P.E.R.C. NO. 2003-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-2001-227

MAINLAND PBA #77 and
APRIL VAN DALEY,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Somers Point violated the New Jersey Employer-Employee Relations Act by reprimanding and suspending an officer represented by Mainland PBA #77 in retaliation for her filing a grievance seeking a shift change to accommodate her National Guard training. The Commission concludes that disciplining Van Daley tended to interfere with her protected right to "grieve" the City's application of certain statutes and regulations to her situation. It further finds that there is no legitimate business justification for reprimanding and suspending Van Daley for her memorandum about leave time. The Commission orders the City to rescind all discipline, expunge the disciplinary actions from her record, and make Van Daley whole for losses of salary and benefits.

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

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CITY OF SOMERS POINT,

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MAINLAND PBA #77 and
APRIL VAN DALEY,

Charging Parties.

Appearances:

For the Respondent, Roger C. Steedle, P.A. attorneys (James F. Ferguson, of counsel)

For the Charging Parties, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel)

DECISION

On February 21, 2001, Mainland PBA Local #77 and April Van Daley filed an unfair practice charge against the City of Somers Point. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/] by reprimanding and

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

suspending Van Daley in retaliation for her filing a grievance seeking a shift change to accommodate her National Guard training.

On December 5, 2001, a Complaint and Notice of Hearing issued. On January 10, 2002, the employer filed an Answer denying that it violated the Act and setting forth several affirmative defenses. The City claimed that Van Daley asserted that her actions were not meant to be a "grievance" and, thus, the discipline imposed did not implicate a protected right. The City further claimed that if Van Daley's actions are deemed to be a grievance, then she violated the contractual grievance procedure and the department's chain of command. Finally, the City contended that the charge is untimely.

Hearing Examiner Jonathon Roth denied the City's request that he stay the unfair practice litigation pending resolution of a related Superior Court matter. On March 1, 2002, we denied special permission to appeal that ruling. P.E.R.C. No. 2002-45, 28 NJPER 148 (¶33049 2002).

On March 11, 2002, the Hearing Examiner conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On August 9, 2002, the Hearing Examiner issued his report and recommendations. H.E. No. 2003-3, 28 NJPER 358 (¶33130 2002). He found that the charging parties proved both retaliation and interference with protected rights. He recommended rescission

of all discipline imposed and expungement of references to these disciplinary actions from Van Daley's work record.

On September 9, 2002, the City filed exceptions. It argues that the Hearing Examiner erred in his factual findings by: (1) quoting selectively from a July 14, 2000 memorandum; (2) concluding that this memorandum was not disrespectful; (3) not finding that the leave denial was because Van Daley did not properly complete a Request form; (4) not considering that Van Daley's demands were based on inapplicable statutes and regulations; (5) quoting selectively from the Chief's Report dated August 23, 2000; and (5) not finding that the two-day suspension for insubordination reflected progressive discipline. The City also asserts that the Hearing Examiner erred in his analysis by: (1) ruling irrelevant Van Daley's deposition testimony; (2) inadequately considering the department's concern over its management rights; and (3) failing to find that Van Daley's manner and tone demonstrated insubordination.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-12) and note that the Hearing Examiner attached as exhibits Van Daley's July 14, 2000 memorandum and a July 20, 2000 Chief's Report from Captain Salvatore Armenia to Chief Orville F. Mathis. We reject the City's factual exceptions. The City asserts that the findings were incomplete because they did not quote more fully from certain exhibits. Those exhibits are part of the record and must be

considered by the Hearing Examiner. A Hearing Examiner need not, however, quote the entirety of all relevant documents in preparing a report. The Hearing Examiner's careful analysis shows that he fully considered the exhibits cited by the employer.

On July 14, 2000, Van Daley submitted a memorandum to Chief Mathis and Captain Armenia explaining that "despite previous practice," she would no longer use her vacation or holiday time to attend Air National Guard's Unit Training Assemblies (UTAs). She cited a statute and regulation allegedly entitling her to be paid. The letter concluded by thanking them for their attention and referring them to her attorney should they have any questions.

Mathis and Armenia discussed the memorandum. Mathis asked Armenia if the memorandum was a grievance. Armenia responded that he did not know.

On July 15, 2000, Van Daley submitted a request for authorized leave.

Soon after receiving the July 14 memorandum, Armenia began a disciplinary investigation. As part of this investigation, he interrogated other employees about Van Daley's conversations with them concerning leave time and he directed them to prepare reports.

On July 18, 2000, Armenia and Van Daley discussed her memorandum. Armenia told Van Daley that if she wished to be rescheduled around her UTAs, she had to file a written request. He also ordered her to submit a chief's report explaining why she

failed to follow the chain of command and why she violated the grievance procedure. Van Daley responded that her memorandum was not a grievance and that it was only a request for a schedule change when she had Guard duty.

Van Daley complied with Armenia's order by submitting a formal request that she be given a leave of absence when her work schedule and Guard schedule conflicted. She also submitted a Chief's Report explaining that her memorandum was merely a letter to explain her rights as a Guard member. The letter was meant to prevent any misunderstanding and was not a grievance.

