

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,
Respondent,

and

Docket No. CO-76-60-52

WAYNE P.B.A. LOCAL NO. 136,
Charging Party.

SYNOPSIS

The Commission in its Decision and Order adopts the findings of fact and conclusions of law of the Hearing Examiner in an unfair practice proceeding, but finds the exceptions filed by the P.B.A. relating primarily to questions of remedy to be meritorious and modifies the Hearing Examiner's recommended Order accordingly. The Commission, in agreement with the Hearing Examiner, concludes that the Township of Wayne had engaged in unfair practices, proscribed by N.J.S.A. 34:13A-5.4(a)(3), by discriminatorily demoting William Culmone from the Detective Bureau to the Patrol Division of the police department because of Culmone's active role in the P.B.A., particularly as a member of the P.B.A. negotiating committee. The Commission in addition concludes that the Township's violation of N.J.S.A. 34:13A-5.4(a)(3) has necessarily interfered with, restrained and coerced its police department employees in the exercise of rights protected under the Act and therefore finds that the Township has violated N.J.S.A. 34:13A-5.4(a)(1).

The Commission orders the Township to cease and desist from engaging in similar conduct in the future and to cease and desist from discriminating in regard to hire or tenure of employment or any term and condition of employment of any employee within the police department to discourage said employees in the exercise of protected rights under the Act; and affirmatively orders the Township to offer Culmone reinstatement to the Detective Bureau from which he was unlawfully transferred on September 1, 1975, without prejudice to any rights or privileges enjoyed by him; to make him whole for any loss of pay that may have been suffered as a result of the Township's improper conduct; to post appropriate notices and to notify the Commission, in writing, of the steps taken to comply with the Commission's Order.

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In the Matter of

TOWNSHIP OF WAYNE,

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Docket No. CO-76-60-52

WAYNE P.B.A. LOCAL NO. 136,

Charging Party.

Appearances:

For the Township of Wayne
~~Frank Scangarella, Esq.~~
(~~Laura J. Landa, On the Brief~~)

For Wayne P.B.A. Local No. 136
Zazzali & Zazzali, P.A.
(Lawrence A. Whipple, Jr., On the Brief)

DECISION AND ORDER

On September 2, 1975, the Wayne Patrolmen's Benevolent Association Local No. 136 (the "PBA") filed an Unfair Practice Charge (supported by an affidavit of William Culmone) with the Public Employment Relations Commission (the "Commission") alleging that the Township of Wayne (the "Township") had engaged in certain prohibited conduct within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the PBA alleged that the Township had discriminatorily demoted Mr. Culmone from the Detective Bureau to the Patrol Division of the Police Department due to his activities on behalf of the PBA, thereby violating N.J.S.A. 34:13A-5.4(a)(1), (3) and (4).^{1/} It appearing to the

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.

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

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given information or testimony under this Act."

Commission's then Executive Director ^{2/} that the allegations in the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 12, 1975.

Pursuant to the Complaint and Notice of Hearing a plenary hearing was held before Commission Hearing Examiner Edmund G. Gerber on March 9, 1976 and April 5, 1976 at which all parties were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Following the close of the hearing, briefs were submitted by both parties by June 31, 1976.^{3/} After consideration of the entire record in this proceeding, the Hearing Examiner issued his Recommended Report and Decision on June 17, 1977, which Report included findings of facts and conclusions of law and a proposed order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.

Based upon the entire record herein, the Hearing Examiner found that the Township's action in transferring William Culmone was discriminatory and motivated in part by a desire to discourage the exercise of protected rights and was therefore violative of N.J.S.A. 34:13A-5.4(a)(3).

The Hearing Examiner also concluded that because the PBA's post-hearing brief referred to the Charge as being based upon a violation of N.J.S.A. 34:13A-5.4(a)(3) only and because the essence of the instant matter

^{2/} On June 3, 1976 the then Executive Director, Jeffrey B. Tener was appointed the Commission's first full time Chairman. See N.J.S.A. 34:13A-5.3 [The position of Executive Director was eliminated as the Chairman is the Commission's chief executive officer.] The functions previously performed by the Executive Director in unfair practice proceedings were transferred by the Commission to the Director of Unfair Practice Proceedings.

