previously, after which the meeting was permitted to resume (2 Tr 76-78).

12. Fricks personally handed CP-11 (the transfer grievance) to Capt. Hatfield on June 21, 1988. The response of Hatfield was to state "What's this?" and after reading it he said (referring to Grossman) "He's dead. He's f------ dead" (2 Tr 70-72). Later Hatfield stated to Fricks that "We had a deal..." and then he repeated his earlier words, supra (2 Tr 73).

MICHAEL T. MOSER

13. Moser has been employed in the Township's Police Department for 15-1/2 years. He has been a Sergeant for the past two years, having been a Patrolman for the years prior thereto. He is currently a member of the FOP, and is represented by FOP Lodge No. 22 as a supervisor. [2 Tr 110, 111].

14. On June 3, 1988, Moser was standing with Fricks and Carullo at the rear of the Police Headquarters entrance. Fricks excused himself and intercepted Capt. Hatfield, as he was entering the building, at which time Fricks gave him a "packet of paper." After Hatfield had briefly examined the packet, he stated to Fricks "...He is f------ dead..." Moser did not know to whom Hatfield was

referring at that time but Fricks later indicated to Moser that it was Grossman's grievance. [2 Tr 112-114].

15. Moser recalled that in 1987, there was a special PBA meeting to discuss whether or not the PBA should take action regarding promotional testing. Shortly after the meeting was called to order, Lt. Cronin entered the room and asked Carullo "to come outside..." Carullo did so and "...there was some discussion..." as to whether the PBA meeting at that time and in that room "...was appropriate..." Carullo and others then went "upstairs" to meet with Shupin. Upon his return, Carullo stated that the matter had been "worked out" and that the meeting would continue.[8/] [2 Tr 118-120, 143].

ARTHUR CARULLO

16. Carullo has been a Patrolman for 12 years and has been a member of the PBA for 11-1/2 years. He has most recently been President of the PBA for 2-1/2 years since January 1987. [2 Tr 150].

17. Carullo has made numerous requests for data in connection with collective negotiations over the period of the past two years. These requests for data were first made by Carullo to the Chief and Deputy Chief Napoli and then to the Business Administrator. The PBA's requests included the "Master Policy" regarding insurance coverage. This request was acknowledged by Leo

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8/ When Moser had been President of the PBA between 1980 and 1897 he had never had to obtain permission to conduct PBA meetings, which were held once a month in the "Squad Room" at the "Municipal Center." [2 Tr 120, 121].

in a March 16, 1988, memorandum that he sent to the Township's Director of Finance, directing that the data be provided (CP-14).

18. Although Carullo testified on direct examination that the PBA was never supplied with the data requested (2 Tr 151-157), Carullo acknowledged on cross-examination that he signed a receipt for 32 of the requested documents, which were submitted to him by Alan F. Crane of Personnel with a covering memorandum dated December 1, 1988 (R-5; 4 Tr 90-93). The overwhelming number of the documents submitted to Carullo by Crane pertained to life insurance and hospitalization. Carullo also testified on direct examination that his efforts to obtain data on the Township's Schooling and Training Program were unsuccessful (CP-15; 2 Tr 162-171). However, on cross-examination Carullo acknowledged that Leo made a good faith effort to obtain the information requested by him concerning schooling and training from the Police Department (see CP-15 and 4 Tr 125). Carullo acknowledged further that some of the documents requested were in the possession of the administration of the Police Department and were not in the possession of the Township's civilian administration; and that when Leo was requested by Carullo to obtain certain information from the Chief, the Chief refused Leo's request (4 Tr 89, 90). Carullo also acknowledged that Leo has cooperated with him in his efforts to obtain the data requested and that the only refusals have been those of the Chief and Deputy Chief Napoli (4 Tr 94, 95).

19. Carullo corroborated the testimony of Fricks and Moser above, regarding the intervention of Lt. Cronin in the PBA meeting in 1987 where Cronin stated that the Chief had told him that the meeting could not continue. After Carullo and others met with Business Manager Shupin and the Chief, the Chief permitted the meeting to continue. [3 Tr 29-34].

20. After the above meeting incident, which apparently occurred in April 1987, Carullo noticed a distinct change in attitude on the part of the police administration, including the Chief, toward him as President of the PBA. This was indicated by such statements as "You're not going to beat city hall," "...we got a bigger pocketbook than you..." and "I played this game before..." [3 Tr 34, 35].

21. The 1986-88 Collective Negotiations Agreement provides in Article XXIII that a joint committee shall be established within 90 days of ratification of the agreement "...to review and possibly update the rules and regulations..." of the Police Department (CP-45, p. 24). There is no other reference in the agreement to "rules and regulations." On October 5, 1987, Carullo sent a memorandum to the Chief, which stated that on October 1, 1987, he had been informed by Deputy Chief Napoli that the Police Department had drafted a complete set of rules and regulations without notification to the PBA (CP-26; 4 Tr 6-12). Although the PBA never formally requested negotiations with respect to the

proposed Rules and Regulations of the Police Department, Carullo had sent the above memorandum of October 5th to the Chief. Sometime after October 5, 1987, Carullo had received a copy of the proposed Rules and Regulations, he encountered Deputy Chief Napoli and told him that they (the Rules) "...were supposed to be negotiated with our Review Committee..." In response, Napoli stated "...too bad, here they are..." [4 Tr 12]. Thereafter, the PBA filed a grievance on October 8, 1987 (CP-46) and on December 1, 1987, Business Administrator Shupin denied the grievance (CP-47) on the ground that Article XVII, §§2 and 3 of the Agreement allowed for the establishment of Rules and Regulations by the Township (see CP-45, p. 20; CP-48; 4 Tr 14-20).[9/]

22. Mayor Russell J. Azzarello denied the PBA's grievance with respect to the implementation of the Chief's Rules and Regulations on December 18, 1987 (CP-48). Since he was about to be succeeded by Haney on January 1, 1988, Azzarello agreed to turn the Rules and Regulations grievance over to the incoming administration and this was agreed to by the PBA. [4 Tr 19-21]. Thereafter, some discussion ensued with Leo, the new Business Administrator. The only tangible result was a memorandum from the PBA's Labor Consultant to Leo on February 8, 1988, which delineated the objectionable sections of the newly implemented Rules and Regulations for the Police Department (CP-49; 4 Tr 23-26).

9/ The Rules and Regulations became effective on October 23, 1987 (CP-27; 4 Tr 23, 43, 44).

Thereafter the Rules and Regulations issue attenuated on this record except for a brief reference to it in a letter from Leo to the PBA under date of June 22, 1988 (CP-28) and Carullo's testimony that Napoli had stated at a meeting (date unspecified) that the Chief was adamant that the subject of the Department's Rules and Regulations was non-negotiable (4 Tr 29, 30, 119-121). Carullo testified that Leo's response to the Chief's position was that "...certain rules and regulations..." were negotiable if they changed the terms and conditions of employment (4 Tr 30).

23. (a) The 1986-88 Collective Negotiations Agreement provides in Article XX, "Outside Employment and Activities," in part, that officers shall be entitled to "...obtain any lawful work while off duty..." but must consider their position with the Township as their "primary employment," and that "...any outside employment..." must not constitute "...any conflict of interest," and that "All outside employment shall be listed with the Chief of Police..." [CP-45, p. 22]. Prior to December 2, 1987, the PBA had a "Work Committee," which handled the distribution of outside employment ["...the jobs and billing and so forth..." (4 Tr 36)]. This Committee would submit assignments to the Chief, who would approve them if there was no problem (4 Tr 37). Then on December 2, 1987, the Chief issued a memorandum to "All Police Personnel," stating that outside employment would fall under the Rules and Regulations of the Police Department and would be under the direction of Planning and Administration (CP-31; 4 Tr 36, 37). The

Chief's memorandum of December 2nd also provided that outside employment will be scheduled by the "Work Committee," comprised of four named officers. Further, the Chief's memorandum directed that police personnel notify the "...Work Committee for all Voluntary Outside Employment desired..." and that any complaints should be directed to Sgt. Bonfante, who was to "...oversee the detail..." Thereafter, there were complaints that Deputy Chief Napoli had taken over the scheduling at Raceway Park and had scheduled himself for over $630.00 of work over a three or four-day period when most other personnel were averaging about $180.00 (4 Tr 38).

