

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

In the Matter of

SOUTH JERSEY PORT CORPORATION,

Respondent,

-and-

Docket No. CO-H-96-57

SECURITY OFFICERS, POLICE AND GUARDS  
UNION, LOCAL 1536,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the South Jersey Port Corporation did not discharge Joseph Epstein because of his exercise of protected rights. The Hearing Examiner found that the Corporation's chief executive did not know that Epstein was involved in a recently conducted union organizing campaign. The Hearing Examiner also found that Epstein waived his Weingarten rights by failing to ask for a union representative before proceeding into an investigatory interview that Epstein reasonably believed could potentially lead to discipline.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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

In the Matter of

SOUTH JERSEY PORT CORPORATION,

Respondent,

-and-

Docket No. CO-H-96-57

SECURITY OFFICERS, POLICE AND GUARDS  
UNION, LOCAL 1536,

Charging Party.

Appearances:

For the Respondent,  
Apruzzese, McDermott, Maestro & Murphy, attorneys  
(Frank X. McDermott, of counsel)

For the Charging Party,  
Spear, Wilderman, Borish, Endy,  
Spear & Runckel, attorneys  
(Charles T. Joyce, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On August 22, 1995, the Security Officers, Police and Guards Union, Local 1536 ("Union" or "Charging Party") filed an unfair practice charge (C-3)<sup>1/</sup> with the Public Employment Relations Commission ("Commission") against the South Jersey Port

---

<sup>1/</sup> Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to charging party's exhibits and those marked "R" refer to respondent's exhibits. Transcript citation 1T1 refers to the transcript developed on May 30, 1996, at page 1. Transcript citations 2T and 3T refer to the transcript developed on August 29 and December 19, 1996, respectively.

Corporation ("Corporation" or "Respondent"). The Union alleged that the Corporation denied a unit member's request to be accompanied to an investigatory interview by a Union representative, and that the Corporation discharged the employee in retaliation for engaging in protected union activity. The Union additionally charged that the Corporation sought to deal directly with unit employees, bypassing the Union, by posting a notice stating that unit members do not have to pay Union dues.<sup>2/</sup> The Union alleges that the Corporation's actions violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, sections 5.4(a)(1), (3) and (5).<sup>3/</sup>

On December 14, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On January 2, 1996, the Corporation filed its answer (C-2) generally denying that the Corporation's actions violated the Act. Hearings were conducted on May 30, August 29 and December 19, 1996, at the Commission's Offices

---

<sup>2/</sup> The "direct dealing" portion of the charge was withdrawn by the Union on the first day of hearing (1T19).

<sup>3/</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. (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."

in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by May 5, 1997.

Upon the entire record, I make the following:

#### FINDINGS OF FACT

1. The parties stipulated that the Corporation was a public employer, the Union was a public employee representative and, at all times relevant to this charge, Joseph Epstein was a public employee within the meaning of the Act (1T9).

2. In mid-March, 1995, James Lassiter, Jr. and another Local 1536 member went to the Corporation's Broadway Terminal to begin organizing the guards (1T23-1T24). Lassiter spoke to Guards Epstein and Wolbert at the Broadway Terminal and Guard Honey at the Corporation's Beckett Street Terminal (1T24-1T25). Epstein signed a Union authorization card and obtained additional cards from Lassiter to distribute to other guards (1T25; 1T85-1T86).

3. Epstein supported the Union's organizing effort by speaking to almost all of the guards urging them to support the Union and by engaging in other pro-union actions (1T27; 1T85-1T86; 1T112). On Corporation vehicles, he would remove the dirt covering vehicles in a manner so as to leave the message "vote yes

Local 1536" (1T86). In April 1995, in support of the Union, Epstein prepared flyers on his personal computer in favor of the Union and passed them out to the guards (1T27; 1T86-1T87; CP-1; CP-2; CP-3). He prepared the flyers after he signed an authorization card (1T116). He wanted to post the flyers in the guard shack and asked permission from Chief of Security Ronald Burch (1T30; 1T87). Burch denied Epstein's request (1T30; 1T56; 1T87).<sup>4/</sup>

