P.E.R.C. NO. 83-127

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN (BERGEN PINES
COUNTY HOSPITAL),

Respondent,

-and- Docket No. CO-81-375-178-C

COUNCIL 52, LOCAL 549, AFSCME,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission issues a decision in a case concerning whether the County of Bergen (Bergen Pines County Hospital) had complied with the Commission's order directing the Hospital to rehire an employee it had discriminatorily refused to consider for two available positions and requiring the Hospital to pay that employee his back wages with interest. The Commission determines that the Hospital complied with its order to rehire the employee. It also finds that the Hospital need not pay the employee for two periods of time he worked as a Union employee, but must pay the employee for those periods of time he received an interest-free loan instead of a paycheck from the Union. The Hospital need not pay interest on the back pay it owes.

P.E.R.C. NO. 83-127

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN (BERGEN PINES
COUNTY HOSPITAL),

Respondent,

-and- Docket No. CO-81-375-178-C

COUNCIL 52, LOCAL 549, AFSCME,

Charging Party.

Appearances:
For the Respondent, Edwin C. Eastwood, Jr., Esquire

For the Charging Party, Rothbard, Harris & Oxfeld
Esqs. (Sanford R. Oxfeld, of Counsel)

SUPPLEMENTAL DECISION AND ORDER

On June 4, 1982, we issued a decision in this case, In re County of Bergen-Operating Bergen Pines County Hospital, P.E.R.C. No. 82-117, 8 NJPER 360 (¶13164 1982), appeal pending App. Div. Docket No. A-117-82-T1, finding that the County of Bergen had engaged in unfair practices in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) when it failed to consider Richard McCulley's application for two available positions after his position as morgue attendant had been abolished. We directed the hospital to rehire McCulley into one of the positions for which he possessed the qualifications and to make him whole through an award of back salary at the higher paying of the two positions together with interest.

Following our decision a dispute developed between the parties with respect to our order that McCulley be paid back wages. The County maintained that McCulley was not entitled to any back wages as he had been a full-time salaried employee of

Local 549, Council 52, AFSCME, AFL-CIO during the entire period covered by the back pay order and thus had suffered no monetary loss. The Union alleged that the money paid to McCulley during this period was a loan which was to be repaid to the Union in the event he prevailed in the case before the Commission and was awarded back pay. In view of this dispute, the Chairman of the Commission, in accordance with our compliance procedures set forth at N.J.A.C. 19:14-10.1 et. seq., issued a Notice of Hearing and directed that the parties appear before Commission Hearing Examiner Edmund G. Gerber.[1/]

On January 12, 1983, the parties appeared before the Hearing Examiner and had an opportunity to present documentary and testimonial evidence, to examine and cross-examine witnesses, and to present argument.

On January 26, 1983, the Hearing Examiner issued his compliance hearing report and recommendations, H.E. No. 83-23, 8 NJPER ___ (¶_____ 1983) (copy attached). He determined that the County should be allowed to offset from the backpay award payments received by McCulley from the Union for work he did as a Union employee from June 1981 to January 2, 1982 and from May 7 to June 18, 1982. He rejected the County's claim that it should be allowed to offset money received by McCulley from the Union from January 3 to May 7, 1982 and from June 18 to July 6, 1982 because he concluded that

1/ The County has complied with all other aspects of the order except that the Union has alleged that by placing McCulley at a remote work location, the County has not fully complied with the reinstatement aspects of our order. We deal with this issue as well in this decision.

McCulley had received this money as a loan. He also concluded that the County had failed to comply with the Commission's reinstatement order because, he believed, the location of McCulley's new position was too remote from Union activities and membership.

Exceptions to the report were filed by the Union on February 9, 1983 and by the County on February 14, 1983. The matter is now properly before us for decision.

We have reviewed the Hearing Examiner's recommended findings of fact in light of the entire record in this supplementary proceeding and the Exceptions filed by the parties. We find the factual determinations are supported by substantial evidence on the record and hereby adopt them with one modification.

In finding of fact #4, the Hearing Examiner states that "on June 11, 1981, McCulley was wrongfully terminated from Bergen Pines Hospital." In our prior decision we found that the Hospital's decision to lay McCulley off from the position of morgue custodian, which had been abolished, was not an unfair practice. Rather, we found that McCulley should have been hired into one of two titles at the Hospital for which he was qualified and for which openings existed and that the Hospital's refusal to do so was an unfair practice. Thus, his termination was unlawful only in the sense that he should have been continued on the hospital payroll in a new position. His termination as morgue custodian, standing alone, was not unlawful.