(b) On May 25, 1988, the Chief sent Carullo a memorandum, objecting to his having contacted the owner of Raceway Park concerning summer outside employment, which, the Chief stated, infringed upon his authority (CP-24; 4 Tr 39). The Chief emphatically stated to Carullo in this memorandum that the allocation of manpower fell under his auspices and that any scheduling would be handled through his office.[10/] The above changes in outside employment, as set forth in the Chief's memorandum of December 2nd, were never negotiated with the PBA (4 Tr 41, 42).

10/ After the Chief sent a memorandum to Leo on June 1, 1988, regarding the rate at which officers working on off-duty assignments should be paid (CP-30), Leo responded on June 9th, directing that the Chief make no commitments regarding the scheduling of officers for summer employment at Raceway Park and the rates of pay which may be authorized (CP-30; CP-29).

24. On June 30, 1988, the Chief issued a memorandum to all patrol and dispatch personnel regarding the discontinuance of emergency vacation leave, stating that this term was not in the collective negotiations agreement and would not be allowed (CP-22). The Chief noted that the prior practice of emergency vacation leave had caused unnecessary overtime. Carullo testified that the prior practice had been that if an emergency arose and there was adequate "...manpower on the road..." then an officer would be allowed to take the day off without notice, this practice having been in effect for at least Carullo's twelve years (4 Tr 47, 48). Although Carullo acknowledged that there was no provision in the agreement regarding this matter, the PBA's objection was that the Township had never negotiated the proposed change (4 Tr 53).

25. Also, on June 30, 1988, the Chief sent a memorandum to all police officers regarding job postings in the Narcotics Unit and the Detective Bureau, in which the Chief advised that there was one job assignment in the Narcotics Unit, several assignments in the Detective Bureau and that anyone interested should submit a letter by July 12, 1988 (CP-23). After this notice was posted at Headquarters, Carullo, on behalf of the PBA, took exception only to the job description for the Detective in the Narcotics Unit because "...it seemed...to mask a change in...our work schedule..." in order to avoid the payment of overtime (4 Tr 54, 55). Also, Carullo

objected specifically to the fact that this job description change was never negotiated (4 Tr 55, 56).[11/]

26. The PBA's objection to CP-39, consisting of three memoranda from Deputy Chief Napoli (April 6, April 18 and May 23, 1988) was that a copy was sent to the FOP (4 Tr 56, 57). This resulted in a memorandum from Carullo to the Chief under date of May 27, 1988 (CP-40), in which Carullo objected to the use of the Chief's office "...in the establishment of a rival Police Organization..." (4 Tr 57). The Chief also sent a like memorandum on August 11, 1988 (CP-40). Carullo also testified regarding the October 26, 1987 meeting where, according to Carullo, the Chief "...was attempting to start an FOP Lodge with the rank and file members..." This activity continued during the fifteen minutes that Carullo was present at this meeting. [4 Tr 58-62, 111-117]. The Chief never responded to Carullo's memorandum of May 27th (4 Tr 64).

27. On September 28, 1987, the Chief reprimanded Carullo in writing for alleged misuse of time and placed the letter of

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11/ Article VII, "Overtime," in the 1986-88 Agreement provides, in part, in Section E that "It is understood by the parties that at the time of execution of this Agreement, the negotiability of work schedules is in question. Therefore, the parties agree that the following work schedules are adopted and shall remain in full force and effect until either: The parties mutually agree, through collective negotiations, to alter them, assuming that work schedules are held to be negotiable, or; The Township determines that it wishes to implement, as a managerial prerogative, new work schedules, assuming that the work schedules are held to be non-negotiable. In which case, however, the Township shall negotiate with the P.B.A. over those aspects which affect negotiable terms and conditions of employment prior to the implementation of such schedules." [CP-45, p. 8][emphasis supplied].

reprimand in his personnel file (see generally CP-44; 2 Tr 123, 124; 4 Tr 72-74). Following a grievance hearing on January 27, 1988, Leo sustained Carullo's grievance and directed that the reprimand be removed from his file.

28. On June 22, 1988, Carullo received a letter of reprimand from Napoli for failure to attend mandatory in-service training on hazardous materials, which letter stated that it would be placed in Carullo's personnel file (CP-20;4 Tr 69). Carullo testified that he had been on vacation and that upon his return no one had told him about this particular in-service training requirement (CP-21; 4 Tr 69, 70). Thereafter, Carullo filed a grievance and the Business Administrator removed the letter of reprimand from Carullo's personnel file (4 Tr 70, 71).

29. With respect to the alleged non-receipt of mail by the PBA (CP-17; 3 Tr 35-37), Carullo testified that problems with the receipt of PBA mail have occurred at sometime between receipt in the municipal building and the time of delivery to Police Headquarters, which mail is often late and often is opened. However, he was unable to offer any specific evidence implicating the Township's civilian administration or the Police Department. [4 Tr 95-100].

30. Carullo testified without contradiction that he was retaliated against for having made complaints about unsafe vehicles in 1987, as a result of which he was assigned to the Runyon Reservoir where he was the lone person so assigned. There had never been a like assignment of an officer at that location. [4 Tr 102].

SCOTT DYSON

31. Dyson has been employed in the Township's Police Department for 15 years, the last five years as a Detective, assigned to criminal investigations (3 Tr 89, 90, 98). Dyson was assigned to the same case as Grossman, which involved the theft of "T tops" (the glass tops of automobiles), in the spring of 1988. The original officers involved in that case were Moltisanti and Spinola, Jr. [3 Tr 90]. Grossman, in the course of his investigation, expressed some uneasiness to Dyson as to the relationship between Spinola, Jr., and his father, Sgt. Charles Spinola, Sr., the result of which was that Grossman asked to be relieved from the case (3 Tr 92, 93). However, because Capt. Hatfield and Sgt. Lynch expressed the utmost faith and confidence in Grossman, Grossman continued on the case, which led to Grossman's going to the Office of the Middlesex County Prosecutor with respect to an indictable offense involving the "T Tops" (3 Tr 93, 94). Capt. Hatfield was aware that Grossman went to the Prosecutor's Office and approved of it (3 Tr 95). In or around March 1988, Charles Spinola, Sr. stated to Capt. Hatfield that Grossman "...was attempting to get his son..." (3 Tr 95, 96).

DAVID KANIG

32. Kanig has been employed in the Township's Police Department for 14 years and at the time of the hearing was assigned to the Patrol Division, having been assigned 14 months previously to the Detective Bureau where he had worked for four years (3 Tr 106,

107). On April 12, 1988, Kanig was assigned to "...the task force..." and, following a request by a Detective in the Prosecutor's Office to telephone Sgt. James Leslie, he did so and an argument ensued (3 Tr 109). Leslie accused Kanig of providing information to Deputy Chief Young or a newspaper with respect to electronic surveillance equipment that had been purchased by the Police Department (3 Tr 109). On April 13th, a Deputy Chief at the Prosecutor's Office told Kanig that he was to meet with Leslie on April 14th "...per orders of the Chief..." (3 Tr 110, 111). On the same day, April 13th, Kanig contacted PBA Vice President William C. Moscaritolo and asked him to be present at the meeting with Leslie on April 14th (3 Tr 111). On April 14th, when Kanig and Moscaritolo arrived at Leslie's office, Leslie told Moscaritolo to leave the room since the matter was "personal" between Leslie and Kanig (3 Tr 111, 112). Moscaritolo testified that Leslie told him to get the f--- out and that he left at Kanig's request but overheard Leslie yelling at Kanig and making accusations against him (3 Tr 127-129). Kanig's account of the meeting was more restrained. He testified that he and Leslie spoke briefly about Leslie's complaint regarding the electronic surveillance equipment. Leslie then stated that if Kanig failed to explain his "complicity" then Kanig "...might be transferred..." [3 Tr 112, 113]. Leslie did not accept Kanig's explanation and at that point Moscaritolo was allowed to reenter the room. Leslie told Kanig that the possibility of his transfer was up to the Chief (3 Tr 112-113, 114). Immediately thereafter, Kanig and

Moscaritolo met with the Chief, who said that he couldn't discuss the matter with Kanig since it had become a union matter and that he had not had an opportunity to discuss it with Sgt. Leslie (3 Tr 114, 115).