^{3/} On July 12, 1976, two weeks after the submission of briefs, a Hearing Examiner's Recommended Report and Decision was issued in the matter of City of Hackensack and Richard Winner, et al., H.E. No. 77-1. This report discussed various possible standards for finding violations of §5.4 (a) (3). The parties mutually suggested to the Hearing Examiner that the instant Report not be issued until the Commission issued its Decision and Order in Hackensack. The Commission issued said decision, P.E.R.C. No. 77-49, on March 17, 1977.

was an N.J.S.A. 34:13A-5.4(a)(3) type violation, the Hearing Examiner considered the N.J.S.A. 34:13A-5.4(a)(1) and (4) charges to have been withdrawn by the PBA.

The PBA excepts to the Hearing Examiner's recommended order in that it does not contain a requirement that the Township make Culmone whole for all losses incurred by him as a result of the Township's discriminatory conduct against him. The PBA states that where an (a)(3) type violation has been found, the traditional remedy has been reinstatement of the employee to his prior position with back pay. The PBA claims that had the discriminatory conduct not occurred herein, Culmone would have received approximately \$1100 additional compensation during the period from September 22, 1975 (the date of Culmone's transfer from the Detective Bureau to the Patrol Division) to July 1, 1977. Accordingly, the PBA concludes that the Township should be ordered to pay Culmone back pay plus interest.

The PBA further excepts to footnote four of the Recommended Report and Decision of the Hearing Examiner wherein he considered the (a)(1) and (a)(4) charges to have been withdrawn. The PBA urges the adoption by the Commission of the doctrine of derivative violation, and therefore, regardless of whether or not it intended to withdraw the (a)(1) charge, the PBA contends that an (a)(1) violation should be found as a derivative of the (a)(3) violation.

The Township in its reply to the exceptions filed by the PBA, contends that no payments of an overtime differential are necessary to render Culmone whole. The Township contends that the annual \$600 detectives' differential is payment made in lieu of compensation for overtime hours worked by detectives. The Township states that prior to January 1, 1977,

uniformed patrol officers received compensatory time for hours worked over 40 hours a week; however, it is noted that for hours worked over 40 hours per week which were spent in Municipal Court, patrol officers received straight hourly compensation therefor. After January 1, 1977, the Township claims that patrol officers received time and a half compensation for all hours worked over 40 hours a week, pursuant to the terms of a collective negotiations agreement between the above-referred parties. Accordingly, it is contended that Culmone has been fully compensated for any overtime hours which he has worked since his transfer into the Patrol Division, in that he was paid either time and a half, straight time, or compensatory time as dictated by the parties' agreement.

Finally, the Township cites Galloway Twp. Board of Education v. Galloway Twp. Assoc. of Educational Secretaries, 149 N.J. Super. 346 (App. Div. 1977), for the proposition that the Act does not authorize the Commission to order back pay for time not worked.

We observe at the outset that neither party has excepted to the Hearing Examiner's findings of facts and conclusions of law with regard to his determination that the Township has violated N.J.S.A. 34:13A-5.4(a)(3). Accordingly, upon careful examination of the entire record herein, the Commission affirms the Hearing Examiner's determination that the Township violated N.J.S.A. 34:13A-5.4(a)(3) substantially for the reasons cited by him. Specifically, we find that the transfer of Culmone from the Detective Bureau to the Patrol Division at least in part resulted from an effort by the Township to discriminate against Culmone for exercising his protected rights.

With reference to the PBA's exception to the Hearing Examiner's recommended order, the Commission notes that the recommended order did

require that Culmone be reinstated to the Detective Bureau "without prejudice to any rights or privileges enjoyed by him."^{4/} However, it is also noted that upon the finding of N.J.S.A. 34:13A-5.4(a)(3) type violations, under appropriate circumstances, the remedy provided may contain a specific recital of an affirmative order to make whole the victim of the unlawful discrimination.^{5/}

N.J.S.A. 34:13A-5.4(c) gives the Commission authority "to take such reasonable affirmative action as will effectuate the policies of this Act" (emphasis added). Clearly, part of the policy of the Act is to discourage the commission of unfair labor practices. Accordingly, we believe it was intended that the Commission take the steps it deems necessary to remedy whatever damage has resulted from an unfair practice which the Commission has determined was committed. Under the circumstances present herein, only by ordering an offer of reinstatement and a ~~make~~ whole award can the Commission insure that the Township has not benefitted from its unfair practice and that the violation of protected rights is remedied.

