

P.E.R.C. NO. 87-27

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MIDDLESEX,

Respondent,

-and-

Docket No. CO-85-225-136

NEW JERSEY STATE POLICEMEN'S  
BENEVOLENT ASSOCIATION, INC.,  
LOCAL 181,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the New Jersey State Policemen's Benevolent Association, Inc., Local 181 filed against the Borough of Middlesex. The charge alleged the Borough violated the New Jersey Employer-Employee Relations Act when it reassigned the State PBA delegate from a rotating to a steady work shift in order to cause acrimony among unit members. The Commission, in agreement with a Hearing Examiner, finds that Local 181 did not establish its allegations by a preponderance of the evidence.

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LOCAL 181,

Charging Party.

Appearances:

For the Respondent, Edward J. Johnson, Esq.

For the Charging Party, Klausner & Hunter, Esqs.  
(Stephen E. Klausner, of Counsel)

DECISION AND ORDER

On March 1, 1985, the New Jersey State Policemen's Benevolent Association, Inc., Local 181 ("Local 181") filed an unfair practice charge against the Borough of Middlesex ("Borough"). The charge alleged that the Board violated subsections 5.4 (a)(1), (2), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee

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<sup>1/</sup> 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; (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."

Relations Act, N.J.S.A 34:13 A-1 et seq. ("Act"), when it reassigned patrol officer William Medler from his normal rotating shift to a steady day shift, the most desirable shift, in order to provide Medler, a State PBA delegate, with a benefit not granted other unit members, thus causing acrimony among unit members.<sup>2/</sup>

On May 14, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Borough then filed an Answer admitting it temporarily reassigned Medler, but denying any unlawful motive or violation. The Borough asserted that Medler was rescheduled, as were other officers, so he could receive training in his areas of weakness, including operation of the breathalyzer and charge desk.

On November 7, 1985, Hearing Examiner Richard Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by March 31, 1986.

On May 23, 1986, the Hearing Examiner issued his report. He recommended dismissal of the Complaint. H.E. No. 86-58, 12 NJPER 471 (¶17177 1986) (copy attached). No exceptions have been filed.

We have reviewed the record. The Hearing Examiner's findings of fact are accurate (pp. 3-8). We add that all command

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<sup>2/</sup> The charge contained three other counts which were later settled.

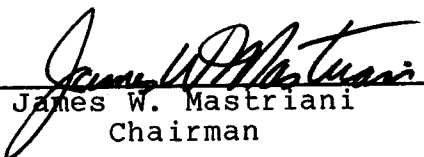
officers deemed it necessary to train Medler on the breathalyzer, report writing and desk procedures.<sup>3/</sup>

Under all the circumstances of this case, we conclude that Local 181 has not established its allegations by a preponderance of the evidence. Medler needed training on the breathalyzer and desk operations, among other areas. When the Chief received additional officers from the police academy, he was able to schedule that additional training for Medler as well as other officers. Medler's reassignment lasted only 18 work days, the time needed for training. There is no evidence whatsoever that this temporary reassignment was intended to cause or did cause any acrimony among unit members or interference with Medler's PBA activities; indeed the Chief expressed his willingness to accommodate Medler in discharging his PBA duties. Under these circumstances, we perceive no violation of the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson and Wenzler voted in favor of this decision. Commissioner Smith was opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey  
September 25, 1986  
ISSUED: September 26, 1986

<sup>3/</sup> In the absence of exceptions, we will not address the admissibility of the tape recording of the two meetings between Medler and the Chief of Police. We note, however, that substantial portions of the recording of the second meeting are inaudible and thus bring into question the recording's reliability.

H.E. NO. 86-58

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

In the Matter of

BOROUGH OF MIDDLESEX,

Respondent,

-and-

Docket No. CO-85-225-136

NEW JERSEY STATE POLICEMEN'S  
BENEVOLENT ASSOCIATION, INC.,  
LOCAL 181,

Charging Party.

SYNOPSIS

The hearing examiner recommends dismissal of a complaint alleging violations of 5.4(a)(1), (2) and (3) filed by PBA Local 181 against the Borough of Middlesex. Local 181 alleged that the Borough rescheduled a patrolman, who was a State PBA delegate and a member of Local 181's negotiations committee, in an attempt to interfere with union affairs and in retaliation for the patrolman's protected activity. While Local 181's proofs on the (a)(1) and (3) claim did raise an inference sufficient to shift the burden under Bridgewater, the Borough proved by a preponderance of the evidence that it would have rescheduled the patrolman from a rotating shift to steady days even in the absence of his protected activity. The hearing examiner recommends dismissal of the (a)(2) allegation because Local 181 failed to submit any evidence supporting its claim that the Borough's action interfered with Local 181 affairs. The hearing examiner declined to discuss an independent (a)(1) issue based on a comment made by the Chief of Police because it was not fully and fairly litigated. The hearing examiner also notes that Local 181 failed to allege an (a)(5) violation.