33. The status quo of Kanig continued until June 27, 1988, when Kanig was transferred from the Detective Bureau to the Patrol Division, this transfer allegedly being based upon the Chief's prerogative to transfer (3 Tr 115, 116). Kanig filed a grievance on July 20th and Fricks handled his grievance but there was no disposition (3 Tr 116, 117).

WILLIAM C. MOSCARITOLO

34. Moscaritolo has been employed in the Township's Police Department for 14-1/2 years as a Patrolman and was until July 1989 the Vice President of the PBA, having served for 2-1/2 years (3 Tr 125, 126). As Vice President of the PBA, Moscaritolo processed grievances (3 Tr 126).

35. On April 13, 1988, Moscaritolo was contacted by Kanig regarding the representation of Kanig the next day in a meeting before Sgt. Leslie where Leslie told Moscaritolo to get the f--- out, which Moscaritolo resisted to no avail (3 Tr 127, 128). Moscaritolo left at Kanig's request but overheard Leslie yelling at Kanig and making accusations against him (3 Tr 129). Thereafter, Moscaritolo was permitted to reenter the meeting with Leslie and Kanig where Leslie stated that he did not trust Kanig and that it would "...be up to the Chief as to what happened but there was talk

of a transfer..." (3 Tr 129, 130). Thereafter, Kanig asked to see the Chief and Kanig and Moscaritolo went to the Chief's office where the Chief stated that he would have "...to discuss the matter with Leslie and if there were a problem of trust, it would be up to Sgt. Leslie in regard to the transfer" (3 Tr 131).[12/]

JOSEPH P. LEO

36. Leo has been the Township's Business Administrator since early January 1988, having been appointed by Mayor Haney, who assumed office on January 1, 1988 (4 Tr 134).

37. In the spring and early summer of 1988, Haney attempted to make a number of changes in the Rules and Regulations of the Police Department, following which the Chief sought to block the proposed rule changes by restraining order and a Judge of the Superior Court did restrain most of the proposed rule changes (4 Tr 136).

38. Since Leo assumed the position of Business Administrator in early January 1988, he has issued a series of memoranda to the Chief seeking various kinds of reports and information as to the Police Department, including the distribution of overtime, the distribution of school and training opportunities,

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12/ The testimony and exhibits concerning Kenneth Popek and Charles Miller do not involve an unfair practice under the Act. Therefore, these allegations and the proofs of the Charging Party are deferred to the parties' grievance procedure under State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)[see 3 Tr 132-142, 146-153; CP-41, CP-42, R-3, R-4].

the use of bereavement passes, etc.. Most of these requests have not been answered by the Chief. [4 Tr 136, 137].

39. As a result of subsequent litigation by the Chief, regarding the establishing of the position of Director of Public Safety, Leo was by Township Ordinance designated Acting Public Safety Director until a full-time Director was selected (4 Tr 138, 139). This occurred in June 1988, and since that time Leo as the Acting Director of Public Safety has issued instructions to the Chief to respond to prior requests for data enumerated above, i.e., overtime, schooling, bereavement passes, etc. The Chief has refused to obey these instructions from Leo about 90% of the time. [4 Tr 140; R-6 ¶1].

40. In the spring or early summer of 1988, Leo was asked by a payroll officer, who had received a number of payroll request change forms from Deputy Chief Napoli, whether the requests for payroll contributions to the PBA should be diverted to the FOP (4 Tr 142, 143). The legal advice obtained by Leo was that these changes in deductions or contributions, supra, should not be permitted and the payroll office was so advised (4 Tr 143).

41. Leo testified credibly that he has never refused to negotiate the impact of the Rules and Regulations changes promulgated by the Chief in October 1987. However, the Chief and others in the administration of the Police Department at all times vigorously opposed negotiations with respect to Rules and Regulations. [4 Tr 147-150].

42. Leo acknowledged the complaints of the PBA in the summer of 1988 regarding overtime opportunities at the Raceway in the Township (4 Tr 153, 154).

43. Leo has served the Chief with three different sets of written disciplinary charges, if not more, and these have included charges of insubordination for failure to obey Leo's orders concerning matters involving labor relations. Also, Leo has obtained a court order directing the Chief to submit the personnel files of members of the Police Department to his office on two occasions, once in 1988, and once in 1989, but these orders have not been obeyed and contempt has been sought. [4 Tr 156, 157; R-6 ¶3]

* * * *

At the outset of the third day of hearing on August 22nd, the representative of the Charging Party made an offer of proof, which was not objected to by the Township, the pertinent parts of which follow and are deemed evidentiary in this proceeding:

a. A Democratic administration governed the Township in 1986. During 1986 or early 1987, approximately 13 promotions were made to the position of temporary Sergeant, pending a testing procedure and permanent appointments. [3 Tr 4, 5]. When an ordinance was adopted to make these positions permanent, a lawsuit was filed by 25 members of the Police Department, which sought to overturn the permanent Sergeant promotions (3 Tr 5, 6). At a special meeting of the PBA in April 1987, it was decided not to support this litigation (3 Tr 7, 8). Following a court decision, on

January 16, 1987, invalidating this ordinance, the Township attempted to cure its legal deficiencies by amendment. When this became the subject of a second lawsuit by the same 25 plaintiffs, the PBA joined in this lawsuit [3 Tr 9-12]. This latter lawsuit has still not been resolved (3 Tr 9-11).@[13/]

b. Between June and September 1987, a number of the foregoing temporary promotions were made permanent, including 17 Sergeants. Thereafter, the Superior Officers (including the Sergeants) severed their affiliation with the PBA and created FOP Lodge No. 22 in November 1987. [3 Tr 13-15]. At about the same time, Haney, a Republican, became Mayor of the Township with a Republican majority on the Council. Leo was appointed Business Administrator as of January 1, 1988, replacing Shupin. [3 Tr 15].[14/]

ANALYSIS

Introductory Statement

The Township contends that it cannot be held legally responsible for the conduct of its Police Chief, the Intervenor

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13/ A reading of the record makes clear that there is considerable confusion as to the sequence of events with respect to the filing of the first suit and the filing of the second suit, both as to chronology and as to content (see 3 Tr 5-13).

14/ On the third day of hearing, the Charging Party without objection offered an amendment on the record to its Charge as follows: (1) on May 19, 1989, the Township required a special report of Carullo (CP-18); and (2) on August 11, 1989, the police administration continued to show de facto recognition of FOP Lodge 32 by copying Robert Kellett, the President of FOP Lodge 32, on memoranda from the Chief to Leo (CP-37). [3 Tr 45-47].

herein, since the Chief acted on his own and without authorization from the civilian administration of the Township from the Mayor on down. Nor, did the Township ratify the conduct of its Chief of Police, which forms the essential basis for the instant Unfair Practice Charge, as amended.