On July 20, 2000, Armenia submitted a Chief's Report to Mathis. He wrote that Van Daley's "grievance" was disrespectful and insolent and he recommended disciplinary action. He cited her conversations with other employees in which she said she was going to file a grievance.

In a July 24, 2000 Chief's Report, Armenia denied Van Daley's schedule change request. Mathis had directed Armenia to deny the request.

Van Daley spoke to Myron Plotkin, her union representative. On July 26, 2000, Plotkin sent a letter to Armenia characterizing his denial of Van Daley's schedule change as "blatantly illegal." He also wrote that:

> any forms of reprisals, penalties, retribution, discrimination, etc., arising from Officer Van Daley's exercising her legal rights, including but not limited to her request for a schedule change and/or the issuance of this letter will be viewed as a very serious matter and handled through the appropriate authorities.

The City's attorney responded that the City had lawfully denied Van Daley's request.

On August 23, 2000, Mathis placed a Chief's Report in Van Daley's personnel file recommending disciplinary action. Van Daley had informed Mathis that her July 14 memorandum was not intended to be a grievance and that he need not "process" it. He nevertheless wrote that the charges stemmed from Van Daley's "written letter in grievance form." He sustained charges of: failure to follow the grievance procedure; failure to follow the chain of command because Van Daley's memorandum bypassed a step of the chain of command; and insubordination because Van Daley had indicated that she intended to violate department policy regarding time off for UTAs. He imposed written reprimands for violating the grievance procedure and the chain of command and a two-day suspension for insubordination.

An employer violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The Hearing Examiner found that the City violated 5.4a(1) because its response to Van Daley's July 14, 2000 memorandum tended to interfere with, restrain and coerce Van Daley in exercising her statutory right to file grievances concerning

her working conditions. The City argues that the Hearing Examiner should have considered Van Daley's deposition testimony in a related matter and given greater consideration to its concern over its management rights.

We believe that disciplining Van Daley for informing the City that she would no longer be using vacation or holiday time for UTAs tended to interfere with her protected right to "grieve" the City's application of certain statutes and regulations to her situation. Van Daley's memorandum was protected. Even if it was not intended to be a grievance, the employer treated it as such and disciplined her for failure to properly follow the grievance procedure. In his report recommending discipline, Mathis specified that the charges stemmed from her memorandum in "grievance form."

That Van Daley may have been wrong in her interpretation of her rights does not entitle the City to discipline her in retaliation for what the City believed was a grievance questioning its interpretation of her rights. Essex Cty., P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994) (fact that employee did not have right to union representation during meeting did not mean that employee could be discharged for requesting representation). Van Daley ultimately recognized that the City viewed her memorandum as confrontational and disrespectful and indicated that she regretted sending it. But that assessment of reality does not undo the fact that the City acted to interfere with her right to question the application of the leave policy.

Van Daley's deposition testimony is irrelevant. Her subjective regret about her and her union representative's sending memoranda with inaccurate information that ultimately led to her discipline does not answer whether that activity was protected or whether the discipline tended to interfere with her right to engage in that activity. The test for determining whether 5.4a(1) has been violated is an objective one based on whether an employer's action tends to interfere with employee rights, not a subjective one based on an employee's actual state of mind. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983); New Jersey Sports & Exposition Auth.

We appreciate that the City has a legitimate concern that grievances be filed at the proper level of the chain of command. But we cannot find a legitimate business justification for reprimanding and suspending Van Daley for her memorandum about leave time. A simple response that she correct her error would have sufficed and would not have tended to send a message that questioning policies on terms and conditions of employment would have serious consequences unless done absolutely correctly.

Finally, the City argues that the charge of insubordination is established by the manner and tone of Van Daley's actions. It notes that her memorandum begins with "despite past practice" and that it was followed by a "confrontational and even threatening

letter from her Union Representative." We decline to find that the phrase "despite past practice" evidences insubordination that outweighs an employee's right to question an employer's leave policy. And we reject the assertion that an employee can be disciplined for insubordination based on the written words of her union representative. We respect a police department's right to maintain departmental order and discipline. These internal communications, however, do not appear to challenge that right and they come within the ambit of protection afforded to public employees by the Legislature.

The Hearing Examiner recommended rescission of all discipline, expungement of those disciplinary actions from Van Daley's record, and making Van Daley whole for losses of salary and benefits. We adopt these remedial recommendations.

The Hearing Examiner separately found that the employer's action violated 5.4a(3) and, derivatively, a(1). Having found a violation of 5.4a(1) and having issued an appropriate remedy, we need not reach the question of whether the reprimand was motivated by hostility to Van Daley's protected activity. Any remedy for that violation would be the same. Camden Cty. Sheriff, P.E.R.C. No. 2001-55, 27 NJPER 184 (¶32060 2001); cf. City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp.2d 58 (¶39 App. Div. 1979) (order to excise reprimand to remedy independent 5.4a(1) violation upheld; court did not consider whether a(3) was also violated).