We believe the circumstances present herein warrant an affirmative order requiring the Township not only to reinstate William Culmone to the Detective Bureau from which he was unlawfully transferred on September 1, 1975, but also to make him whole for any loss of pay he may have suffered as a result of the Township of Wayne's discriminatory conduct.^{6/} Based upon

^{4/} See Hearing Examiner's Recommended Report and Decision attached hereto, H.E. No. 77-20 at p. 9.

^{5/} See In re City of Hackensack, P.E.R.C. No. 77-49, p. 15-18, 3 NJPER 143 (1977).

^{6/} In the decision In re Galloway Twp. Board of Education, P.E.R.C. No. 76-31, aff'd. in part, rev'd. in part, sub. nom., Galloway Twp. Board of Education v. Galloway Twp. Assoc. of Educational Secretaries, 149 N.J. Super. 346 (App. Div. 1977), certif. granted, ___ N.J. ___, July 20, 1977, the Commission ordered the public employer to pay employees back pay where the public employer unilaterally reduced the work hours of said employees in violation of the employer's negotiation obligation under the Act. See N.J.S.A. 34:13A-5.4(a)(5) and N.J.S.A. 34:13A-5.3.

(Continued)

the entire record herein, we find that but for the discriminatory transfer of Culmone out of the Detective Bureau, he would have received the annual \$600 detectives' differential payment during the period from September 1, 1975 through the date of his reinstatement to the Detective Bureau.

Accordingly, on the basis of the foregoing and the record as a whole, the Township shall be ordered to pay William Culmone the annual \$600 detectives' differential payment which he would have received as a detective had he not been unlawfully transferred from the Detective Bureau to the Patrol Division, less any compensation ^{7/} received for overtime hours worked while a patrol officer from September 1, 1975 to his date of reinstatement to the Detective Bureau.^{8/}

6/ (Continued)

The Court voided the Commission's order for such payments as ultra vires because the payments were to be made for services not rendered.

We would first note that, as indicated above, the Supreme Court has granted certification to hear this case primarily on the issue of the Commission's authority to issue back pay. While a final resolution of the matter is thus not clear, the Commission believes that the instant type of case is distinguishable from the Galloway decision. The Court in Galloway specifically reserved judgment concerning remedies for illegally dismissed public employees. The instant case deals with that very problem. The employer has been found to have discriminated against an employee because of that employees' activities on behalf of his representative organization. This action violated N.J.S.A. 34:13A-5.4(a)(3). The Galloway case concerned the proper remedy for a violation of N.J.S.A. 34:13A-5.4(a)(5), a refusal to negotiate in good faith. Therefore, the Commission believes that the Galloway case does not prevent the issuance of a make whole remedy in the within matter.

^{7/} This would include any and all compensation received for overtime hours worked while a patrol officer, including time and a half payments, straight time payments, and compensatory time.

We emphasize that the intent of this remedy is to make Culmone whole and not to provide him with a windfall. Therefore, his monetary remedy, if any, reflects only the difference between that which he would have received in payments in lieu of overtime as a detective and that which he received in overtime payments as a patrol officer during the relevant period.

^{8/} When computing the differential amount to which Culmone may be entitled, it should be noted that he is potentially entitled to the full \$600 differential for each full year which he spent outside the Detective Bureau and to a proportionate amount of the annual \$600 differential for each fractional portion of any year spent outside the Detective Bureau --- from September 1, 1975 to his date of reinstatement to the Detective Bureau.

~~The PBA has also excepted to the absence of a finding of an N.J.S.A. 34:13A-5.4(a)(1) violation in the Hearing Examiner's Recommended Report and Decision. In several earlier decisions, the Commission has held that an unfair practice under subsections (a)(2) through (7) necessarily interferes with employees in the exercise of their rights and thus derivatively violates subsection (a)(1).~~^{9/} Accordingly, we find in the instant matter that the Township's violation of N.J.S.A. 34:13A-5.4(a)(3) has necessarily interfered with, restrained, and coerced its Police Department employees ~~in the exercise of their rights under the Act and therefore we further find that the Township~~ has violated N.J.S.A. 34:13A-5.4(a)(1).

ORDER

Accordingly, for the reasons set forth above, the Public Employment Relations Commission hereby determines that the Respondent Township of Wayne has violated N.J.S.A. 34:13A-5.4(a)(1) and (3) with regard to William Culmone and IT IS HEREBY ORDERED that the Respondent, Township of Wayne, shall

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act.