4. The Union did not ask Epstein to prepare pro-union literature nor authorize or assist him in his efforts (1T115). Lassiter did not want Epstein to get in trouble with the Corporation, so he told Epstein to stop distributing the literature (1T55-1T57). Lassiter approached Burch to discuss Epstein's literature. Lassiter told Burch that it was his job, not Epstein's, to post notices (1T30). Burch did not tell Epstein that he could never post literature at the Broadway Terminal, nor did Burch ever threaten Epstein for asking to post literature in the guard shack (1T56). The Union never asked Epstein to solicit other guards on its behalf and, ultimately, asked Epstein to discontinue his organizing activities (1T71; 1T121-1T122). Other than developing

---

<sup>4/</sup> Burch could not confirm during his testimony that Epstein asked him to post the flyers. Burch thought Epstein asked him to post a different document (2T150). Epstein may have prepared a fourth piece of literature to pass out (1T156). That document, as all of the other documents Epstein prepared, was pro-union (1T156). Burch did not read the entire document which Epstein presented to him for review and did not remember whether it was a pro- or anti-union document (2T150-2T151). Nonetheless, Burch knew that the document Epstein showed him related to Union (2T150-2T151).

the three or four pieces of literature, asking Burch's permission to post some of the literature in the guard shack, writing on dirty vehicles, and expressing a pro-union position to other guards, Epstein did not take an active role in the Union's organizational campaign (1T120-1T121).

5. Chief Executive Officer Joseph Balzano was unaware of Epstein's involvement in supporting the Union's organizational campaign. Neither Epstein nor any other Corporation employee advised Balzano regarding Epstein's union activity (2T42; 2T91).

6. Prior to the election campaign, there was discussion among the guards concerning whether the Corporation would replace all of the guards with a private security firm which paid its guards \$5.00 per hour. Lassiter testified that he was told by Guard Fitzpatrick who was told by Burch and Security Guard Lieutenant, Ricky Williams, that Balzano was so angry about the Union's organizing efforts that he (Balzano) would lay-off the guards if the Union is elected and bring in \$5.00 an hour guards (1T43). Lassiter also testified that Fitzpatrick told him (Lassiter) that Burch and Williams said that Balzano said that Epstein was responsible for bringing in the Union. Lassiter stated that he had heard the same story from other guards (1T41; 1T43; 1T69; 1T89). Donald Doria, a former guard employed during the time relevant here, testified that Williams and another supervisory level guard, Solenberger, said that the Corporation might bring in \$5.00 an hour private guards if the Union was successful in its organizing efforts (2T12-2T13).

Prior to being employed by the Corporation, Doria was employed by Camden County, in what was referred to as Camden County Security (2T7). The County privatized Camden County Security, laid-off all the guards employed in that unit and replaced them with what Doria describes as \$5.00 an hour guards (2T8; 2T22). Prior to the election, Doria and Burch were engaged in a general conversation during which Doria raised the question regarding the \$5.00 per hour guard issue (2T24-2T25). Doria recalls Burch to have responded by saying "you never know what could happen" (2T25). Burch never said anything about replacing Corporation guards with private guards paid \$5.00 per hour (2T122). Burch stated that he heard that employees were saying that he said that Corporation guards would be replaced by \$5.00 per hour private guards (2T122).

Lassiter testified that Guard Nancy Smith told him that in May, 1995, before the election, that Balzano told her that if the Union won he would bring in \$5.00 per hour guards (1T64; 1T74). Lassiter also stated that Smith told him that Balzano told her that he was angry at Epstein because he thought Epstein brought in the Union (1T74). Lassiter reassured Smith that Epstein was not responsible for bringing in the Union (1T74).