ORDER

The City of Somers Point is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly the right of employees to file grievances or otherwise address with the employer issues regarding terms and conditions of employment without fear of interference, restraint or coercion.

B. Take this action:

1. Rescind all discipline meted out to April Van Daley pertaining to her July 14, 2000 memorandum.

2. Expunge from Van Daley's records all notices and references to discipline imposed as a consequence of her July 14 memorandum.

3. Promptly reimburse Van Daley for all losses of salary and benefits imposed as a consequence of such discipline plus interest pursuant to R. 4:42-11.

4. 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.

5. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: December 19, 2002
Trenton, New Jersey
ISSUED: December 20, 2002

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly the right of employees to file grievances or otherwise address with the employer issues regarding terms and conditions of employment without fear of interference, restraint or coercion.

WE WILL rescind all discipline meted out to April Van Daley pertaining to her July 14, 2000 memorandum.

WE WILL expunge from Van Daley's records all notices and references to discipline imposed as a consequence of her July 14 memorandum.

WE WILL promptly reimburse Van Daley for all losses of salary and benefits imposed as a consequence of such discipline plus interest pursuant to *R.* 4:42-11.

CO-H-2001-227
Docket No.

CITY OF SOMERS POINT
(Public Employer)

Date: _____ By: _____

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

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

APPENDIX "A"

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H.E. NO. 2003-3

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

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and-

Docket No. CO-H-2001-227

PBA MAINLAND LOCAL #77
& APRIL VAN DALEY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a public employer violated 5.4a(1) independently and derivatively and also violated 5.4a(3) of the Act when it disciplined and suspended an employee in retaliation for filing a memorandum regarding leave time off. The Hearing Examiner found that the Charging Party had presented both direct and circumstantial evidence of retaliation, pursuant to the test set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). The Hearing Examiner also found that the public employer's conduct tended to interfere with protected rights, pursuant to the test set forth in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2003-3

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

In the Matter of

CITY OF SOMERS POINT,

Respondent,

-and- Docket No. CO-H-2001-227

PBA MAINLAND LOCAL #77
& APRIL VAN DALEY,

Charging Party.

Appearances:

For the Respondent, Roger C. Steedle, attorney
(James F. Ferguson, of counsel)

For the Charging Party, Selikoff & Cohen, attorneys
(Steven R. Cohen of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 21, 2001, PBA Mainland Local #77 and April Van Daley filed an unfair practice charge (C-1)[1/] against the City of Somers Point. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), both independently and derivatively, and 5.4a(3)[2/] by retaliating against Van Daley for her July 14, 2000

1/ "C" refers to Commission exhibits; "CP" refers to Charging Party exhibits; "R" refers to Respondent exhibits.

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

letter to the City requesting that her shift be rescheduled around her Air National Guard training. Specifically, the charge alleges that the City, perceiving the letter as a grievance, was hostile to her exercise of protected rights and unlawfully disciplined her in retaliation for it.

On December 5, 2001, a Complaint and Notice of Hearing issued. On January 10, 2002, the City filed an Answer, denying that it violated the Act and setting forth several defenses (C-2). The City claims that Van Daley asserted that her actions were not meant to be a "grievance" and, thus, if so found, the discipline imposed would not have implicated a protected right. The City further asserts that if Van Daley's actions are deemed to be a grievance, then she violated the contractual grievance procedure and the department's chain of command. The City contends that its actions have not had a chilling effect on Van Daley and her exercise of protected rights; nor have its actions adversely affected any other unit members. Finally, the City asserts that to the extent Van Daley filed a grievance, it was untimely and that her unfair practice charge was also untimely and should be dismissed.

2/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On January 3, 2002, the City requested that I stay the unfair practice litigation, pending resolution of a related Superior Court case filed by Van Daley; on January 15, 2002, I denied the request. On January 30, 2002, the City requested special permission to appeal my decision; on March 1, 2002, the Commission denied the request (P.E.R.C. No. 2002-45).

A hearing was held on March 11, 2002. The parties submitted post hearing briefs and reply briefs by May 31, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The City and Local #77 are parties to a collective negotiations agreement extending from January 1, 2000 through December 31, 2003 (J-2). The agreement has a 4-step grievance procedure specifying in a pertinent part:

> A grievance shall be defined as a complaint by an employee covered by this Agreement as to working conditions, terms and conditions of employment, and/or any personal loss or injury because of a violation to this Agreement between the parties. A grievance, to be considered under this procedure must be initiated by the employee within ten (10) calendar days from the time of its occurrence, or the knowledge of its occurrence.

A provision also specifies that an officer shall not be discriminated against for instituting a grievance under the agreement (J-2).

2. April Van Daley is a patrol officer in the City's police department and is a member of the collective negotiations unit represented by Local #77. She is also a member of the Air

National Guard (C-1). As a guard member, Van Daley is required to attend inactive duty training, known as "unit training assemblies" or "UTAs", one weekend per month throughout the year (T70-T71).3/

Orville Mathis is the City's police chief. He has served in that capacity since February 1986.