The Hearing Examiner concluded that from June 12, 1981 until January 2, 1982, McCulley was an employee of the Union and was compensated in amounts equivalent to his prior salary at the

Hospital. The Hearing Examiner found that on January 2, 1983, McCulley, having lost a recent election, relinquished his presidency of Local 549. He also relied on the fact that about this time a loan agreement was executed by McCulley and the Union.[2/] He found that the execution of the loan agreement and the expiration of McCulley's term as president were not merely coincidental. It was also about this time that the Union stopped making deductions from McCulley's checks for social security and unemployment insurance. Additionally, the Hearing Examiner found that during the period from May 7 to June 18, 1982, McCulley was employed by the Union to work in an organizing campaign in Jersey City. McCulley was reemployed by the Hospital on July 6, 1982. Thus, he recommended that the Hospital's back pay liability, which ran from June 12 to July 6, 1982, be offset by the amounts paid to McCulley by the Union during the periods from June 12, 1981 to January 2, 1982 and from May 7, 1982 to June 18, 1982.

At the hearing, the Union also alleged that the County had not complied with the Commission's reinstatement order because the position given McCulley as a hospital attendant was located at a small drug rehabilitation facility far away from the main hospital complex. The Hearing Examiner found that the Commission's direction that McCulley be employed in a "substantially equivalent position" referred not only to duties and salary, but also to McCulley's work location. Noting McCulley's past union activity, the Hearing Examiner concluded that stationing McCulley at the facility would serve to isolate him from future union

2/ The agreement was not produced at the hearing, although there was testimony as to its existence and execution.

activity. He thus recommended that McCulley be transferred, within a reasonable time, to a position on the premises of the hospital.

In its Exceptions, the County continues to dispute McCulley's entitlement to any back pay. The County notes that a copy of the loan agreement between the Union and McCulley was not produced at the hearing. The County, referring to the Union's alleged policy of compensating, on a loan basis, illegally discharged union "leaders", claims that policy would have no applicability to McCulley at any time during 1982 since he had been voted out of office and thus would not be eligible for such a loan. The County also excepts to the Hearing Examiner's recommendation that McCulley be transferred back to the main facility, arguing that our order contained no specification as to work location.

The Union contends, in its Exceptions, that except for the six-week period from May 7 to June 18, 1982, McCulley was covered by the Union's longstanding loan policy. It cites minutes of Union meetings and the fact that the Union had previously sued McCulley for a similar loan as evidence of the policy and of McCulley's status. The Union also disputes the County's allegation that the policy would not be applicable once McCulley ceased holding union office.

We find there is sufficient evidence in the record to conclude that the Union had a policy of supporting ousted union leaders with loans which were repayable if they won reinstatement

and back pay from their employers[3/] and that such a loan was made in this case. We find no evidence in the record to suggest that the beneficiaries of this policy had to be officeholders and thus conclude it could have applied to McCulley even after his term as president expired. Since McCulley was refused employment in June 1981 by the Hospital on account of his activities on behalf of the Union, he undoubtedly could have benefitted from the policy as he did in the past. However, given that no loan agreement was executed until late in 1981, coupled with the making of regular deductions from McCulley's paycheck which would not have been done if the payments were a loan, we agree with the Hearing Examiner that McCulley was an employee of the Union from June 12, 1982 to January 2, 1982, as well as during the six week period in May-June 1982 which is undisputed. We will mitigate the County's back pay obligation accordingly.

In addition, we will modify our prior order which directed that the County's back pay obligation include interest. McCulley, whether receiving salary or loan payments from the Union, had at all times the use of money he would have been earning had he remained on the County payroll. Since the loan made by the Union was interest-free (Tr. at p. 63), it would be inequitable to require the County to pay interest on the sum covered by the loan since McCulley suffered no loss of the use of the money. See NLRB v. My Store Inc., 468 F.2d 1146, 81 LRRM 2225, 2229 (7th Cir. 1972). Since the purpose of a back pay

3/ Such an arrangement is not unique. See e.g., in the private sector, NLRB v. My Store Inc., 468 F.2d 1146, 81 LRRM 2225 (7th Cir. 1972), certif. den. 410 U.S. 910 (1973).

award is to make the employee whole, any award of interest in these circumstances would be punitive.