(b) Discriminating in regard to hire or tenure of employment or any term and conditions of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act including the right to form, join and assist any employee organization without fear of penalty or reprisal.

^{9/} See In re Galloway Twp. Board of Education, P.E.R.C. No. 77-3, ___ NJPER ___ (1976).

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer William Culmone reinstatement to the Detective Bureau from which he was unlawfully transferred on September 1, 1975, without prejudice to any rights or privileges enjoyed by him, and make him whole for any loss of pay he may have suffered as a result of the discriminatory transfer by the Township of Wayne by paying William Culmone the detectives' overtime differential payments which he would have received as a detective less any compensation received for overtime worked while a patrol officer, from September 1, 1975, the date on which he was unlawfully transferred, to his date of reinstatement in the Detective Bureau.

(b) Post at the Municipal Building in Wayne, New Jersey, copies of the attached notice marked Appendix "A". Copies of such notices on forms to be provided by the Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


Jeffrey B. Tener, Chairman

Chairman Tener, Commissioners Forst, Hartnett, Hipp and Parcels voted for this decision. Commissioner Hurwitz voted against this decision.

DATED: Trenton, New Jersey

September 8, 1977

ISSUED: September 9, 1977

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL offer William Culmone reinstatement to the Detective Bureau from which he was unlawfully transferred on September 1, 1975, without prejudice to any rights or privileges enjoyed by him.

WE WILL make William Culmone whole for any loss of pay he may have suffered as a result of the discriminatory transfer by the Township of Wayne by paying William Culmone the detectives' overtime differential payments which he would have received as a detective less any compensation received for overtime worked while a patrol officer, from September 1, 1975, the date on which he was unlawfully transferred, to his date of reinstatement in the Detective Bureau.

Township of Wayne

(Public Employer)

Dated _____

By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

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

In the Matter of

TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CO-76-60-52

WAYNE P.B.A. LOCAL NO. 136,

Charging Party.

SYNOPSIS

The Wayne Policemen's Benevolent Association, Local No. 136 brought this action alleging that Wayne Township had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act by discriminatorily demoting William Culmone from the Detective Bureau to the Patrol Division of the Police Department because of Culmone's active role in the PBA, particularly as a member of the PBA negotiating committee.

The Hearing Examiner finds that the Township had actual knowledge of Culmone's protected activities and that the transfer of Culmone from detective to patrolman status was discriminatory and motivated in part by an intent to discourage the exercise of protected rights. Said action was a violation of the Act, and the Hearing Examiner's recommended order requires the Township to offer Culmone an immediate transfer back to detective status.

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 conclusions of law.

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RELATIONS COMMISSION

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Docket No. CO-76-60-52

WAYNE P.B.A. LOCAL NO. 136,
Charging Party.

Appearances:

For Township of Wayne
Gerald L. Dorf, P.A.
(Thomas J. Savage, On the Brief)

For Wayne P.B.A. Local No. 136
Zazzali & Zazzali, P.A.
(Lawrence A. Whipple, Jr., On the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Wayne Patrolmen's Benevolent Association, Local No. 136 (the "PBA"), filed an Unfair Practice Charge (supported by an affidavit of William Culmone) with the Public Employment Relations Commission (the "Commission") on September 2, 1975 alleging that Culmone's employer, Wayne Township (the "Township") had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") by its actions in demoting Culmone from the Detective Bureau to the Patrol Division of the Police Department. ^{1/}

^{1/} The PBA specifically alleged that the Township violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4). These subsections provide that an employer, its representatives or agents are prohibited 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.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given information or testimony under this Act."

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 17, 1975. Hearings were held before the undersigned on March 9, 1976 and April 5, 1976 at which times all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs were submitted subsequently by all parties, all of which were filed by June 31, 1976.^{2/} Upon the entire record in this proceeding, the Hearing Examiner finds:

1. Wayne Township is a Public Employer within the meaning of the Act and is subject to its provisions.
2. Wayne PBA, Local No. 136, is an employee representative within the meaning of the Act, and is subject to its provisions.
3. An Unfair Practice Charge having been filed with the Commission alleging that Wayne Township has engaged or is engaging in unfair practices within the meaning of the Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

*

William Culmone has been a police officer with the Township since approximately 1965. He was a patrolman for about eight years and became a detective on March 28, 1973. He has been the Local No. 136 delegate to the State PBA and a member of the Local No. 136 negotiating committee for several years.