In her application for employment with the City, Van Daley wrote that she was a member of the National Guard. Chief Mathis read her application; pursuant to his usual practice during applicant interviews, he explained to Van Daley City policy regarding leave to perform guard duty, particularly, unit training assemblies. He specifically informed Van Daley that in order to attend unit training assemblies she might: 1) take a leave without pay; 2) switch days off with another employee, or 3) take authorized leave, i.e., vacation, personal days or holidays (T63). He repeated the options to her on the day she was actually hired (T102-T107). The City policy on leave to attend unit training assemblies is unwritten; it is not set forth in department rules and regulations (T65, T71-T73, T116; J-1).

Chief Mathis prescribed two ways that an officer's request for a schedule change to attend a unit training assembly can be handled. First, the officer may switch days off with another officer, or the City has the option of rescheduling the officer's

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3/ "T" refers to the transcript of the March 11, 2002 hearing.

days off (T106-T107). The City believed that its policy conformed to the law and that, under the law, it was neither obligated nor authorized to provide paid leave to employees attending unit training assemblies (T63, T102-T104). The City's policy regarding unit training assemblies has been consistently followed during Chief Mathis' tenure (T107).

4. In June and July 2000, Van Daley spoke with fellow patrol officer Jerome Zucker about City policy regarding leave to attend unit training assemblies. Zucker knew the policy because he was also a guard member and had been told the policy upon his hiring (T66-T67). According to Zucker, Van Daley "was looking for free time so that she wouldn't get (time) charged against her, in order to take her UTA or unit training assemblies" (T67). Zucker explained City policy to her, reiterating that she would have to use her own time unless she was scheduled off. Zucker opined that Van Daley was "pretty much damned and determined to do whatever she had to do" (T63-T67).

5. In July 2000, Van Daley also spoke with Paul Hodson, a former police department member and former Local #77 shop steward, about time off to attend UTAs. While employed in the department, Hodson partook in UTAs as a member of the Army Reserves. He had discussed the issue of leave to attend UTAs with Chief Mathis and had also researched whether any State law or administrative code covered the issue (T84-T89, T100).

In their July 2000 conversation, Van Daley asked Hodson how he had secured time off to attend UTAs when he was with the department. According to Hodson, Van Daley was concerned about not getting paid and about rescheduling her days off in order to attend UTAs. Hodson explained that he used his own holiday or vacation time or rescheduled his days off in order to complete his weekend UTA obligation. He noted that he never received paid leave to attend a unit training assembly; and that, under the law, an employer was merely required to grant unpaid leave (T90-T94). He told Van Daley that the department could reschedule her days off so that she could attend UTAs and he directed her to a statute (T94-T100).

6. On July 14, 2000, Van Daley submitted a memorandum to Chief Mathis and Captain Salvatore Armenia (J-3). She wrote that she "will no longer be using vacation or holiday time . . ." to attend UTAs. Most of the memorandum set forth various statute provisions. This memorandum is attached as Exhibit A.

7. Captain Armenia and Chief Mathis promptly discussed the memorandum. Chief Mathis asked Captain Armenia if the July 14 memorandum was a grievance; Captain Armenia replied that he did not know (T129-T131).

8. On July 15, 2000, Van Daley submitted a request to Captain Armenia for authorized leave for August 5 and 6, 2000 (J-4).

9. Soon after receiving the July 14 memorandum, Captain Armenia began a disciplinary investigation of Van Daley. He learned of conversations Van Daley had with fellow department members Zucker

and Michael Boyd about time off to attend unit training assemblies. Armenia directed them to prepare reports about the discussions (T74, T76, T137; J-8, J-8A, J-8B, J-15).

On July 18, 2000, Van Daley and Captain Armenia discussed her memorandum. Armenia advised Van Daley that if she wished to be rescheduled around her UTAs, she must file a formal written request. He also ordered her to submit a chief's report explaining why she failed to follow the proper chain of command and why she violated the grievance procedure. Van Daley responded that her July 14 memorandum was not a grievance; that it was only a request for a schedule change when she had guard duty (J-5, J-8, J-15).

10. Van Daley complied with Captain Armenia's order by submitting a memorandum dated July 19, 2000, (J-5). Specifically, she officially requested that she be given a leave of absence when her work schedule and guard schedule conflicted, and that she be rescheduled to work the time she will have owed.

Also on July 19, 2000, Van Daley submitted a chief's report to Captain Armenia about her July 14 memorandum. Van Daley wrote that her memorandum was ". . . merely a letter to explain my rights as a New Jersey Air National Guard member. The letter was meant to clarify and to prevent any misunderstandings and was not a grievance" (J-6).

11. On July 20, 2000, Captain Armenia submitted a chief's report to Chief Mathis entitled "Subject P.O. April Van Daley, Disciplinary action" (J-8). Armenia wrote that Van Daley's

"grievance" was "disrespect[ful]" and "insolen[t]" and he recommended "disciplinary action." Attached to the report was the July 14 memorandum and Zucker's and Boyd's reports (J-8A and J-8B). The Captain's report is attached as Exhibit B.