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. 86-58

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

In the Matter of

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Respondent,

-and-

Docket No. CO-85-225-136

NEW JERSEY STATE POLICEMEN'S  
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LOCAL 181,

Charging Party.

Appearances:

For the Respondent,  
Edward J. Johnson, Esq.

For the Charging Party,  
Klausner & Hunter, Esqs.  
(Stephen E. Klausner, Esq.)

HEARING EXAMINER'S  
RECOMMENDED REPORT AND DECISION

On March 1, 1985, New Jersey State Policemen's Benevolent Association, Inc., Local 181 ("Local 181") filed an Unfair Practice Charge against the Borough of Middlesex ("Borough") alleging violations of subsections 5.4(a)(1), (2), (3) and (5) <sup>1/</sup> of the New

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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

Footnote Continued on Next Page

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). In a four-count charge, Local 181 alleged that the Borough: (1) reassigned Patrolman Medler from his normal rotating shift to a steady day shift in order to provide Medler, a State P.B.A. delegate, with a benefit not granted other unit members; (2) unilaterally changed the practice of how unit members could use a contractually guaranteed floating holiday; (3) unilaterally implemented a new schedule under which a number of unit members were required to work additional midnight shifts; and (4) unilaterally established a new procedure for reporting in.

On May 14, 1985, the Director of Unfair Practices issued a Complaint and a notice scheduling a hearing for July 10, 11 and 12, 1985.

On November 7, 1985, after granting two requests for postponements, I conducted a hearing.

Under the terms of a tentative settlement agreement reached before the record was opened, Local 181 withdrew counts two, three and four of its charge. (T pp. 5-7). The remaining count deals with

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1/ Footnote Continued From Previous Page

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; (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."

Medler's reassignment from his rotating shift to steady days. Local 181 claims that the reassignment was an attempt to "interfere with internal union affairs" that resulted in "disharmony and acrimony" and amounted to a violation of subsections 5.4(a)(1), (2) and (3). On May 22, 1985, the Borough filed an Answer, admitting that Medler was reassigned but denying any unlawful motive or other violation of the Act. The Borough asserts that Medler was scheduled to the day shift for training. (C-2).

At the hearing on November 7, 1985, the parties were given an opportunity to examine witnesses and introduce documents. They filed post hearing briefs, the last of which was received on March 31, 1986. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Borough is a public employer within the meaning of the Act and is subject to its provisions.

2. Local 181 is an employee representative within the meaning of the Act and is subject to its provisions.

3. Medler has been employed as a patrolman by the Borough since 1972. He is a State P.B.A. delegate and is on Local 181's negotiations committee. Over the past several years he has filed grievances; most of them were apparently filed on his own behalf. (T pp. 31-33).



4. Prior to November 1984, Medler worked a rotating shift. On or about November 8, 1984, a new schedule was posted under which Medler was assigned to a steady day shift with weekends off. The schedule was the product of Chief Conrad, Captain King and Lieutenant Benson, the training officer. When Medler noticed the new schedule, he asked the desk sergeant why he had been assigned to a day shift. The sergeant did not know and suggested that Medler ask Lieutenant Benson. When Medler asked Benson why he was reassigned, the Lieutenant said he did not know and recommended that the patrolman speak with Chief Conrad. By this time Medler had a concealed tape recorder with him. He recorded his conversation with Conrad.<sup>2/</sup> This is what they said:

Chief Conrad - Ya Bill

Medler - On the new schedule I just want to know why I'm on steady days.

Chief Conrad - Well mainly because your the delegate. You'll have access to command personnel at all times, perhaps we can eliminate any problems before they get to the grievance stages.

Medler - Well I always have access to command personnel.

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<sup>2/</sup> The Borough objected to the introduction both of the tape recording of the November 8, 1984 discussion between Medler and Conrad and the recording of the step-one grievance hearing conducted November 14, 1984 (see finding 5 infra.). The tape was authenticated, it is relevant, and it does not violate any New Jersey law. I accept it as evidence.