On the other hand, the Chief argues that the conduct that he engaged in was carried out on behalf of the "appropriate authority," which, as defined in N.J.S.A. 40A:14-118 includes the Mayor, manager, or such other appropriate executive or administrative officer. Thus, does the Chief contend that his conduct must be imputed to the Township under ordinary agency principles. Accordingly, it is the Mayor and those who serve under him, rather than the Chief of Police, who are responsible for for the adoption of an ordinance providing, inter alia, for the "police function," including the adoption of "rules and regulation" and the "...appointment of a chief of police..." Further, such ordinance shall provide that "...the chief of police...shall be the head of the police force and...be directly responsible to the appropriate authority for the...routine day to day operations thereof..." [Title 40A, supra].

The threshold question becomes (1) whether this case involves the Township's being bound under ordinary agency principles by the conduct of the Chief or (2) whether the conduct of the Chief was without authorization, apparent authority or ratification by the Township. In the latter case the Township would be exonerated from any responsibility for the unfair practice charges alleged by the

PBA. Further, since the Chief of Police is not a "public employer" within the meaning of Section 3(c) of our Act, the PBA would necessarily be without a remedy herein should the Township be absolved of liability for the actions of its Chief.

The Commission has decided two cases, which are relevant to deciding the above question, namely: Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983) and Matawan-Aberdeen Reg. Bd. of Ed. & Kidzus, P.E.R.C. No. 85-110, 11 NJPER 307 (¶16109 1985). In Commercial, the issue was whether or not the alleged illegal conduct of the Board's Superintendent and President was binding upon the Board as a "public employer." Without delving into the specific facts at this time, suffice it to say that the Commission concluded that a certain threatening letter issued to an employee of the Board by its Superintendent together with the threat of its President in a negotiations meeting was deemed to have occurred "...within the scope of the authority delegated to them by the Board and their apparent authority as Board agents, regardless of whether the Board formally ratified or even knew of the threats they made..." (8 NJPER at 552)(emphasis supplied).

In contrast, however, the Commission in Matawan concluded that a single Board member was not a "public employer" within the meaning of the Act, supra, nor was he "...acting as an agent or representative of the Board..." [as defined in Section 3(e) of the Act] when he circumvented the Association by contacting two non-tenured members in the unit and threatened their employment

unless they agreed to waive contractual salary benefits. The Commission here distinguished Commercial, supra, when it observed that the Board member (Kidzus) was clearly not acting as an agent of the Board since his conversations with the two employees did not occur "...within his normal duties or 'apparent authority' ..." Rather, Kidzus "...acted solely as an individual board member. He was not authorized to so speak by the Board; it did not approve or ratify his actions; and he did not even have 'apparent authority' ..." (11 NJPER at 308, 309).

Thus, the Hearing Examiner must discern in each instance the precise capacity in which the Chief of Police was acting, i.e., with or without "apparent authority," vis-a-vis the facts alleged and proven by the PBA. If the Chief's conduct was within the scope of his "apparent authority" in performing the duties of his office in any given situation, then, plainly, the Township is bound and is responsible for his conduct whether or not it was formally ratified. However, if the conduct of the Chief was without "apparent authority," then the Township is absolved and the Charging Party is left without a "public employer" to which a remedy might attach.

The Respondent Township Violated Sections 5.4(a)(1) And (3) Of The Act When, Following A Reprimand To John T. Grossman On May 4, 1988, And The Filing Of Two Grievances, The Chief Transferred Grossman From The Detective Bureau To The Patrol Division As Of July 1, 1988.

The Hearing Examiner has little difficulty in finding a causal connection between Grossman's first grievance of June 3,

1988, protesting his reprimand on May 4, 1988, and the Chief's transfer of Grossman from the Detective Bureau to the Patrol Division, effective July 1, 1988.

It will be recalled that Moser testified without contradiction that he observed Fricks give Capt. Hatfield a "packet of papers" on June 3, 1988, the day that Grossman filed his grievance as to the reprimand. After Hatfield had briefly examined the packet, he said to Fricks "...He is f------ dead..." Moser later learned from Fricks that it was Grossman's grievance. [See Findings of Fact Nos. 7 & 8, supra].

When Grossman learned of his imminent transfer around June 20, 1988, he sought the assistance of PBA President Carullo but a meeting with the Chief on June 20th was to no avail. The PBA filed a grievance on Grossman's transfer on June 21st. Fricks testified without contradiction that on June 21st he handed the Grossman transfer grievance to Hatfield, who, after asking "What's this?" and then reading it, again said "He's dead. He's f------ dead..." After stating to Fricks that "We had a deal...," he repeated his earlier words. [See Findings of Fact Nos. 8 & 12, supra].

A hearing on the two Grossman grievances was held before Business Administrator Leo on July 7, 1988, even though Sgt. Ruszalla had attempted to prevent Grossman from appearing (see Finding of Fact No. 9, supra). Leo overruled the Chief both as to the reprimand of May 4th and the transfer of July 1st. Although the

PBA later prevailed before an arbitrator a Judge of the Superior Court vacated the arbitrator's award and this decision is on appeal at this time. [See Finding of Fact No. 9, supra].

With respect to the Section 5.4(a)(1) and (3) allegations as to Grossman's grievance filings and his transfer on July 1, 1988, this case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)[15/] in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.[16/] In such cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

15/ The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

16/ These provisions of the NLRA are directly analogous to Section 5.4(a)(1) and (3) of our Act.

The Court in Bridgewater made clear that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. The Charging Party may do so by direct evidence or by circumstantial evidence demonstrating that the employee engaged in protected activity, that the employer knew of this activity, and, finally, that the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].17/

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or if its explanation has been rejected as pretextual, then there is a sufficient basis for finding a violation of the Act without more. However, where the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have occurred even in the absence of protected conduct [Id. at 242].18/

17/ However, the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

18/ This affirmative defense need only be considered if the Charging Party has proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id].

The Commission has held on many occasions that the filing of grievances is a protected activity. For example, see Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); and Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988), adopting H.E. No. 88-52, 14 NJPER 319, 322 (¶19117 1988).

It cannot be gainsaid that Grossman's filing of grievances on June 3rd and June 21st constituted protected activities under the Act and that the Township in fact knew of Grossman's grievance activities. Further, there can be no doubt but that the PBA has proven that the Township, by the conduct of Capt. Hatfield on the same dates as the grievance filings, manifested hostility or animus toward Grossman's exercise of protected activities. There can be no justification or excuse for Hatfield's two scatological outbursts to Fricks upon being handed the grievances separately on June 3rd and June 21st. An inference may be drawn that Hatfield's hostility was directly imputable to the Chief thereby tainting the Chief's action in transferring Grossman on July 1, 1988.

Since the Township offered no evidence to demonstrate that Grossman's transfer would have occurred even in the absence of his protected activities, the Hearing Examiner necessarily concludes

that the grievance filings were a motivating factor in the Chief's decision to transfer Grossman.[19/]

It having been found that Section 5.4(a)(3) of the Act was violated by the Chief's transfer of Grossman on July 1, 1988, and derivatively Section 5.4(a)(1), it remains to determine whether the Chief acted with or without "apparent authority." It appears to the Hearing Examiner that the Chief's action in transferring Grossman was within the scope of his "apparent authority," however, misplaced and, thus, the Township is bound by his actions. Therefore, the Hearing Examiner will recommend that Grossman be transferred back to the Detective Bureau in order to remedy this Section 5.4(a)(1) and (3) violation of the Act.[20/]

The Respondent Township Violated Section 5.4(a)(1) Of The Act When David Kanig Was Summoned To A Disciplinary Interview By Sgt. James Leslie On April 14, 1988, Where Kanig Was Denied Representation By The PBA Vice President, Following Which Kanig Was Transferred On June 27, 1988, From The Detective Bureau To The Patrol Division.