I find that the Corporation's supervisory personnel engaged in conversations with guards which left the impression that the Corporation was considering the privatization of the security function which might result in replacing Corporation guards with private guards earning \$5.00 per hour. I credit Doria's unrebutted

testimony that he engaged in such conversations with Williams and Solenberger. I do not find, however, that the Corporation started the rumors regarding privatization. Further, applying the residuum rule,<sup>5/</sup> I do not credit Lassiter's testimony that Balzano engaged in conversations regarding \$5.00 per hour guards or that he told employees that Epstein was responsible for bringing in the Union. Lassiter's testimony regarding comments which he attributed to Balzano is based solely on hearsay evidence or multiple levels of hearsay evidence and is otherwise unsupported by any legally competent evidence.

7. On May 19, 1995, the election was conducted. The election vote was 9 to 7 in favor of the Union (1T31).

8. In April 1995, Lassiter obtained a document prepared by another union pertaining to "Weingarten rights" (1T50).<sup>6/</sup> He retyped the document intending to distribute it among all members of Local 1536, not just Corporation guards (1T49). The document reads as follows:

**\*\* Weingarten rights \*\***

To all members of Local #1536:

In all matters of discipline:

---

<sup>5/</sup> While hearsay evidence is admissible in administrative proceedings, the residuum rule requires that some legally competent evidence exists to support each ultimate finding of fact. Weston v. State of New Jersey, 60 N.J. 36, 51 (1972); N.J.A.C. 1:1-15.5(b).

<sup>6/</sup> I discuss the meaning of Weingarten rights in greater detail below.



Under Federal and State laws you have the right to union representation when you are called in for a disciplinary interview. To get union representation, however, you must have a reasonable belief that you'll be disciplined as a result of the interview, and you must request that a Union Representative be present. You are also entitled to know what the meeting is about, you are also entitled to consult with your Union Representative before the meeting begins.

If you are called in for such an interview, read this statement aloud to your supervisor;

I have reason to believe that this investigatory interview may lead to disciplinary action against me; therefore, in accordance with my rights under Federal and State Statutes, I respectfully request that this interview not begin until, (1) my union representative is present, (2) I am advised of the subject and the purpose of the interview and (3) I have had the opportunity to consult with my Union Representative. [CP-4]

9. About one week after the election, Lassiter spoke to Epstein about his "Weingarten rights" and provided him with a copy of CP-4. Lassiter also distributed CP-4 to the other guards in the unit at the Corporation (1T31-1T32; 1T87-1T88). Lassiter told Epstein that he should call him if he got into trouble before he went into a disciplinary meeting (1T31-1T32).

10. Epstein started working for the Corporation in November 1992 (1T77). Since 1986, Epstein sold wholesale fireworks (1T104-1T105). Since 1993, Epstein sold fireworks to Corporation employees, supervisors, guards and crane operators (1T105-1T106). Epstein testified that every supervisor knew that he was selling fireworks including Burch (1T107). Doria stated that Epstein was selling fireworks to everyone (2T15). Epstein

claims that in 1994 Burch told him that if Balzano ever found out that he was selling fireworks, he would be in big trouble (1T107). Burch testified that he did not know that Epstein was selling fireworks until June 1995 (2T155). I need not resolve the discrepancy in the testimonies concerning whether Burch knew that Epstein was selling fireworks since it will not impact upon the outcome in this matter. However, given Epstein's and Burch's testimony, I find that Balzano was not aware that Epstein was selling fireworks until a few days prior to June 23, 1995 (2T51).

11. In early June 1995, Guard Zach Andrews was having an informal conversation with William Lang, administrative head of security (2T172; 3T9-3T10). During their conversation, Andrews told Lang that he had bought fireworks from Epstein. Lang did not initiate the discussion with Andrews about the sale of fireworks or about his purchase of them (3T9-3T10). Lang told Balzano that Epstein was selling fireworks one or two days later (3T11-3T12). Balzano told Lang that the sale of fireworks is not allowed and Epstein should not be doing it (3T12).