12. In his July 24, 2000 chief's report, Captain Armenia denied Van Daley's schedule change request and wrote that she had the option of taking authorized leave, which is past practice, or a two-day leave of absence without pay (J-9). Chief Mathis had directed Captain Armenia to deny the request after receiving Armenia's July 20 chief's report (T133-T134).

13. Van Daley spoke with Local #77 representative Myron Plotkin about Armenia's July 24 denial. On July 26, Plotkin sent a letter to Captain Armenia characterizing his denial of Van Daley's schedule change request as "blatantly illegal." Plotkin wrote that Armenia could not lawfully force Van Daley to use personal leave time or unpaid leave in order to attend weekend drills. He also wrote that "any forms of reprisals, penalties, retribution, discrimination, etc., arising from Van Daley's exercising her legal rights including . . . her request for a schedule change and/or issuance of this letter will be viewed as a very serious matter and will be handled through the appropriate authorities" (J-10).

Plotkin's letter was forwarded to City attorney James Ferguson. On August 1, 2000, Ferguson mailed a reply to Plotkin stating that the department had acted lawfully in denying Van Daley's request and that, under the law, leave with pay is not

authorized for the drill Van Daley wished to attend. The letter further stated that the City was not required to change Van Daley's schedule in order to appease her (J-11, J-12). (In fact, Van Daley followed City policy and never stopped using her own time to attend weekend guard drills (T118)).

14. On August 23, 2000, Chief Mathis placed a chief's report in Van Daley's personnel file recommending disciplinary action against her (J-13). In a pertinent part, Chief Mathis wrote:

> On July 20, 2000 this office received reports from Captain Salvatore Armenia preferring charges against Officer April Van Daley as follows:
>
> 1. Violating Department Grievance Procedure 4:13
> 2. Insubordination 3:1.10
> 3. Violating the Department Chain of Command 3:1.9
> 4. Failing to be truthful during Department investigation 3:11.5
>
> These charges stem from an incident that occurred on July 14, 2000 when Officer Van Daley submitted a written letter in grievance form to Captain Armenia and myself demanding that her working conditions be changed to accommodate her obligation to attend weekend National Guard Drills (UTA).
>
> Captain Armenia, in his report, charges that her letter clearly violated the Grievance Procedure, the Chain of Command, was disrespectful and she was not truthful when she submitted a report that the letter was not intended to be a grievance.
>
> On August 10th, I personally interviewed Officer Van Daley in the presence of the Shop Steward, Ptl. Robert Knorr, and Captain Armenia. The purpose of the interview was to advise her of the allegations against her and to give her an opportunity to respond to same.
>
> With regard to violating the grievance, she stated that the letter she submitted objecting to

the way she was scheduled for Military Weekend Drills was not intended to be a grievance. She stated she was just trying to clarify the issue.

With regard to violating the chain of command, she advised that she did not intend to violate the chain of command but was following the advice of her attorney.

With regard to the allegation of not being truthful, she denied telling anyone that she was filing a grievance, although she did advise other officers that she was going to submit a letter of complaint to her superiors based upon professional advice.

With regard to the allegation of Insubordination, she again stated that apparently she relied on professional advice that apparently was not accurate. She reported her intentions were not to disrespect anyone.

After reviewing all reports and information made available to this office, and personally interviewing Officer Van Daley, I find the following with regard to the specific charges:

Violation of the Grievance Procedure 4:13. I find that there is clear and sufficient evidence to sustain this charge. The procedure, as written in the Police Contract, is very clear. The definition of a grievance is defined as a complaint by an employee as to working conditions, or terms and conditions of employment. Clearly, a written complaint directly to the Captain and Chief violates the grievance procedure.

2. Failure to follow chain of command 3:1.9. I find clear and sufficient evidence to sustain this charge. Officer Van Daley did not comply with this Rule & Regulation, which is self-explanatory.

3. Insubordination 3:1.10. I find clear and sufficient evidence to sustain this charge, which I consider to be a very serious violation. Officer Van Daley prompted this entire situation by demanding and attempting to dictate to her superiors the procedures that she was going to

> follow in regard to working conditions. She also demonstrated a lack of knowledge and understanding about the military laws and regulations that apply to her absence from duty.
>
> She was relying on regulations that apply to active duty, which are irrelevant and contrary to the issue. The issue is specifically Weekend Drills, which are considered Inactive Duty. She conveniently did not rely on or provide the specific laws that apply to her specific circumstances.
>
> Officer Van Daley then closes out her complaint letter by advising her superiors to contact her attorney if we had any questions about the letters content.
>
> Not only do I find that this letter constitutes improper conduct and disrespect, I find that to advise her superiors to call her attorney if we have any questions about her working conditions to be outright 'insolence.'

Van Daley had informed Chief Mathis that her July 14 memorandum was not intended to be a grievance and that he need not "process" it. He nevertheless sustained a charge of failure to follow the grievance procedure (T108-T110, T142; J-13). He reasoned that if the July 14 memorandum was a grievance, Van Daley did not follow the proper procedure; specifically, she did not first go to her immediate supervisor, her sergeant, and discuss the issue. Nor did she follow the subsequent steps of the grievance procedure (T110-T111; J-2, J-13).