- Chief Conrad - Well not really, there's been times somethings gotten out of hand because there hasn't been anyone around to handle situations. You and I will be working the same time every day, you'll have every weekend off.
- Medler - For what period to time is this?
- Chief Conrad - Indefinitely
- Medler - Indefinitely?
- Chief Conrad - Yea. (Unknown person in hallway, chief replied, I'll be right with you.)
- Medler - Alright.
- Chief Conrad - Basically that's it, you'll be available to be convenient to other people and other problems.
- Medler - If I'm not delegate then I don't have to work steady days, is that correct?
- Chief Conrad - I don't know how your reading other things into it and I don't want to get into a discussion.
- Medler - No, if I resign as delegate would I still be on the shift?
- Chief Conrad - Well as long as it's made out I would say. Some changes but I wouldn't jump to any conclusions.
- Medler - OK, alright.

5. Medler grieved his new schedule. A step-one meeting (with the Chief) was held November 14, 1984. Medler arrived with his concealed tape recorder. The meeting lasted approximately fifty minutes. The following paraphrases the tape-recorded discussion.<sup>3/</sup>

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<sup>3/</sup> See footnote 2, supra.

The meeting started with an argument about who said what when they discussed the new schedule on November 8, 1984. Medler insisted that the Chief had told him he had been reassigned because he was the delegate. The Chief said no, Medler was the one to raise the delegate issue, the reassignment was beneficial for other reasons.<sup>4/</sup> Medler, according to the Chief, was reading other things into it. After Medler and Conrad finished talking about their previous encounter, the Chief explained his reasons for the reassignment. He told Medler that he needed training on the breathalyzer, that his report writing was not up to par, and that he didn't seem to be issuing enough summonses. Medler said he was being harassed and that if he worked only days he would not be able to perform his delegate duties. The Chief assured him that if he needed time off for legitimate P.B.A. business, he would get it. They talked awhile about harassment and discrimination, apparently trying (unsuccessfully) to define those terms. Medler made a proposal to settle the grievance. The Chief tried to point out the advantages of working days. Medler said he wanted to be reassigned to his rotating shift. He thanked the Chief for his time and told him he'd move his grievance to step two.

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<sup>4/</sup> Medler's testimony about the November 8, 1984 discussion was more accurate than Conrad's. This is not surprising because Medler (when he testified) was reading from notes he made of the tape.

Local 181 does not contend that the Chief threatened, harassed, discriminated against or tried to discourage Medler from his union activities at the grievance hearing.

6. Medler worked the day shift from November 26, 1984 to December 21, 1984, a total of eighteen work-days. He was assigned to the desk where he was trained in communications operations procedures. He also attended a breathalyzer refresher course and was given the opportunity to examine all officers' reports.

Lieutenant Benson, the training officer, had instructed the desk sergeants on the areas they were to help Medler. The sergeants were told to submit reports on Medler's progress. They gave the reports to Benson, who also observed Medler's performance at the desk.

On December 21, 1984, Benson prepared a memo to the Chief, indicating his overall satisfaction with Medler's performance at the charge desk. That memo also documented a meeting between Medler, Benson, the Chief and Captain King, at which the Chief offered Medler the opportunity for training in any area that he felt he needed help. Medler refused the Chief's offer and was reassigned to his rotating shift.

Since Medler's reassignment, three or four other patrolmen have been assigned steady days for training on the charge desk. Conrad and Benson both testified credibly that the arrival of three new officers from the training academy provided the manpower necessary to permit staff training.

There is nothing in the record to suggest that while Medler was on the steady day shift he was prevented or discouraged from participating in any union-related activities. Nor is there any evidence that Medler's assignment caused dissention among Local 181 members.

### DISCUSSION

Local 181 asserts that by scheduling Medler to a steady day shift, the Borough singled him out, "for the purpose of providing [him] with a benefit because of his union status and as an attempt to interfere with internal union affairs." (C-1). Local 181's 5.4(a)(1) and (3) theory appears to be that the Borough discriminated against Medler by changing his shift because he was a State PBA delegate and filed some grievances. The case is unique because the alleged reprisal is the conferral of a benefit - as Local 181 puts it, "the most desirable police officer schedule." (CP-1).<sup>5/</sup> The Borough asserts that it rescheduled Medler because he needed training. (C-2).

My analysis of the 5.4(a)(1) and (3) claim is guided by the New Jersey Supreme Court's decision in In re Bridgewater Tp., 95 N.J. 235 (1983). There the Court adopted the "Wright Line" test for dual-motive cases:

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<sup>5/</sup> Local 181 does not allege that the Borough violated section 5.4(a)(5) when it rescheduled Medler.

Under that test, the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. 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.

Once that prima facie case is established...the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected activity. [95 N.J. at 242, citations omitted.]

The Court further explained that:

Under the Wright Line test, in the absence of any direct evidence of anti-union motivation for disciplinary action, a prima facie case must be established by showing that the employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected rights. [95 N.J. at 246. citations omitted.]