12. On June 21, 1995, Balzano met with Andrews and questioned him regarding his purchase of fireworks from Epstein (2T52). Andrews confirmed that he bought fireworks from Epstein. In response to Balzano's request, Andrews delivered the fireworks which he bought from Epstein to Balzano (2T53). Andrews also submitted a statement to Lang stating the following:

On or about 6/8/95, at approximately 4 p.m., Joe Epstein sold me a box of assorted fireworks while

on NJPC's property out of the trunk of his car for \$10. [R-1]

Balzano knew that it was against the law to sell fireworks. However, he did not know that it was also against the law to buy, possess or use them (2T54). Andrews was not disciplined for purchasing fireworks (2T54).

13. Balzano obtained information that Forklift Operator Frank Gibbons also bought fireworks from Epstein. Gibbons signed a statement which, in relevant part, stated the following:

On Friday, June 16, 1995 at approximately 4:15 p.m. Joe Epstein had his trunk open and inside there was a lot of fireworks. A quarter stick of dynamite was the largest one. I gave him \$25 and he gave me the fireworks. This occurred inside of R&S Building inside Broadway Terminal. [R-2]

In response to Balzano's request, Gibbons also delivered his fireworks to Balzano (2T56-2T57). Balzano did not discipline Gibbons at that time for having purchased the fireworks (2T58). Balzano gave all of the fireworks to the police (2T60).

14. On May 26, 1995, Assistant Executive Director John Maier gave Epstein a memorandum concerning excessive absenteeism (CP-6). Maier pointed out that Epstein had used five sick days during the month of May, one day in April and a couple of days in March. Maier advised Epstein that he would be required to provide a doctor's note for all future absences and that failure to do so "may result in termination" (CP-6). On or about June 8, 1995, Maier met with Epstein and told him that his level of attendance was still unacceptable and that if such behavior continued the

Corporation would take disciplinary action against him (CP-7). Maier gave Epstein a memorandum confirming their June 8 meeting concerning excessive absenteeism (CP-7). On June 22, 1995, the Corporation suspended Epstein for three days due to excessive absenteeism and failure to provide the Corporation with documentation and/or a doctor's note for each occasion of absenteeism (CP-8).<sup>7/</sup>

15. Epstein was so emotionally upset by CP-8 that he took medication which had been prescribed for him for depression. On June 23, 1995, Epstein was scheduled to work, however, he called in sick (1T94-1T95).

16. June 23, 1995, was payday. Since Epstein was not feeling well and heavily medicated on antidepressants, he asked his son, Barry, to drive him to the Corporation so he could pick up his paycheck (1T95-1T96).

17. Sometime on June 23, 1995, Balzano contacted the guard at the front gate and told him that if Epstein came to the Corporation to pick up his paycheck, he wanted to meet with him. Balzano told the guard to direct Epstein to his office (2T64). Balzano wanted to meet with Epstein for the purpose of continuing his investigation into Epstein's sale of fireworks on Corporation property (2T60).

---

<sup>7/</sup> The days of suspension were scheduled to take place on June 26, June 27 and July 3, 1995 (CP-8).

18. At approximately 3:30 p.m. on June 23, 1995, Epstein arrived at the Corporation (1T96). Guard Williams directed Epstein to park by the fence, which was routine (1T96). Epstein and his son walked to the payroll department to pick up the paycheck, visited with a cousin and then returned to the car (1T96; 1T165). Williams told Epstein that Balzano wanted to see him in Balzano's office. Epstein testified that Williams said that he would not let him leave the Corporation's property until he (Epstein) complied with Balzano's directive (1T97). Epstein and his son went to Balzano's office (1T97; 1T165).