Chief Mathis sustained the charge of failure to follow the chain of command because Van Daley submitted a communication which bypassed a certain step in the chain of command as specified in department rules and regulations (T111; J-1, J-13). The Chief also

sustained the insubordination charge because in his view, Van Daley had indicated in her July 14 memorandum that she intended to willfully violate established department policy regarding time off for UTAs (T111-T112, T118-T119; J-3).

Chief Mathis imposed written reprimands for violating the grievance procedure and for violating the chain of command; he also imposed a two-day suspension for insubordination (T113; J-13, J-14). Chief Mathis does not believe he retaliated against Van Daley for her July 14 memorandum; rather, he sustained charges for improper respect and not following department rules and regulations (T112-T113; J-13, J-14).

Chief Mathis acknowledged that Van Daley would not have been disciplined in the absence of her July 14 memorandum, conceding under oath that it precipitated the disciplinary process against her (T136-T137). Mathis did not believe that Van Daley's subsequent writings, J-5 or J-6, were relevant in deciding whether to impose discipline for the July 14 memorandum (T121-T126).

ANALYSIS

The City Independently Violated 5.4a(1) of the Act When It Disciplined Van Daley In Response To Her July 14, 2000 Memorandum, J-3.

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New

Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); See generally Hardin, The Developing Labor Law, 76 (3d ed. 1992); Gorman, Basic Text on Labor Law, 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Mine Hill Tp.

I find that the City independently violated 5.4a(1), because its response to Van Daley's July 14, 2000 memorandum tended to interfere with, restrain and coerce an employee's statutory rights.

Delivering her memorandum, Van Daley engaged in protected activity by addressing with her employer a term and condition of employment, i.e., use of her leave time. It makes no difference whether the July 14 memorandum was or was not "a grievance." See No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶42005 1978), aff'd NJPER Supp.2d 63 (¶43 App. Div. 1979). Immediately afterwards, the City initiated the disciplinary process against her. Specifically, Captain Armenia began a disciplinary investigation of Van Daley. He called her to his office on July 19, 2000 and questioned her about the memorandum. Although Van Daley advised that it was not a grievance, Armenia nevertheless characterized it as one and ordered her to submit a report before the end of her shift explaining why she failed to follow the proper chain of command and violated the grievance procedure. (See finding nos. 9 and 10).

The next day, July 20, 2000, Captain Armenia submitted his chief's report to Chief Mathis regarding his disciplinary investigation of Van Daley (J-8). His report exhibits conduct which tends to interfere with Van Daley's protected rights. Specifically, Captain Armenia recommended that Van Daley be disciplined for submitting the July 14 memorandum. He perceived that Van Daley's memorandum was disrespectful and insolent, despite an appropriately phrased salutation and closing. Perceiving the memorandum as a grievance, Armenia found that it violated the grievance procedure.

On August 23, 2000, Chief Mathis issued his report, finding Van Daley "guilty" of violations of the grievance procedure and of the chain of command, and guilty of insubordination. He recommended that she receive two written reprimands and a two-day suspension (J-13). He specifically noted that the charges against Van Daley derived from her July 14 memorandum [i.e., from the exercise of protected activity]. Chief Mathis admitted under oath that the memorandum precipitated the disciplinary process against Van Daley and that she would not have been disciplined in the absence of it. (See finding no. 14). The Chief's reaction is employer conduct which tends to interfere with, restrain and coerce employees in the exercise of protected rights.

I also find the City's action lacks a legitimate and substantial business justification. The City contends that Van Daley had no legitimate rationale for her demand in the July 14 memorandum, as the law precludes paid leave for unit training

assemblies. The City believes that Van Daley should have been aware of the law and was in fact insubordinate by submitting the memorandum. I disagree. That Van Daley's July 14 memorandum may set forth information contrary to the law does not justify the City's strong adverse reaction to it. Van Daley's (not disrespectful) memorandum was protected activity undertaken in good faith; it did not lose protection or legitimacy even if its representations of the law were incorrect. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

The City also claims that discipline for Van Daley was warranted because her memorandum clearly violated established policies and procedures, specifically, the grievance procedure. I disagree. Van Daley had stated and repeated to the employer representatives that her memorandum was not intended to be a grievance. (See findings nos. 9 and 10). Even if the memorandum was a grievance and in fact "violated" the grievance procedure, the discipline against Van Daley for her infraction was not justified. Although the City has an interest in ensuring that department order is maintained; that is, that the grievance procedure is followed, no evidence suggests that Van Daley's alleged inappropriately filed grievance actually interfered with or disrupted the department's ability to operate efficiently. Assuming that Van Daley violated the grievance procedure by not first attempting to verbally resolve her leave request with her sergeant, I believe that the City

reasonably could have denied the grievance or instructed her to refile and follow the proper procedure. The City instead regarded Van Daley's memorandum as an improperly filed grievance that warranted discipline.

Under these circumstances, I find that the City's action tended to interfere with Van Daley's protected rights and lacked a legitimate business justification, independently violating 5.4a(1) of the Act.