This would appear to be a classic "Weingarten" violation of our Act. Kanig was summoned to a meeting on April 14, 1988, by Leslie. However, recall that two days earlier Kanig and Leslie had

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19/ The fact that Leo on July 7, 1988, sustained each of Grossman's grievances, and ordered the removal of the reprimand from Grossman's personnel file and rescinded Grossman's transfer from the Detective Bureau, affects only the remedy for the violation and not the violation in the first instance.

20/ Grossman suffered no reduction in salary by his transfer on July 1, 1988.

argued in a telephone conversation where Leslie had levelled a serious accusation against Kanig, regarding the divulging of information about electronic surveillance equipment. Also, Kanig appeared on April 14th "...per orders of the Chief..." Clearly, Kanig was placed in immediate apprehension of discipline when he appeared before Leslie with PBA Vice President Moscaritolo, whose presence Kanig had requested the prior day. Moscaritolo was told by Leslie to leave the room since the matter between Leslie and Kanig was "personal." Moscaritolo testified that Leslie told him to get the f--- out. At Kanig's request, Moscaritolo left the room but overheard Leslie yelling and making accusations at Kanig. Leslie told Kanig that if he failed to explain his "complicity" then he "might be transferred..." Leslie rejected Kanig's explanation. When Moscaritolo reentered the room Leslie stated that he did not trust Kanig and that the possibility of a transfer was up to the Chief. Immediately thereafter, Kanig and Moscaritolo met with the Chief who said that he would have to discuss the matter with Leslie and "...if there was a problem of trust, it would be up to Sgt. Leslie in regard to the transfer..." (3 Tr 131). About six weeks later, June 27th, Kanig was transferred by the Chief from the Detective Bureau to the Patrol Division. Kanig's grievance, protesting his transfer, had not been resolved as of the hearing in this proceeding. [See Findings of Fact Nos. 32-35, supra].

The Commission has followed the rule of NLRB v.Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975) since at least East Brunswick Bd.

of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (1980). The Commission has applied the Weingarten rule in cases where the facts have indicated that there was a reasonable objective belief that an employee's participation in an investigatory interview might result in discipline: See, for example, State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563, 565 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 377, 378 (¶19146 1988); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 304, 305 (¶19109 1988); Dover Municipal Utilities Authority, supra (10 NJPER at 339, 340); Stony Brook Sewage Authority, P.E.R.C. No. 83-138, 9 NJPER 280, 281 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982), adopting H.E. No. 82-59, 8 NJPER 400, 401 (¶13183 1982); Camden County Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466, 467 (¶12206 1981); and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432, 433 (¶12192 1981).

Notwithstanding, that Kanig acquiesced in Leslie's order that Moscaritolo leave the room, the Hearing Examiner refuses to conclude that Kanig voluntarily waived his Weingarten rights since the atmosphere was clearly coercive. Thus, Kanig had the Weingarten right to have had Moscaritolo present at all times during the disciplinary interview with Leslie.

The Hearing Examiner agrees with the contention of the Charging Party that the complete vindication of Kanig's "Weingarten"

rights entitles him to an order transferring him back to the Detective Bureau from the Patrol Division . [See PBA Brief, pp. 29-31]. The record demonstrates that what transpired in the meeting between Leslie and Kanig on April 14, 1988, resulted in the retaliatory decision of the Chief to transfer Kanig on June 27, 1988. Thus, the decision of the NLRB in Kraft Food Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980), as applied by the Commission in Dover, supra, appears to be applicable here. This is so even though the NLRB in Taracorp Industries, 273 NLRB No. 54, 117 LRRM 1497 (1984), overruled its Kraft Food test concerning reinstatement and back pay. It concluded it had no authority to order reinstatement and back pay for a Weingarten violation unless the discipline was in retaliation for exercising Weingarten rights. It relied on Section 10(c) of the NLRA, 29 U.S.C. §141 et seq., which provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.21/

For the same reasons as in the case of Grossman, the Hearing Examiner concludes that the Chief's conduct in transferring Kanig was within the scope of his "apparent authority" and again the Township is bound by his action. Therefore, the Hearing Examiner

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21/ In Jackson Tp., supra, the Hearing Examiner declined to recommend a Kraft remedy without deciding whether or not Kraft was still an appropriate guide. There the interview was found to be lawful.

will recommend that Kanig be transferred back to the Detective Bureau in order to remedy this Section 5.4(a)(1) violation of the Act.[22/]

The Respondent Township Violated Section 5.4(a)(5) Of The Act When Its Chief Of Police Unilaterally Promulgated New Rules And Regulations, Effective October 23, 1987, Notwithstanding That The Mayor Attempted To Make Certain Changes In These Rules And Regulations Early In 1988 And That The Business Administrator Was Willing To Negotiate The Impact With The PBA.

The leading case on the subject of the negotiability of a public employer's rules and regulations is Tp. of Ocean, P.E.R.C. No. 81-133, 7 NJPER 333 (¶12149 1981) where the public employee representative sought to have declared as an illegal subject a provision in an existing agreement, which gave the employer the right "...to unilaterally establish reasonable new rules or modifications of existing rules governing working conditions..." Since this clause plainly granted to the employer the unfettered right to establish unilaterally rules governing working conditions, the Commission, in an exhaustive analysis, concluded that the clause was contrary to the "Proposed new rules" provision of Section 5.3 of the Act. Accordingly, it constituted an illegal subject of negotiations. The Commission cited Tp. of West Windsor v.P.E.R.C., 78 N.J. 98 (1978) and Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978) for the proposition, inter alia, that

22/ Like Grossman, Kanig suffered no reduction in salary by his transfer on June 27, 1988.

the above-quoted provision was in conflict with Section 5.3, which is "an imperative and mandatory statutory enactment," that may not be modified by negotiated agreement [7 NJPER at 335]. Therefore, the public employee representative could not have waived its right to negotiate future proposed rules and regulations.

Similarly, in Boro of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982), a clause similar to that in Ocean Tp., supra, was at issue. The Commission agreed with the Borough that its clause was less intrusive on Section 5.3 rights than the clause in Ocean Tp., in that the right granted to the Borough was not "unlimited." Nevertheless, the Commission concluded that the clause at issue diluted the Union's Section 5.3 rights because it did not ensure that the Union had the right to negotiate over proposed new or modified rules before any changes were made. Noteworthy was the fact that the clause at issue of Mountainside required the Borough to notify the Union of any proposed changes and to provide an opportunity for input. However, the Commission stated that these procedural assurances did not protect the statutory right to negotiate. Thus, did the Commission conclude that the contract clause proscribing negotiations as to proposed rules and regulations was an "illegal subject of negotiations" and that it must be removed from the contract. [9 NJPER at 82].

It would appear beyond peradventure of doubt that the Ocean and Mountainside cases, govern the situation at hand. Article XXIII of the 1986-88 Collective Negotiations Agreement provides for the

establishment of a joint committee "...to review and possibly update the rules and regulations...." This clause at least suggests some quantum of input by the PBA as was the case in Mountainside. When Carullo learned on October 1, 1987, from Deputy Chief Napoli, that the Police Department had drafted a complete set of new Rules and Regulations, he wrote to the Chief on October 5th, advising the Chief of the information that he had received.

Although Carullo's "demand" for negotiations, regarding any changes in the Rules and Regulations, was less than clear, a fair reading of this memorandum to the Chief (CP-26) indicates that the position of the PBA was that any such changes had to be negotiated. Recall that after October 5, 1987, when Carullo had received a copy of the proposed Rules and Regulations, he went to Deputy Chief Napoli and stated that these Rules were supposed to be negotiated with the review committee. Napoli's response was a flippant "...too bad, here they are..." (4 Tr 12). When a grievance was filed on October 8th, the response of the Township on December 1, 1987, by its then Business Administrator Shupin was that the Management Rights Article (XVII, §§2 and 3) allowed for the establishment of the new Rules and Regulations, which had become effective on October 23, 1987. [See Finding of Fact No. 21, supra].