We next consider whether placing McCulley in the drug rehabilitation unit complied with our reinstatement order. We believe it did. We discount the significance of the Hearing Examiner's factual findings that McCulley was the first employee and only Union member to be stationed at the facility since it is undisputed that the operation of the Center had only very recently come under the Hospital's jurisdiction. Again, we note that the layoff of McCulley from the position of morgue custodian was not found violative of the Act in our prior decision. Rather, the violation lay in the Hospital's refusal to consider his job applications for the positions of hospital attendant and building maintenance worker. He was hired into the position of hospital attendant as directed in the order. The fact that his duties at the Center differed from hospital attendants working at the main facility is not significant given the undisputed testimony that hospital attendant duties varied from department to department in the main facility itself. Further, there is no evidence that the County intentionally placed McCulley in the drug rehabilitation unit in order to isolate him from Union affairs. Accordingly, we will not adopt the Hearing Examiner's recommendation that McCulley be transferred to the main facility.

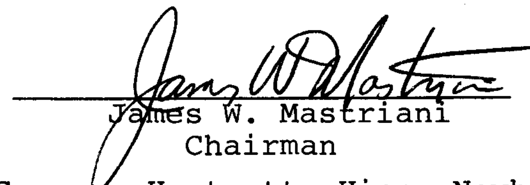
ORDER

Paragraph B1 of the Order issued in P.E.R.C. No. 82-117 is modified to read as follows:

(1) Forthwith offer to reemploy Richard McCulley in

the position of building maintenance worker or hospital attendant, or any other substantially equivalent position;[4/] make him whole for lost earnings from June 12, 1981 to July 6, 1982 at the rate of pay for the higher of the two positions less amounts received from Council 52, AFSCME during the periods of June 12, 1981 to January 2, 1982 and from May 7, 1982 to June 18, 1982.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioner Butch was not present.

DATED: Trenton, New Jersey
March 16, 1983
ISSUED: March 17, 1983

4/ We are satisfied that the County has complied with this portion of the order.

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

In the Matter of

COUNTY OF BERGEN (BERGEN PINES
COUNTY HOSPITAL),

Respondent,

-and-

Docket No. CO-81-375-178-C

COUNCIL 52, LOCAL 549, AFSCME,

Charging Party.

SYNOPSIS

In a proceeding to determine the compliance of Bergen County with the order of the Public Employment Relations Commission in County of Bergen Pines, Operating Bergen Pines County Hospital and Council 52, Local 549, AFSCME, P.E.R.C. No. 82-117, wherein it was found that Richard McCulley was wrongfully denied employment, a Hearing Examiner recommends the Commission find that for a period of approximately six months out of the approximately one year that McCulley was wrongfully denied employment by the Hospital he was employed by AFSCME, Council 52 and for that six-month period the County does not owe McCulley back pay.

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

In the Matter of

COUNTY OF BERGEN (BERGEN PINES
COUNTY HOSPITAL),

Respondent,

-and-

Docket No. CO-81-375-178-C

COUNCIL 52, LOCAL 549, AFSCME,

Charging Party.

Appearances:

For the Respondent, Edwin C. Eastwood, Jr., Esq.

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S COMPLIANCE HEARING REPORT AND RECOMMENDED DECISION

On June 4, 1982, the New Jersey Public Employment Relations Commission ("Commission") found that the County of Bergen, Operating Bergen Pines County Hospital ("Hospital") unlawfully discriminated against Richard McCulley when it failed and refused to consider Richard McCulley's application for an available position, after his position as morgue attendant had been abolished. McCulley, who was the President and principal union activist for Local 549, Council 52, AFSCME AFL-CIO (Council 52), was not considered for employment in other positions because of his activities on behalf of the union. 1/

1/ Specifically it was found that the Hospital violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-5.4(a)(1) and (3).

The Commission ordered that the Hospital re-employ McCulley as a building maintenance worker, hospital attendant or any other equivalent position, and, make him whole for lost earnings from June 8, 1981 at the rate of pay for the higher of the two positions, less interim earnings, together with interest at the rate of 12% per annum from June 8,1981.