The City Violated 5.4a(3) and derivatively a(1) of the Act When It Disciplined Van Daley For Her July 14, 2000 Memorandum.

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

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

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

I find that the Charging Party has proved all three Bridgewater elements. First, Van Daley engaged in protected activity and the employer knew it, when she submitted her July 14, 2000 memorandum to Captain Armenia and Chief Mathis, regarding a term and condition of employment - her use of leave time. I also find that direct and circumstantial evidence shows that the City was hostile towards the exercise of Van Daley's protected rights.

Immediately after Van Daley submitted the memorandum, the City commenced its disciplinary process against her, resulting in Captain Armenia's recommendation that Van Daley be disciplined for violating the grievance procedure and the chain of command, and for being insubordinate. (See finding nos. 9 and 11). Chief Mathis specified in his report recommending discipline against Van Daley, that the charges stemmed from her July 14, 2000 memorandum in "grievance form" demanding that her working conditions be changed to

accommodate her National Guard obligation. The Chief also conceded under oath that Van Daley's memorandum precipitated the disciplinary process and that she would not have been disciplined without it. (See finding no. 14).

The City contends that it would have taken the adverse action against Van Daley, absent the protected conduct. It asserts that Van Daley was disciplined for violating department rules and regulations and not for the exercise of protected activity. It points out that Chief Mathis testified that Van Daley was disciplined for her violation of department rules and regulations. It also notes that Van Daley conceded in her February 25, 2002 deposition in another matter (J-16), that her actions could be perceived as violative of the grievance procedure and that discipline was imposed for the manner in which she communicated with her superiors.

I disagree with the City's contentions. I do not find that Van Daley's deposition is relevant evidence. It was taken several months after the City disciplined her and was related to another matter. Nor do I credit the Chief's testimony that Van Daley was not disciplined in retaliation for her July 14 memorandum; he conceded that it precipitated all the discipline charges against her. (See finding no. 14).

The City also argues that its police department, a para-military organization, requires officers to adhere to established procedures to maintain order within the department, and

to perform efficiently for the protection of the public. It contends that chaos and inefficiency would rule if employees were permitted to protest and grieve in any manner they wished, as Van Daley did.

The City has failed to show how Van Daley's action disrupted the efficiency of the department and caused chaos. The City could have merely denied the request or required Van Daley to follow proper departmental procedures and re-submit her concerns to her immediate supervisor as a "grievance," pursuant to the grievance procedure. Instead, the City commenced its disciplinary process against her in retaliation for engaging in protected activity.

Accordingly, I find that the Charging Party has proved by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action, and that the employer has failed to prove it would have taken the adverse action in the absence of protected conduct. I recommend that the Commission find that the City has violated 5.4a(3) and derivatively 5.4a(1) of the Act.

CONCLUSIONS OF LAW

1. The City violated 5.4a(1) of the Act both independently and derivatively when it disciplined Van Daley for submitting her July 14, 2000 memorandum regarding terms and conditions of employment.

2. The City violated 5.4a(3) when it disciplined Van Daley in retaliation for her July 14, 2000 memorandum.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the City rescind all discipline meted out to Van Daley pertaining to the July 14, 2000 memorandum.

B. That the City expunge from Van Daley's records all notices and references to discipline imposed as a conequence of her July 14 memorandum.

C. That the City promptly reimburse Van Daley for all losses of salary and benefits imposed as a consequence of such discipline.

D. That the City cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; specifically the right of employees to file grievances or otherwise address with the employer issues regarding terms and conditions of employment without fear of interference, restraint or coercion.

2. 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; specifically, the right to file grievances or otherwise address with the employer issues regarding terms and conditions of employment.

E. That the City take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice 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.

Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

Jonathon Roth
Hearing Examiner

DATED: August 9, 2002
Trenton, New Jersey

July 14, 2000

To: Capt. Salvatore Armenia
Chief Orville Mathis
Somers Point Police Department

From: Ptl. April M. Van Daley #371
Somers Point Police Department

Ref: Guard Weekends

Sir,

Despite previous practice, I am advising you that I will no longer be using my vacation or holiday time in order to receive time off to attend my Air National Guard's Unit Training Assemblies (UTA's or Guard Weekends). It has been my understanding that the Police Department has been willing to give time off without pay for such purpose, however to get paid I had to use my vacation and holiday time. I would like to refer you to New Jersey Statue Title 38 (Militia—Soldiers, Sailors, and Marines), Chapter 23 (Leave of Absence from Public Employment), also reflected in SPPD Rules & Regs. 4:11.1, which states the following:

38:23-1 Leave of absence for field training in reserve corps of United States

"An officer or employee of the State or a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Navel Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organizations affiliated therewith, **shall be entitled to leave of absence** from his respective duty without loss of pay or time on all days on which he shall be engaged in **field training**. Such leave of absence shall be in addition to the regular vacation allowed such employee."

Field Training referred to in this statue does not only refer to active duty, but all mandatory or required training. Since I am required to attend my Unit Training Assemblies, they also are covered under this statue. Leave of absence for field training is allowable up to 90 days per year as according to NJS Title 4A:6-1.11.