19. After Balzano told Williams that he wanted to see Epstein, Williams contacted Burch. Williams told Burch that Balzano wanted to see Epstein (2T134-2T135). After Epstein arrived at the Corporation, Williams radioed Burch advising him of Epstein's arrival (2T135). Burch went to Balzano's office to advise him of Epstein's arrival (2T136). Balzano asked Burch to remain in his office to await Epstein's arrival (2T136-2T137). Lang was contacted by beeper and told to go to Balzano's office immediately (3T13). Upon his arrival, Balzano told Lang that he was going to meet with Epstein regarding the sale of fireworks and wanted Lang to attend that meeting (3T14-3T15). Balzano never apprised Burch or Lang regarding the nature of the disciplinary action, if any, which he intended to take against Epstein (2T113; 3T20).

20. Upon the Epsteins' arrival in Balzano's outer office, they were greeted by Marie Cipolone, one of Balzano's secretaries (1T98-1T99; 3T32-3T33). Cipolone told Balzano that Epstein was in the office (3T34).

21. Cipolone had known the Epstein family for approximately four years. Epstein's wife previously worked at the Corporation (3T41). On occasion, the Cipolones and the Epsteins socialized (3T41). The Cipolones and Epsteins stopped socializing two or three years ago after Cipolone adopted her second child because her "life just got hectic" (3T41). Cipolone was one of Epstein's references on his Corporation employment application (R-4; 3T31).

22. After Epstein and his son remained in Balzano's outer office for a few minutes, Balzano entered that office from his inner office and asked Epstein to join him in the inner office (3T35). At that time, only Epstein, his son, Balzano and Cipolone were in the outer office (1T140). Epstein testified that he said to Balzano that if the meeting concerned a disciplinary problem, he wanted a Union representative to accompany him. Epstein states that Balzano again directed him into his inner office and told him that he will have a Union representative. Epstein said that he told Balzano that he wanted Jim Lassiter as his Union representative but Balzano denied Epstein's request. Epstein states that he told Balzano that he would not go into his inner office. Epstein testified that he then asked Balzano if his son

could accompany him into his office and Balzano said no (1T139-140). Epstein then went into Balzano's office.

Barry Epstein's version of what occurred in the outer office is somewhat different. Barry testified as follows:

A: Well, we were in the waiting room waiting for him [Balzano], and then he had come, my Dad's boss had come out and said that -- he said that he needed to see him, and my Dad said he wanted to be represented by a Union Representative, and then he, my Dad's boss said that somebody would be there to represent him, and then he, my Father, asked who it was going to be, and my Dad's boss had said some name, and then he said, my Father said that wasn't good enough, and then he asked if I could be there also.

Q: What did your Dad's boss say?

A: No.

\* \* \*

Q: So at that point in time your Father went into the room?

A: Yeah.

Q: What did you do?

A: I just stayed out in the waiting room.  
[1T165-1T166]

Balzano testified that Epstein never asked for a Union representative while in either the outer or the inner office (2T37-2T38). The only person who Epstein asked to accompany him was his son (2T38). Balzano testified that he denied Epstein's request to be accompanied by his son because Barry was not a Corporation employee and Balzano did not want to embarrass either Epstein or Barry by allowing Barry to attend the meeting (2T38;

2T67-2T68). After Balzano denied Epstein's request to bring his son into the meeting, Epstein did not ask for another representative again (2T38). Burch and Lang, who were seated in Balzano's inner office, confirmed that Epstein only asked to be accompanied in the meeting by his son (2T111-2T112; 2T140; 2T172-2T173; 3T21-3T23). Cipolone testified that after Balzano came into the outer office to ask Epstein to come into his inner office, Epstein asked only if his son could accompany him. She further testified that Balzano said no because it might be embarrassing (3T35-3T36). Epstein did not ask for anyone else to accompany him into Balzano's office. Epstein entered Balzano's inner office; the door between the offices was closed (3T36).

On June 26, 1995, Guard Nancy Smith called Lassiter to advise him that Epstein was terminated (1T34; 1T51-1T52). Smith told Lassiter that Epstein was forced to resign (1T52). Lassiter immediately called Epstein to scold him for not invoking his Weingarten rights (1T35). Epstein told Lassiter that he did ask for a Union representative but his request was denied along with his request to be accompanied by his son (1T35; 1T53).