In September of 1973, negotiations began for the 1974 collective bargaining agreement between the Township and the PBA. No agreement was reached and collective negotiations were suspended in January, 1975. In

^{2/} On July 12, 1976, two weeks after the submission of briefs, a Hearing Examiner's Recommended Report and Decision was issued in the matter of City of Hackensack and Richard Winner, et al., H.E. No. 77-1. This report discussed various possible standards for finding violations of §5.4 (a) (3). The parties mutually suggested to the undersigned that the instant Report not be issued until the Commission issued its Decision and Order in Hackensack. The Commission issued said decision, P.E.R.C. No. 77-49 on March 17, 1977.

February, 1975, the Township Council adopted, by ordinance, the PBA position on 1974 salaries and fringe benefits for police officers.

The Township Mayor brought suit in Superior Court challenging the validity of the ordinances and the PBA intervened in June on the side of the Council. The complaint was dismissed and the ordinances were ordered enforced. In July the trial court denied the Mayor's application for a stay pending appeal. On August 21, 1975, the Appellate Division denied the Mayor's application for a stay pending appeal of the case.

Some five days later, on August 26, 1975, in a memorandum from Acting Chief of Police Peter Daly to Township Business Administrator Jack Harman, Culmone's transfer (along with that of seven other officers) was officially requested. On August 27, 1975, Culmone was notified of his transfer effective September 1, 1975 from detective to patrolman.

The PBA alleges that Culmone's transfer was violative of §5.4 (a)(3) of the Act for it was motivated in whole or in part by the Township's desire to retaliate against Culmone for his union activities. They argue that the transfer is in effect a demotion.

Culmone testified that he had been rated as an average detective and when he first received word of the transfer, he tried to speak to Chief Daly in order to ascertain reasons for the transfer. An appointment was made with the Chief but when Culmone went to his office accompanied by a PBA officer, Daly refused to meet with him unless Culmone was alone. Culmone did not meet with the Chief by himself. Consequently, he never received any reasons for the transfer.

Culmone's testimony, which was uncontested, indicated that Mayor Miller was well aware of Culmone's involvement in the Mayor's litigation against the Council. Shortly after the PBA intervened in the Mayor's suit against the Township Council and won an order directing Mayor Miller to show cause why the ordinances should not be enforced, Culmone had the following conversation with the Mayor in the hall at police headquarters: [Mayor]: "You ought to be smiling now, Culmone." [Culmone]: "Yes, I am." [Mayor]: "Well, you won the war but the battle isn't over yet." ^{3/}

The Township, however, denies that the transfer was discriminatory or motivated by anti-union animus, and claims the transfer was made after

^{3/} Transcript, 3/9/76, page 27.

-4-

Culmone's performance and attitude as a detective had been judged less than satisfactory by his superior officers, and it was hoped that the transfer would increase the overall efficiency of the Police Department.

*

The Commission adopted standards for the application of §5.4 (a) (3) ^{4/} in City of Hackensack, H.E. No. 77-1, 2 NJPER 232 (1976) and In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 2 NJPER ____ (1977).

The Commission will find an (a)(3) violation if a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of encouraging or discouraging employees in the exercise of those rights. The Commission adopted this rationale stating discriminatory acts by employers which discourage the exercise of such rights [even if only partly motivated by an employee's union activities or acts], would clearly tend to frustrate the express intent of the Act. Application of this twofold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him or her by the Act, or that the employer believed said employee was exercising such rights, and there must be proof that the public employer had knowledge, either actual or implied, of such activity.

*

Knowledge of Culmone's longstanding positions as PBA state delegate and member of the Local PBA negotiating team was freely admitted by the Township. Culmone claimed to have been the chief spokesman for the PBA in its negotiating sessions with the Township which began in September,

^{4/} In a post-hearing brief, counsel for the PBA referred to the Unfair Practice Charge as being based on a violation of N.J.S.A. 34:13A-5.4 (a)(3) only, although the actual Charge claimed violation of §5.4(a)(1) and (a)(4) as well. Since the essence of the Charge was an (a)(3) violation, and counsel referred to this alone in the post-hearing brief, the undersigned considers the charges of '(a)(1)' and '(a)(4)' violations withdrawn by the PBA.