Statue 38:23-1. refers to leave of absence, **without loss of pay or time,** in addition to regular vacation time. If I am to use my holiday or vacation time for my UTA's , that would result in loss in time. In order to receive no loss in pay, the police department will now need to reschedule my respective duty for another time. How the time is rescheduled is at the discretion of the police department, however doing so in the same pay period may prevent confusion.

Also for your reference are excerpts of the Uniformed Services Empolyment/Reemployment Rights Act of 1994.

-Section 4312[e][A][i] **Working Double Shifts**: "In the case of a person whose period of service in the uniformed services is less that 31 days,...not later than the beginning of the first fully regularly scheduled work period on the first full calender day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service..." This allows the employee eight hours between their military duty and their next scheduled shift of civilian employment.

-Section 4311[c][1] **Reprisal**: "An employer may not... take any adverse employment action against any person because such person has taken an action to enforce a protection...under this chapter, or has exercised a right." If any employer has taken any adverse action because an employee is a member is a member of the New Jersey Air National Guard, they would be in violation of this section of Title 38.

Thank you for your attention to this matter. If there are any questions reference this matter they may be directed to D. William Subin, P.A. at 609-645-7511.

Respectfully Submitted,

Ptl. April M. Van Daley

Exhibit A

CHIEF'S REPORT

Police Department
Somers Point, NJ

Date 07/20/00

To Chief Orville F. Mathis

Submitted by Captain Salvatore Armenia

Subject P.O. April Van Daley, Disciplinary action

Chief Mathis enclosed you'll find a Grievance from P. O. April Van Daley, the Chief's report is addressed to the undersign and yourself Chief Mathis, the letter stated that she will no longer be using her vacation time or Holidays in order to take time off so she could attend her National Guard meetings.

Chief, P. O. Van Daley also makes mention in her letter that if there are any questions to this matter they are to be referred to her attorney, William Subin.

Chief, I spoke with Sgt. Wood who is her immediate supervisor, I had asked him if he was aware of this Grievance that she, P.O. Van Daley had filed, he stated no, he wasn't aware of it, the only thing was that when she placed it in my mail slot, she informed him that she was advised to do this by her attorney. Sgt. Wood stated that he had no clue what was in the letter and didn't ask her either.

I had P.O. Van Daley in my office and advised her that she was to submit a Chief's report to me as to why she failed to follow the proper chain of command, and also why did she violate the Grievance Procedure. P.O. Van Daley stated that she was going to speak with her shop steward before submitting the Chief's report, she believed it to be her right, I ordered her to submit the Chief's report to my office before ending her shift, which she did so.

P.O. Van Daley stated that she didn't file a Grievance; it was more of a request to reschedule her shift when she had guard duty.

Chief I have enclosed two Chief's reports, one from Det.Sgt. Boyd and one from Ptl. Jerome Zucker who were in the squad room when she made mention that she was going to file a Grievance concerning her vacation time and Holiday time she had to use for her guard weekends, She stated that other departments handle their officers time off differently.

Chief, I Feel that P.O. Van Daley continues to show disrespect and insolence to authority within the police department.

Chief, I Feel that Disciplinary action is warranted in this matter and that the following charges have been substantiated.

4:13 Violation of Grievance Procedure

P.O. Van Daley bypassed her immediate supervisor and directed her paper work directly to myself the undersign.

3:1.10 Insubordination.

I feel that P. O. Van Daley's grievance to be disrespectful and insolent where she states that Despite previous practice, I'm advising you that I will be no longer using my vacation time or holidays to attend my Air National Guard Training, also P.O. Van Daley states that if I have any questions, I could reference this matter with her attorney, William Subin.

3:1.9 Violation of Chain of Command

P.O. Van Daley failed to address the issue with her Sgt, and informed him that she was advised to do what she was doing by her attorney and submitted her grievance directly to myself the undersign and yourself Chief Mathis.

3:11.5 Truthfulness

P.O. Van Daley made it known to other members of the police department that she was filling a Grievance and when I had her in my office and questioned her, she stated that it wasn't really a grievance. Chief attached are Chief's reports from other members of the police department which where present when she made the statement that she was filing a grievance for her time off.

Salvatore Armenia
Captain

Exhibit B

RECOMMENDED

NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL rescind all discipline meted out to Van Daley pertaining to the July 14, 2000 memorandum.

WE WILL promptly reimburse Van Daley for all losses of salary and benefits imposed as a consequence of such discipline.

WE WILL promptly expunge from Van Daley's records all notices and references to discipline imposed as a conequence of her July 14 memorandum.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by this Act; specifically the right of employees to file grievances or otherwise address with the employer issues regarding terms and conditions of employment without fear of interference, restraint or coercion.

WE WILL NOT discriminate 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; specifically, the right to file grievances or otherwise address with the employer issues regarding terms and conditions of employment.

Docket No. CO-H-2001-227 City of Somers Point
(Public Employer)

Date: _____ By: _____

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

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

APPENDIX "A"

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