I find that Epstein never asked to be accompanied into his meeting with Balzano by a Union representative. Epstein was suffering from depression as the result of having been served with a notice of suspension the day before. He was heavily medicated on antidepressant drugs to such an extent that he had to ask his son to drive him to the Corporation because his own ability to



drive was impaired. He called out sick on June 23 because he felt ill. The medication impaired his ability to remember things clearly.<sup>8/</sup> Consequently, the accuracy of Epstein's version of what transpired concerning his request for a representative is questionable. Balzano's, Burch's, Lang's and Cipolone's versions of what occurred are nearly identical. I find that Cipolone, although she serves as Balzano's secretary, has the least interest in the actual outcome of the events surrounding Epstein. Although their paths over the last two or three years had separated, the Epsteins and Cipolones were social friends and she served as a reference on Epstein's employment application. Moreover, I find Cipolone's demeanor during testimony to be relaxed and to convey an air of self confidence. Her answers to questions were responsive and forthcoming. I credit her testimony. Additionally, it is unlikely that an employee who was individually instructed in his Weingarten rights would make no effort to contact the Union after such rights were violated. Epstein never called Lassiter or any other Union representative after his meeting with Balzano to advise that his Weingarten rights had possibly been breached. It was not until Lassiter called

---

<sup>8/</sup> When Epstein was asked if he called Maier and Burch in the middle of the night in an attempt to call in sick for June 23, Epstein indicated that he believed that he tried to get everybody but he was not sure who he actually contacted. Also, Epstein could not remember what time of night he made such calls other than he knew it was late because, as he testified, he was heavily medicated (1T145-1T146).

Epstein on June 26, 1995, and began scolding him for not having adhered to his Weingarten rights that Epstein raised the issue.

23. Between 3:50 and 4 p.m. Epstein entered Balzano's inner office and took a seat at a large conference table to begin the meeting (1T100; 1T111; 2T65). Epstein testified that Balzano started the meeting by raising Epstein's excessive absenteeism (1T100). Balzano, Burch and Lang testified that the only issue discussed during the meeting was Epstein's sale of fireworks on Corporation property; his absenteeism was not raised (2T34; 2T113; 2T174). In any event, the sale of fireworks was the main issue addressed during the meeting. Balzano told Epstein that he had evidence that Epstein was selling fireworks on Corporation property (1T100; 1T103; 2T35; 2T70). Epstein admitted possessing and selling fireworks (1T142; 2T70; 3T23). Epstein admitted selling fireworks with the explosive power equivalent to a quarter stick of dynamite (1T143). Epstein told Balzano that he had a license which allowed him to sell fireworks (1T103-1T104; 1T143; 2T35). Epstein showed Balzano his Soldiers, Sailors and Marines Vending License and told him that the license not only allowed him to sell fireworks but drugs as well, if he so chose (CP-9; 1T104; 1T152; 2T36-2T37). Epstein told Balzano that the sale of fireworks was merely a misdemeanor in New Jersey (1T110; 1T142). Balzano told Epstein that he did not have the right to sell fireworks notwithstanding his license (2T37-2T38; 2T102-2T103).

24. Epstein testified that he rose from his chair to leave Balzano's inner office. Balzano told Burch to stop Epstein's exit, but Burch did not move (1T100-1T101). Epstein opened the door to the outer office and took a few steps into it. Epstein states that Balzano told him that he was not going anywhere, his car was blocked and a police officer was waiting for him (1T101). Barry Epstein's testimony accords with Epstein's (1T166). Subsequently, Epstein went back into Balzano's office (1T167). Balzano, Burch and Lang testified that Epstein never attempted to leave, or, in fact, left Balzano's inner office. Cipolone testified that Epstein did not come back into the outer office during the course of the meeting. Moreover, Burch was never told to prevent Epstein from leaving the inner office (2T39; 2T112; 2T128; 2T175; 3T39; 3T43). I do not resolve this testimonial conflict since it does not impact upon the outcome of this decision.