-5-

1973 and in the litigation which followed. Business Administrator Jack Harman testified that both he and Mayor Miller had been in face-to-face negotiations across the bargaining table from Culmone on several occasions. Harman denied that Culmone was the chief negotiator for the PBA but admitted Culmone took an active and vocal role. ^{5/} He further denied knowledge that Culmone motivated the PBA to intervene in the litigation between the Mayor and the Township Council.

*

Throughout the hearings and in its brief, the Township maintained that Culmone's transfer was nothing but a routine reassignment, that it was not a demotion in any legal sense of the word, nor was it considered such by the parties involved. But Culmone testified that, in the Police Department, transfer into the Detective Bureau is considered a promotion. The notice of his transfer into the Bureau indicated that he was "elevated" to detective status, and would receive a \$600 per year pay differential. ^{6/} On the same day that Culmone received notice of his transfer back to patrol, Patrolman Cunniffe was transferred into the Detective Bureau. Acting Chief Daly's memo to him included: "Congratulations on your elevation to the Detective Bureau." ^{7/}

Culmone testified that it was difficult to explain to the family a transfer from detective to patrol status. Harman admitted a certain loss of prestige accompanied such a transfer and Daly admitted that the officers considered it a demotion. Evidence was introduced to show that the Township Council very definitely considered such a transfer to be a demotion which should be accompanied by good reasons. ^{8/}

The undersigned is satisfied that a transfer from detective to patrol status in the Wayne Police Department is, in the minds of all concerned, considered a demotion. This makes the transfer a change in a

^{5/} Transcript, 4/5/76, page 50.

^{6/} Exhibit CP-1.

^{7/} Exhibit CP-6.

^{8/} Exhibit CP-3.

-6-

condition of employment and accordingly, if it was motivated even in part by an intent to discourage protected union activities, would constitute an unfair practice.

*

The Township maintains that the Business Administrator, the Mayor, and the Chief "agreed that there was a need to strengthen supervision in certain areas of the Department and this was the primary reason leading to [Culmone's] transfer." ^{9/}

Lieutenant Aeillo, Culmone's superior in the Detective Bureau, testified that it was he who had requested Culmone's transfer to the Detective Bureau in 1973, and that Culmone was an average detective, good when he wanted to be, sometimes lazy, but never disobeyed an order. ^{10/} Aeillo testified that several days prior to issuance of the August 27, 1975 memorandum announcing Culmone's transfer, ^{11/} he was ordered by his Captain, Captain Hazelwood, to take four men out of the Detective Bureau. Aeillo claimed Hazelwood was acting on orders from the Chief because patrols were short and more road supervision was needed. Aeillo related that he submitted a list to Captain Hazelwood proposing the transfer of the four men [in the two requested categories -- Sergeant and Detective] with the least time in the Detective Bureau, including Culmone. ^{12/}

Acting Chief Daly then testified that shortly after he was appointed Acting Chief by the Mayor on May 7, 1975, he began holding meetings with his two captains during which they discussed departmental operations and the possibility of some transfers to improve overall supervision and efficiency. Daly claimed that he received written recommendations from both Hazelwood and Aeillo regarding possible transfers, but his testimony was conflicting as to whether they were received separately or together and whether

^{9/} Township's Brief, page 3.

^{10/} Transcript, 3/9/76, pages 94-95.

^{11/} Exhibit GP-2.

^{12/} Transcript, 3/9/76, page 97. Sergeant Youngman, the man with the least time of all in the Detective Bureau, although on Aeillo's list, was not transferred. Aeillo claimed the explanation he received was that Youngman "was a good detective and they wanted him to stay in the Detective Bureau." [Transcript, page 99].

they were received in early or late July. Daly claimed Aeillo's testimony was incorrect in regard to Aeillo's recollection that recommendations were not even requested until after mid-August. ^{13/} Daly denied that any of the other patrolmen transferred as of September 1, 1975 were transferred because of nonperformance, but when asked if Culmone had been transferred for that reason, claimed the question was too broad to answer either affirmatively or negatively. ^{14/} He claimed that he relied principally on the recommendations of Aeillo and Hazelwood in making his decision to transfer Culmone; including the August 8 evaluation of Culmone by Hazelwood, ^{15/} a handwritten version of which he claimed to have received in late July. He said he met with Harman and Mayor Miller in early August to discuss the proposed transfers.