Notwithstanding that the ultimate resolution of the grievance was carried over to the administration of Mayor Haney after January 1, 1988, no change in the October 23, 1987, Rules and Regulations ever occurred through collective negotiations or

otherwise. This was the case even though Leo testified credibly that he had never refused to negotiate the impact. [See Findings of Fact Nos. 22, 41, supra].[23/]

The Hearing Examiner has no doubt but that the conduct of the Township through its representatives, including the Chief, constituted a refusal to negotiate in good faith as required by Section 5.4(a)(5) of the Act. Once again it appears that the Chief's promulgation of new Rules and Regulations, which became effective on October 23, 1987, fell within the scope of his "apparent authority." He was not effectively barred by the Township from so acting even though his conduct was in obvious conflict with Title 40A, supra.

As has been previously noted, this statute, as amended August 24, 1981, invests in the "appropriate authority" (previously defined) the power to adopt and promulgate rules and regulations governing the police force. The fact that a Democratic administration was in office prior to January 1, 1988, and was succeeded by a Republican administration, which was somehow more conciliatory toward the PBA, is totally irrelevant (see Charging Party's Brief pp. 42-44; Findings of Fact Nos. 21, 22; and pp. 24, 25, supra). Therefore, the Township's refusal to negotiate,

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23/ It is noted that in the spring and early summer of 1988, Mayor Haney had attempted to make a number of changes in the new Rules and Regulations, following which the Chief sought to block the rules changes by restraining order and a Judge of the Superior Court did restrain most of the proposed rule changes (see Finding of Fact No. 37, supra).

regarding a putative "illegal subject," constituted a refusal to negotiate within the meaning of the Commission's decisions in Ocean Tp. and Mountainside, supra. Thus, an appropriate remedy will be recommended hereinafter.[24/]

The Respondent Township Violated Section 5.4(a)(5) Of The Act When The Chief Unilaterally Discontinued Emergency Vacation Leave On June 30, 1988.

Carullo testified without contradiction that prior to June 30, 1988, the practice with respect to emergency vacation leave was that if an emergency arose and there was adequate "...manpower on the road..." then an officer would be allowed to take the day off without notice. Further, this practice had been in effect for at least the twelve years of Carullo's employment. The Chief's memorandum abrogating this practice, effective June 30, 1988, was based upon his position that emergency vacation leave was not contained in the contract and that it had caused unnecessary overtime (CP-22). Carullo acknowledged that there was no provision in the agreement with respect to such leave but added that the PBA nevertheless objected to the fact that the Township had never negotiated the proposed change. [See Finding of Fact No. 24, supra].

24/ Neither the finding of a violation of the Act nor the recommending of a remedy is time-barred by Section 5(c) of the Act since the actions of Mayor Haney and Leo in the first half of 1988 occurred within six months of the filing of the charge on July 26, 1988. [See Findings of Fact Nos. 22, 37, 41, and Local Lodge 1424 IAM v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 416, 45 LRRM 3212 (1960) and Essex County Bd. of Chosen Freeholders, E.D. No. 76-33, 2 NJPER 113, 114 (1976)].

The PBA cites the twin decisions of the Commission in City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982) and P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982) for the proposition that the "...granting and scheduling of time off is a clearly negotiable subject to the extent that the agreed-upon system does not cause manpower levels to fall below an employer's manning requirements..." (see 8 NJPER at 305 and 568). It is noted that the position of the Chief was that unnecessary overtime was being caused by the grant of emergency vacation leave but significantly he failed to state that the practice had interfered with the minimum manning requirements in the Police Department. [See, also City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978)].

The Commission held in Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983) that the town violated Sections 5.4(a)(1) and (5) of the Act when it unilaterally limited the amount of vacation time an employee could take during the July-August period, citing the earlier Elizabeth cases, supra. The Commission observed that the Chief of Police in Harrison did not base his decision to limit the amount of vacation time taken in July and August upon his concern with minimum manning but rather he acted because he believed that it was unfair to allow officers of greater rank and seniority to receive larger amounts of summer vacation time

at the expense of the less senior officers who received smaller amounts.[25/]

Notwithstanding that there is no express contractual term in the 1986-88 Collective Negotiations Agreement regarding emergency vacation leave, it is clear from the testimony of Carullo that there existed a binding past practice, which had existed at least over the twelve years of his employment. The decisions of the Courts and the Commission are well settled that a binding past practice is generally entitled to the same status as a term and condition of employment, defined either by the terms of the collective negotiations agreement or by statute. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978); Watchung Boro, P.E.R.C. No. 81-88, 7 NJPER 94 (¶12038 1981) and Cty. of Sussex, P.E.R.C. No. 88-4, 8 NJPER 431 (¶13200 1982). Further, where an agreement is silent or ambiguous on the particular issue in dispute, then past practice controls. See Rutgers, The State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982); Cty. of Sussex, supra; Barrington Bd. of Ed., P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Dkt. No. A-4991-80 (1982).

In United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970) the Court of Appeals stated that whether the prior conduct establishes a "working

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25/ See also: Tp. of Marlboro, P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987); Town of West New York, I.R. No. 89-14, 15 NJPER 199 (¶20084 1989); and County of Essex, I.R. No. 90-2, 15 NJPER 459 (¶20188 1989).

practice" depends upon a consideration of the facts and circumstances of the case. Thus, one might reasonably consider the mutual intent of the parties, their knowledge of and acquiescence in prior acts, in addition to evidence of whether there was joint participation in the prior course of conduct (Id. at 2597). See also, Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part, 180 N.J. Super. 440 (1981).

There being no express contractual provision to the contrary in the case at bar, the Hearing Examiner finds and concludes that the Chief's unilateral action, abrogating emergency vacation leave as of June 30, 1988, supra, constituted an action in derogation of the obligation of the Township to negotiate over this subject. Since the Chief in this instance was once again clearly acting within the scope of his "apparent authority," the Township is bound by his action and Section 5.4(a)(5) of the Act was violated. An appropriate remedy will be recommended hereinafter.

The Respondent Did Not Violate Section 5.4(a)(5) Of The Act When The Chief On December 2, 1987, Sought To Reclaim His Managerial Prerogative Of Assigning Police Personnel To Outside Employment Since The Prior Practice Was Illegal.

As previously found in Finding of Fact No. 23(a), supra, Article XX of the 1986-88 Agreement provides, in part, that "All outside employment shall be listed with the Chief of Police..." (CP-45, p. 22)(emphasis supplied). However, the practice prior to December 2, 1987, as testified to by PBA President Carullo, was that

the PBA handled the distribution and assignment of outside employment, which assignments were then submitted to the Chief who would approve them if there was no problem (4 Tr 36, 37).

This practice, although not inconsistent with Article XX, would appear to have been illegal under the Commission's decision in City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522, 523 (¶16184 1985). There the specific contract language stated that all outside employment during off-duty hours "...will be administered by the P.B.A. President or his designee and the Director of Police or his designee..." This clause was deemed unlawful because the approval of outside employment for police officers by the the Director of Police and the PBA President "...involves an undue delegation of managerial authority..." (11 NJPER at 523).

Thus, when the Chief on December 2, 1987, sought to reclaim his managerial authority over the assignment of police personnel for outside employment, his action was legal on its face since it constituted the valid exercise of a managerial prerogative. He restated this prerogative in his memorandum to Carullo of May 25th, the second paragraph of which refers to the fact that "...any allocation of extra manpower" fell under his auspices and that scheduling would be handled through his office (CP-24).