Local 181 has shown that: 1) Medler was a PBA State Delegate and filed grievances; 2) the Chief knew it; and 3) Medler was rescheduled from a rotating shift to a steady day shift with weekends off. The only evidence arguably raising an inference that Medler's protected activity motivated the Borough's scheduling decision is the Chief's recorded comments to Medler on November 8, 1984. In response to Medler's question about why he was rescheduled, the Chief responded, "Well, mainly because you're the delegate, you'll have access to command personnel at all times, perhaps we can eliminate any problems before they get to the

grievance steps." (CP-1).<sup>6/</sup> Local 181 presented no other evidence of union animus.

The underlying question is whether the Chief was hostile toward Medler's protected activity. An (a)(3) violation requires a finding of anti-union animus. Borough of Haddonfield Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); Bridgewater. The anomaly here is that Local 181 admits that the day shift is a benefit, a desirable schedule. It is conceivable, however, that a reprisal can take the form of a benefit - for example, if an active union member is promoted out of his unit in order to curb his exercise of protected rights. I conclude that Local 181's proofs did raise an inference sufficient to shift the burden to the Borough to prove by a preponderance of the evidence that it would have rescheduled Medler even in the absence of his protected activity. Bridgewater.

The Borough asserts that it rescheduled Medler to the day shift so that he could receive training on the breathalyzer, get experience at the charge desk, and review other officers' reports to

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<sup>6/</sup> Local 181 did not specifically plead, prove, or argue in its brief, that the Chief's comments amounted to an independent violation of section 5.4(a)(1) of the Act. The Borough provided no related defense. The issue was not fully and fairly litigated. Thus, I do not rule on it here. The statement was used by Local 181 as evidence to support its 5.4(a)(3) claim that Medler's new assignment violated the Act. In re State of New Jersey (Department of Higher Education), P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985); Commercial Twp Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982) aff'd App. Div. Docket No. A-1642-8212 (12/8/83).

improve his own report writing skills. I credit this testimony. The Chief and Lieutenant Benson had discussed the need for Medler to receive training before the schedule was made. Their discussions were prompted, in part, by Medler's inability to properly use the breathalyzer. The schedule was implemented at a time when the arrival of new police academy graduates provided additional manpower.<sup>7/</sup> Medler's tour on the day shift lasted approximately one month - eighteen work days. The Borough assigned other officers to the same training (desk) duty after Medler was rescheduled to his rotating shift. It stretches credulity to assume that the Borough concocted the training program as a pretext to "discipline" Medler or prevent him from engaging in protected activity.

I conclude that the Borough has shown by a preponderance of the evidence that it did not violate subsections 5.4(a)(1) and (3) by rescheduling Medler to a steady day shift and I recommend dismissal of this part of the complaint.

The remaining issue is whether the Borough violated subsection 5.4(a)(2). Commission cases dealing with (a)(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a

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<sup>7/</sup> On the issue of the timing of the schedule change, I note that Local 181 failed to establish a time frame between Medler's exercise of protected rights and the implementation of the schedule. The timing of an alleged reprisal and the asserted protected activity is critical. cf. Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 17005 (1985).



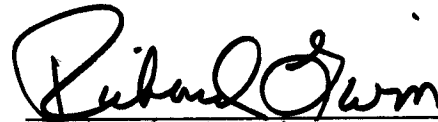
union and his position as an agent of an employer. Union County Regional Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976) (exclusivity clause is not per se violative of section 5.4(a)(2) but must give way to organizational rights once timely representation petition's filed, or during open period); County of Middlesex (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981) (employer may not negotiate with incumbent if real question of representation is pending); In re County of Camden, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983) (County violates 5.4(a)(1) and (2) by permitting its personnel assistant, who was also a union officer, to represent the County in handling of employee's grievance).

While motive is not an element of an (a)(2) offense, there must be a showing that the acts complained of actually interfered with (or dominated) the formation, existence or administration of the employee organization. cf. Morris, The Developing Labor Law, (A.B.A. 2d ed. 1983), p. 279 citing Garment Workers (Bernard Altman Texas Corp) v. NLRB, 366 U.S. 731 (1961): ("there is no basis for a finding of a Section 8(a)(2) violation without evidence of its realization.") [see generally id. at 269-279].

Noting the absence of any evidence showing that Medler's reassignment interfered with the formation, existence or administration of Local 181, and the fact that I have credited the Borough's business justification, I recommend dismissal of the 5.4(a)(2) claim.

RECOMMENDED ORDER

I recommend that the complaint be dismissed in its entirety.

A handwritten signature in black ink, appearing to read "Richard C. Gwin", written over a horizontal line.

Richard C. Gwin  
Hearing Examiner

DATED: May 23, 1986  
Trenton, New Jersey