In compliance with the Commission order, the Hospital reinstated McCulley on July 6, 1982, as a hospital attendant at the Msgr. Wall Social Service Center in Hackensack, N.J.

On July 20, 1982, Council 52 notified this agency that McCulley had not yet received his back pay award, nor had he been reinstated to a comparable position as ordered by the Commission. Council 52, therefore, requested that this agency file an application for enforcement with the Superior Court, Appellate Division.

On July 22, 1982, the Hospital responded to Council 52's request. It contends that McCulley has not received back pay because he was employed by Council 52, at the same salary, from the date of termination until reinstatement. Additionally, the Hospital claims McCulley's reinstated position is in full compliance with the Commission's Order.

On July 28, 1982, Council 52 notified this agency of a factual dispute concerning the characterization of payments received by McCulley from Council 52, which affects the computation of back pay. Council 52 recommended a fact finding hearing to resolve this dispute before this agency seeks to enforce its Order.

It appearing that the Commission Order may not have been complied with and that a factual dispute regarding the computation of the Award exists, a notice of hearing regarding compliance proceedings was issued on November 3, 1982, by the Chairman, pursuant to N.J.A.C. 19:14-10.2. This hearing was conducted on January 12, 1983, in Newark, N.J. The parties examined witnesses and presented evidence. They were given the opportunity to make oral arguments and to file briefs by January 17, 1983.

At the conclusion of the hearing, the parties agreed that the Hearing Examiner should proceed to issue a recommended decision without the benefit of a transcript. Therefore, based upon the parties' submissions and the testimony elicited at hearing, the Hearing Examiner makes the following findings of fact:

Findings of Fact

1) Council 52 has had a long-standing policy regarding support of local presidents under attack through discipline by management. This policy calls for pecuniary support of discharged or suspended local leaders, pending the outcome of the appropriate proceeding. Policy dictates that if such charges are successful and back pay is awarded, Council 52 shall be reimbursed in full by the disciplined leader.

2) Council 52's "Support Policy" has been implemented in the past. In 1975 the complaining witness, McCulley, was suspended or terminated (it is not clear which). The matter went to arbitration and McCulley was reinstated with back pay. During the

interim period McCulley was given a loan by Council 52. Subsequently, the union successfully sued McCulley for repayment of the loan.

3) Other local officials, besides McCulley, have also benefited by Council 52's "Support Policy." These officials have either voluntarily or involuntarily complied with the reimbursement provisions of the policy.

4) On June 11, 1981, McCulley was wrongfully terminated from the Bergen Pines Hospital.

5) On June 12, 1981, Council 52 began "supporting" McCulley commensurate with his prior net salary.

6) Council 52 made salary deductions for Social Security and unemployment insurance from McCulley's "support payments" and forwarded these deductions to the appropriate agencies.

7) McCulley did not receive any of the standard benefits, such as hospitalization, pension, life insurance or auto insurance reimbursement that other Council 52 employees received.

8) On October 2, 1981, Michael Lanni, the Executive Director of Council 52, testified at the unfair practice hearing concerning McCulley's discharge that McCulley was employed by Council 52 immediately upon his termination as a "lost time employee." Lanni stated that McCulley's function as a "lost time employee" was to continue servicing the membership he presided over.

9) Subsequent to McCulley's termination, at an arbitration hearing at the Bergen Pines County Hospital regarding uniforms, McCulley testified that he was employed by Council 52.

10) Michael Lanni testified that he wanted McCulley's presence maintained at the Hospital, for the benefit of the other

employees, because of the nature of the termination.

11) After McCulley's termination, he continued to function as President of Local 549, a non-paying position. McCulley manned Local 549's office at the Hospital, processed grievances and organized membership meetings. In addition, McCulley made more frequent trips to Council 52 headquarters in Jersey City, New Jersey, on union business. The local held an election on January 2nd and McCulley lost. His union duties were assumed by the newly elected President.

12) On cross-examination, Lanni testified that although he and McCulley discussed application for unemployment benefits, Council 52 never advised McCulley to apply and, in fact, McCulley never did apply for same.

13) Lanni testified that in December 1981 he realized McCulley's "support" was not being handled in a manner consistent with his status; that is, McCulley's payments were not being treated as a loan. Henceforth, all salary deductions immediately ceased and notice was sent to the appropriate authorities explaining this action. Lanni was unable to recall whether these deductions were ever returned to Council 52.