The complaints of the Township's police officers, regarding the administration of outside employment on and after December 2, 1987, e.g., Deputy Chief Napoli's alleged abuse, should have been

addressed as grievances under the collective agreement.[26/] The grievance course was taken by the PBA in Tp. of Montclair, P.E.R.C. No. 80-39, 15 NJPER 629 (¶20264 1989) after the township in that case unilaterally adopted a policy on outside employment during off-duty hours. The PBA objected to several paragraphs under "Procedure," which pertained to the written reporting of outside employment, the requesting of permission in writing and the necessity for township approval before outside employment could be accepted. The Commission permitted the grievance to proceed to arbitration in a "Scope" proceeding because, under the cases cited, negotiating (arbitrating) over the procedures at issue would not substantially limit governmental policy-making powers. In any event, the township could not unilaterally require prior approval: Ass'n of N.J. State College Faculties, Inc. v. N.J. Board of Higher Education, 66 N.J. 72, 76, 77 (1974); Somerset Cty., P.E.R.C. No. 84-92, 10 NJPER 130, 131 (¶15066 1984); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125, 128 (¶18056 1987). However, the Charging Party herein failed to follow the successful course taken by the PBA in Montclair, supra.

Thus, the change implemented unilaterally by the Chief on December 2, 1987, having been within his prerogative to regulate

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26/ It is noted that no demand to negotiate the changes made by the Chief on December 2nd was ever made by the PBA.

outside employment, the Hearing Examiner has no alternative but to recommend dismissal of this paragraph of the Complaint.[27/]

The Township Violated Section 5.4(a)(5) Of The Act When The Chief Posted A Job Vacancy For A Detective In The Narcotics Unit On June 30, 1988, Which Contained A Unilateral Change In The Work Schedule Affecting Overtime Since This Change Was Not Negotiated With The PBA.

Although the Chief's job posting of June 30, 1988, contained two categories of vacancies, one for a Detective position in the Narcotics Unit and the other for several Detective positions in the Detective Bureau, the PBA's quarrel was only with the posting for the Detective in the Narcotics Unit (4 Tr 54, 55). The basis of the PBA's objection was a provision under "Qualifications" that the officer receiving this assignment would work a "flexible schedule" but the "basic schedule" would be "a 5 x 2 schedule with adjustments as per the present labor agreement..." (CP-23, p. 2). It is noted that a "5 x 2 schedule" is consistent with the schedules for employees assigned to "Non-Patrol Bureaus" [Article VII, Section E(2), CP-45, p. 8]. However, Carullo testified without contradiction that the provision in the job posting for both a "flexible schedule" and a "5 x 2 schedule" masked a change in the

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27/ It is noted that the cases cited in the Charging Party's Brief (pp. 36, 37) are inapposite since they pertain to the allocation of overtime to unit and non-unit employees of the same employer and not to outside employment.

work schedule of the Narcotics Detective since the hours of the new position could be adjusted to avoid the payment of overtime. This situation had never occurred in the past. [4 Tr 54, 55]. Carullo also testified without contradiction that the above unilateral change in the work schedule was not negotiated with the PBA. Negotiations were required since it was contrary to Article VII, Section E(2), supra, which provides that employees in Non-Patrol Bureaus shall work a "5 x 2 schedule," forty hours per week, Monday through Friday, with weekends and holidays off (4 Tr 55, 56).

It will be recalled that the 1986-88 Agreement provides in Article VII, Section E that the "...negotiability of work schedules is in question..." Since there is no evidence that the parties ever mutually agreed "to alter" work schedules, one must turn to a subsequent provision in the Agreement which states that when "The Township determines that it wishes to implement as a managerial prerogative new work schedules..." then the Township "...shall negotiate...over those aspects which affect negotiable terms and conditions of employment prior to the implementation..." (emphasis supplied).

It appears to the Hearing Examiner that page two of the job posting for a Detective in the Narcotics Unit, which provided for a "flexible schedule" and a "basic schedule" of "5 x 2," coupled with the uncontradicted testimony of Carullo as to the potential impact on overtime, falls within the Township's obligation to have negotiated this aspect of the above job posting with the PBA prior

to implementation. Since the PBA promptly took express exception to the schedule "Qualification" in the job posting it did not waive its right to have the matter negotiated prior to implementation.[28/]

Clearly, the potential effect of overtime fell within the phrase "...aspects which affect negotiable terms and conditions of employment...," supra. The obligation of the Township to have negotiated on this subject prior to implementation is supported by the Commission's decision in Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd 215 N.J. Super. 108 (App. Div. 1987). See also, Boro of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985).[29/]

Accordingly, the Hearing Examiner will recommend an appropriate remedy.

The Township Did Not Violate Section 5.4(a)(2) Of The Act By The Conduct Of The Chief And His Superior Officers With Respect To The FOP.

The PBA's evidence in support of its allegation that the Township violated Section 5.4(a)(2) of the Act by the conduct of the Chief and his Superior Officers was that Deputy Chief Napoli sent a copy of his memoranda of April 6, April 18 and May 23, 1988, to the FOP, to which Carullo objected plus another like memorandum from the

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28/ Compare: Haddon Craftsmen, Inc., 297 NLRB No. 67, 133 LRRM 1081 (1989).

29/ This is not an instance requiring deferral to the parties' grievance procedure under Human Services, supra, since the Township has here repudiated an express provision of the 1986-88 Agreement.

Chief on August 11, 1988. October 26, 1987, Carullo was present for fifteen minutes at a meeting where the Chief was attempting to start an FOP Lodge with members of the rank and file (presumably in the PBA unit. [See Finding of Fact No. 26; ¶(b), p. 25, supra; CP-37, CP-39, CP-40; 4 Tr 56-62, 111-117]. This latter evidence regarding October 26, 1987 is, of course, time-barred under Section 5.4(c) of the Act and may not be considered. This leaves Napoli's memoranda and that of the Chief as the sole evidence of an alleged Section 5.4(a)(2) violation.

It appears from prior Commission decisions that the only way in which a public employer can be held to have violated Section 5.4(a)(2) is for it to have engaged in "...pervasive...control or manipulation of the employee organization...": No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193-195 (¶11095 1980) and Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599, 600 (¶17224 1986).

Since the conduct of the Chief and Napoli in sending copies of their memoranda to the FOP cannot under any circumstances meet the test of "pervasive employer control or manipulation" of the PBA herein, the Hearing Examiner must recommend the dismissal of this allegation in the Complaint.[30/]

30/ It is noted that in mid-1988, Leo ordered "Payroll" not to divert funds due to the PBA to the FOP (see Finding of Fact No. 40, supra).

The Allegation That The Superior Officers In The Police Department Interfered With The Conduct Of A PBA Meeting In April 1987 Is Time-Barred Under The Act.

Findings of Fact Nos. 11, 15, 19 & 20, supra, demonstrate quite clearly that the Superior Officers in the Township's Police Department engaged in conduct which tended to interfere with the exercise of Section 5.4(a)(1) rights by PBA members whose meeting in April 1987 was improperly interrupted. Were it not for the fact that this event is time-barred under Section 5.4(c) of the Act the Hearing Examiner would have found an independent (a)(1) violation of the Act by the Township based upon such Commission decisions as Jackson Tp., H.E. No. 88-49, 14 NJPER 293, 304 (¶19109 1988), adopted P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988).

Accordingly, the Hearing Examiner must recommend dismissal of this allegation in the Complaint.

* * * *

A careful examination of the Charging Party's Brief discloses that it has not addressed the following allegations in the Complaint: (1) Carullo's request for data (see Findings of Fact Nos. 17 & 18, supra); (2) the two reprimands of Carullo on September 28, 1987 and June 22, 1988 (see Findings of Fact Nos. 27 & 28, supra); (3) the alleged interference with the delivery of PBA mail (see Finding of Fact No. 29, supra); and (4) the alleged retaliation against Carullo for having made complaints regarding unsafe vehicles in 1987 (see Finding of Fact No. 30, supra). The Hearing Examiner has reached this conclusion because these matters were not specifically argued in the Charging Party's Brief. For example,

although the Charging Party included the "request for data" issue in the heading of "Point 4" of its Brief (p. 41), it did not thereafter brief the matter.