In his testimony, Captain Hazelwood unequivocally took full responsibility for initiating Culmone's transfer, claiming Culmone had not, in his opinion, lived up to the standards of a good detective and denying that he had been requested by Chief Daly for specific transfer recommendations. ^{16/}

Jack Harman, however, claimed repeatedly that the transfer decision had been made by late July but that it was decided to postpone the announcement until late August when Acting Chief Daly returned from vacation. He claimed Culmone's transfer was designed for "overall efficiency of the department." ^{17/} On redirect examination he testified that the transfers were made to fill certain vacancies which had existed at least since he was hired in May of 1974. ^{18/}

The testimony of Jack Harman, who was a witness for the PBA, contradicted the three superior police officers, who also contradicted each other as to both the timing and the sequence of events leading to Culmone's transfer as well as the degree of the Mayor's involvement in the decision. Harman was questioned at great length regarding the Mayor's involvement in the decision.

^{13/} Transcript, 3/9/76, pages 115-119.

^{14/} Transcript, 3/9/76, page 121.

^{15/} Exhibit CP-5.

^{16/} Transcript, 4/5/76, pages 89, 91, 93.

^{17/} Transcript, 4/5/76, page 76.

^{18/} Transcript, 4/5/76, page 85.

He was extremely evasive, uncooperative, often unresponsive to the questions asked of him, and gave the undersigned the distinct impression he was attempting to conceal the Mayor's involvement. When questioned directly about the Mayor's part in the negotiations and his reactions to the PBA and its involvement in the litigation, he refused to answer some questions, claiming confidentiality, frequently hesitated and turned to counsel for guidance, and even when denying improper activities on the Mayor's part, almost always carefully qualified his answers. The totality of Harman's testimony led the undersigned to believe that Harman really intended to avoid the truth. ^{20/} His testimony standing alone is sufficient to raise serious questions as to the Mayor's involvement in the demotion and when Harman's testimony is coupled with that of Culmone's, the inescapable conclusion emerges that Culmone's transfer was, at least in part, motivated by the Mayor ^{21/} in an attempt to retaliate against Culmone for exercising his protected rights.

Admittedly, valid reasons were offered by the Township for transferring Culmone because of his poor performance as a detective and the need for more officers on patrol. Evidence as to poor performance was conflicting, however, between Aeillo and Hazelwood, and Hazelwood could not be specific about Culmone's shortcomings. Even if these reasons were believed in their entirety, [and Aeillo was in fact a forthright and credible witness] if the transfer decision was, nonetheless, motivated in part by a desire to discourage protected union activities, then it was unlawful.

Based primarily on the testimony of Jack Harman, relating to the Mayor's involvement in negotiations and the transfer decision, and for all the other reasons given above, the undersigned concludes that the PBA met its burden of proving by a preponderance of the evidence that the Township's action in transferring Officer Culmone from the Detective Bureau to the Patrol Division was discriminatory and motivated in part by a desire to discourage the exercise of protected rights and was, therefore, violative of N.J.S.A. 34:13A-5.4(a)(3).

^{20/} See e.g., Transcript, 4/5/76, pages 24-28.

^{21/} It should be noted that the Mayor did not testify at the hearing.

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, it is hereby recommended that the Commission issue an ORDER that the Respondent, Wayne Township, shall

1. Cease and desist from:

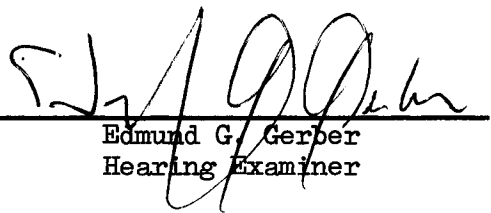
Discriminating in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer William Culmone reinstatement in the Detective Bureau from which he was unlawfully transferred on September 1, 1975, without prejudice to any rights or privileges enjoyed by him.

(b) Post at the Municipal Building in Wayne, New Jersey, copies of the attached notice marked Appendix "A". Copies of such notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Commission in writing, within twenty (20) days of receipt of this Order what steps the Respondent has taken to comply herewith.


Edmund G. Gerber
Hearing Examiner

DATED: June 17, 1977
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL offer William Culmone reinstatement in the Detective Bureau from which he was unlawfully transferred on September 1, 1975, without prejudice to any rights or privileges enjoyed by him.

Township of Wayne

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780