14) Sometime in December 1981, McCulley signed a loan agreement with Council 52, witnessed by Richard Gollin, Associate Director. Neither Council 52 nor McCulley were able to produce a copy of this agreement at hearing. McCulley and Gollin testified that the terms of the agreement called for McCulley to reimburse Council 52 in the event back pay was ordered by this agency.

15) Although McCulley lost in the election for President of Local 549, McCulley remained active in the union and served as a steward for Local 549.

16) McCulley was employed by Council 52 for a Hudson County organization campaign from May 17, 1982 to June 18, 1982. AFSCME International reimbursed Council 52 for this salary expense. Salary deductions were not made from these payments received by McCulley.

17) On July 6, 1982, McCulley was reinstated by the Hospital as a hospital attendant in a drug rehab program at the Msgr. Wall Social Service Center in Hackensack, New Jersey.

18) The Msgr. Wall Social Service Center is an ancillary operation of the Hospital, located a considerable distance from the Bergen Pines Hospital.

19) McCulley is the first Bergen Pines Hospital employee ever to be stationed at Msgr. Wall.

20) Only two titles at Msgr. Wall are in Local 549's negotiations unit. One of these positions is held by McCulley and the other by a non-member, making McCulley the only union member at Msgr. Wall.

21) At the time McCulley was re-employed at Msgr. Wall, openings were available at the Bergen Pines Hospital.

22) McCulley believed that his duties at Msgr. Wall were different than the standard duties of a hospital attendant but the Hospital has attendants doing a wide variety of tasks.

Discussion and Analysis - Back Pay

It is apparent that when McCulley was let go by the Hos-

pital, the union's actions were not based on its own pecuniary self-interest. Rather, its actions were based on its very reason for being, the protection of one of its members from the improper conduct of an employer. Further, it served the union's self-interest to demonstrate to all Hospital employees its support for McCulley and have him maintain his visibility at the Hospital and continue to function as the local union president.

Michael Lanni never attempted to contradict his testimony at the unfair practice hearing that McCulley was, in the summer and fall of 1981, considered an employee of the union.

Further, the union made the standard salary deductions from McCulley's pay check. Although the union did not grant him the same benefits or salary as other union representatives, McCulley did not have their duties. He was in a special situation.

Sometime in December 1981, Council 52 became concerned with McCulley's status. At that time, it ceased making salary deductions and executed a loan agreement with McCulley. This, coincidentally, all took place as a Local Presidential Election was approaching. If McCulley, a candidate in the election, was not successful, which he wasn't, the functions he was currently performing would be assumed by the new President and his services would no longer be needed. The nexus between all these events occurring within a reasonable time of each other cannot be discounted.

Therefore, I find that until the date the loan agreement was executed, McCulley should be considered an employee of Council #52.

The absence of evidence establishing the date of the loan agreement must work against the union for the purposes of computation of back pay since it has made the assertion. The effective date of the agreement for establishing the Hospital's back pay obligation will be January 2, 1982, the date McCulley relinguished the presidency of Local 549.

Accordingly, it is recommended that payments collected by McCulley from June '81 to January 2, 1982, along with wages collected during the Hudson County organization campaign from May 7, 1982 to June 18, 1982, should be considered as mitigating factors in the computation of McCulley's back pay award.

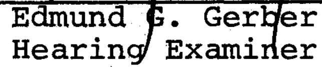
Discussion and Analysis

Reinstatement

Regarding McCulley's reinstatement, it is evident that the Hospital has failed to comply with the Commission's reinstatement order. The terms of the Order call for McCulley to be reemployed in a "substantially equivalent position." Substantially equivalent refers not only to duties and salary, but also to location. Location in this instance is especially important because of McCulley's activities with the union and its membership.

Regardless of the Hospital's intent, the reinstatement of McCulley at a distant facility with no other union employees, only serves to isolate McCulley from any future union activity. Therefore, it is recommended that Richard McCulley must be transferred, within a reasonable time, to a substantially equivalent position on the premises of the Bergen Pines Hospital.

It is noted however that the evidence does not demonstrate that McCulley's duties themselves were other than substantially equivalent.



Edmund G. Gerber
Hearing Examiner

Dated: January 26, 1983
Trenton, New Jersey