However, Findings of Fact Nos. 17 and 18 establish that Carullo's requests for data from the Township were satisfied to the fullest extent possible and, thus, the Township could not have been held to have violated Section 5.4(a)(5) of the Act. Additionally, since Carullo's two reprimands were removed from his personnel file by the Business Administrator, this issue might be deemed moot.[31/] Even assuming that the Carullo reprimand issue is not moot, no proof was adduced that the Chief and Napoli were illegally motivated within the meaning of Bridgewater, supra. Moreover, the alleged retaliation against Carullo for complaining about unsafe vehicles appears to be time-barred under Section 5.4(c) since the incident occurred in 1987. Finally, the mail interference issue must fall for lack of proof that the Township bore any responsibility whatsoever.

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No evidence having been adduced as to alleged violations of Sections 5.4(a)(4) and (6) of the Act, these allegations will be dismissed.

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Based upon the entire record in this case, the Hearing Examiner makes the following:

31/ But see, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1, 16-24 (1978).

CONCLUSIONS OF LAW

1. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it transferred John T. Grossman from the Detective Bureau to the Patrol Division, effective July 1, 1988, in retaliation for Grossman's having filed grievances over his reprimand on May 4, 1988, and his imminent transfer on June 21, 1988.

2. The Respondent Township independently violated N.J.S.A. 34:13A-5.4(a)(1) when it transferred David Kanig from the Detective Bureau to the Patrol Division, effective June 27, 1988, which followed directly from Kanig's having been denied union representation in violation of his Weingarten rights at the investigatory interview on April 14, 1988.

3. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when its Chief of Police unilaterally promulgated new Rules and Regulations, effective October 23, 1987, without first entering into collective negotiations with the Charging Party.

4. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when its Chief of Police unilaterally discontinued emergency vacation leave on June 30, 1988, without first entering into collective negotiations with the Charging Party.

5. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when its Chief of Police on December 2, 1987, sought to reclaim his managerial prerogative with respect to the outside employment of police personnel by subjecting such employment to the Rules and Regulations of the Police Department.

6. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when its Chief of Police on June 30, 1988, posted a job vacancy for Detective in the Narcotics Unit without first negotiating a proposed change in the contractual work schedule with the Charging Party.

7. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) and (2) by its Deputy Chief having sent copies of his memoranda to a rival organization (FOP) in April and May 1988, the Chief having also sent a like memorandum in August 1988, nor by the conduct of its Chief of Police in attempting to "...start an FOP Lodge with the rank and file members..." in October 1987.

8. The Respondent Township did not independently violate N.J.S.A. 34:13A-5.4(a)(1) by interfering with a lawfully convened meeting of the Charging Party in April 1987 since the event was time-barred under N.J.S.A. 34:13A-5.4(a)(c).

9. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(4) or (6) by its conduct herein, no evidence having been adduced in support of these allegations.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly (a) by transferring employees such as John T. Grossman in retaliation for the filing of grievances; (b) by transferring employees such as David Kanig in retaliation for the

exercise of Weingarten rights; (c) by unilaterally promulgating new Rules and Regulations and by discontinuing emergency vacation leave without first negotiating with the PBA; and (d) by unilaterally altering terms and conditions of employment in the posting of qualifications for job vacancies.

2. Transferring employees such as John T. Grossman in retaliation for the filing of grievances or transferring David Kanig in retaliation for the exercise of his Weingarten right to union representation at an investigatory interview.

3. Refusing to negotiate in good faith with representatives of the PBA with respect to (a) the unilateral promulgation of new Rules and Regulations; (b) the unilateral discontinuance of emergency vacation leave; and/or (c) the unilateral altering of terms and conditions of employment in the posting of qualifications for job vacancies, in each case, prior to implementation.

B. That the Respondent Township take the following affirmative action:

1. Subject to any limitations contained in the decision of a Judge of the Superior Court on August 1, 1989, forthwith rescind the transfer of John T. Grossman from the Detective Bureau to the Patrol Division, which became effective July

1, 1989, and restore him to his prior position in the Detective Bureau without loss of privileges or benefits.[32/]

2. Forthwith rescind the transfer of David Kanig from the Detective Bureau to the Patrol Division, which became effective June 27, 1989, and restore him to his prior position in the Detective Bureau without loss of privileges or benefits.[33/]

3. Upon demand, negotiate in good faith with representatives of the PBA with respect to any proposed promulgation of new Rules and Regulations prior to implementation.[34/]

4. Forthwith restore the status quo ante by rescinding the June 30, 1988, directive of the Chief of Police, which unilaterally discontinued the policy of granting emergency vacation leave to police personnel and thereafter, upon demand, negotiate in good faith with representatives of the PBA as to any future proposed change in this policy prior to implementation.

5. Forthwith restore the status quo ante by deleting from the posted "Qualifications" for Detective in the Narcotics Unit any reference to changes in the contractual work schedule(s) and

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32/ The authority for so ordering derives from such cases as: Boro of Carteret, H.E. No. 88-31, 14 NJPER 83, 87 (¶19030 1988), adopted P.E.R.C. No. 88-81, 14 NJPER 238, 239 (¶19086 1988).

33/ See Boro of Carteret, supra.

34/ Due to the lapse of time since the October 23, 1987 effective date of the current Rules and Regulations, the Hearing Examiner will not order their rescission nor the restoration of the status quo ante.

thereafter, upon demand, negotiate in good faith with representatives of the PBA as to any future proposed change in the contractual work schedule(s) prior to implementation.

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

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

C. That the allegations that the Respondent Township violated N.J.S.A. 34:13A-5.4(a)(4) or (6) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: March 5, 1990
Trenton, New Jersey

Appendix A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly (a) by transferring employees such as John T. Grossman in retaliation for the filing of grievances; (b) by transferring employees such as David Kanig in retaliation for the exercise of Weingarten rights; (c) by unilaterally promulgating new Rules and Regulations and by discontinuing emergency vacation leave without first negotiating with the PBA; and (d) by unilaterally altering terms and conditions of employment in the posting of qualifications for job vacancies.

WE WILL NOT transfer employees such as John T. Grossman in retaliation for the filing of grievances or transferring David Kanig in retaliation for the exercise of his Weingarten right to union representation at an investigatory interview.

WE WILL NOT refuse to negotiate in good faith with representatives of the PBA with respect to (a) the unilateral promulgation of new Rules and Regulations; (b) the unilateral discontinuance of emergency vacation leave; and/or (c) the unilateral altering of terms and conditions of employment in the posting of qualifications for job vacancies, in each case, prior to implementation.

WE WILL, subject to any limitations contained in the decision of a Judge of the Superior Court on August 1, 1989, forthwith rescind the transfer of John T. Grossman from the Detective Bureau to the Patrol Division, which became effective July 1, 1989, and restore him to his prior position in the Detective Bureau without loss of privileges or benefits.

Docket No. CO-H-89-32 TOWNSHIP OF OLD BRIDGE
(Public Employer)

Dated _____ By _____
(Title)

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

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

WE WILL forthwith rescind the transfer of David Kanig from the Detective Bureau to the Patrol Division, which became effective June 27, 1989, and restore him to his prior position in the Detective Bureau without loss of privileges or benefits.

WE WILL upon demand, negotiate in good faith with representatives of the PBA with respect to any proposed promulgation of new Rules and Regulations prior to implementation.

WE WILL forthwith restore the status quo ante by rescinding the June 30, 1988, directive of the Chief of Police, which unilaterally discontinued the policy of granting emergency vacation leave to police personnel and thereafter, upon demand, negotiate in good faith with representatives of the PBA as to any future proposed change in this policy prior to implementation.

WE WILL forthwith restore the status quo ante by deleting from the posted "Qualifications" for Detective in the Narcotics Unit any reference to changes in the contractual work schedule(s) and thereafter, upon demand, negotiate in good faith with representatives of the PBA as to any future proposed change in the contractual work schedule(s) prior to implementation.