25. Notwithstanding Epstein's claim that selling fireworks was a misdemeanor, Balzano told Epstein that he would "make a big deal" of Epstein's sale of fireworks by having him taken off the Corporation's property in handcuffs and locked up. Balzano also threatened to impound his car, call his wife and the newspapers and embarrass Epstein and his family (1T110; CP-13). Epstein became extremely agitated (1T144). Epstein told Balzano

that he (Epstein) could punch him in the head but he did not know if it would do any good. He also said that he felt like turning the conference table over on top of Balzano. He told Balzano that he knew that he had a steering wheel from the Moshulu, a ship of historical value that was brought to the Corporation's Broadway Terminal for repairs (1T145; 2T39; 2T174-2T175; CP-13; CP-14; CP-16). Epstein further claimed that he knew that Balzano and a maintenance supervisor employed by the Corporation had a secret bank account together; Balzano had affairs with three hookers located at the Broadway Terminal; and that Balzano had an affair with a Corporation employee (1T145; 1T147; 2T39; 2T174-2T175; CP-13; CP-14; CP-16). Epstein told Balzano that he was going to physically get in shape to the point where he would be able to wear his old military fatigues and then he would take action against him. Epstein told Balzano that when he goes after him (Balzano) he would not know what hit him (1T147; 2T41; 2T174-2T175).

26. Balzano called Camden County Prosecutor Audino. Epstein listened to Balzano's conversation (1T148; 2T42). Balzano told Audino that Epstein was very intimidating and was threatening his physical well being (2T42). Audino asked Balzano if he needed assistance but Balzano said no (2T75; 2T143).

27. Epstein told Balzano that he had nothing but trouble from working at the Corporation and that he wanted to leave (2T71). Balzano told Epstein that he would give him an

opportunity to resign (2T71; CP-13). Epstein asked Balzano if he could telephone his wife (1T155). Balzano told Epstein that he could use the telephone on the desk in his office to call his wife or anyone else, and that he and the others would leave the office if he wanted privacy (2T46-2T47). Epstein did not ask the other people in the office to leave during his telephone conversation (2T46-2T47; 2T178). Epstein called his wife and had a brief conversation. Epstein spoke with his wife before he agreed to resign (2T78). Epstein's wife advised him to resign (1T162). Epstein did not indicate that he wanted to call a Union representative or that he specifically wanted to call Lassiter (1T155; 2T46-2T47).

28. Although Epstein testified that in his mental condition he would have signed anything, he nonetheless worked on the language for his letter of resignation for the next hour (1T110; 1T142). Several versions of a letter of resignation were prepared, however, Epstein and Balzano could not agree on the final language (1T152). Initially, Epstein asked to use the same language contained in a letter of resignation executed by Frank Minix, a former Corporation security guard supervisor (2T39-2T40; 2T72; 2T114; 2T176). Neither Balzano nor Lang would allow Epstein to copy Minix's resignation letter. Lang directed Epstein to write his own, original letter (2T72; 2T114; 2T176). Finally, Cipolone was called into Balzano's inner office and asked to type Epstein's letter of resignation. Epstein told Cipolone that he

was resigning and dictated the letter to her (2T40; 2T73; 3T38-3T39; CP-10; CP-17). Epstein signed the letter (CP-10).

29. After signing his resignation letter, Epstein said to Balzano that he hoped he would be able to leave Corporation property without anyone giving him any trouble. Balzano responded that Epstein would be escorted out of the terminal and that no one would give him any trouble (CP-13). Burch accompanied Epstein and his son to his car (1T112; 1T157; 2T125). Although during the meeting Balzano told Epstein that he was going to call the local police, Balzano testified that he never made the call (2T83-2T84; 2T89). However, when Epstein and Burch left Balzano's office, they found a police officer outside of the building (1T158; 2T114). The officer did not say anything to Epstein nor did the officer search Epstein's car. Burch spoke to the police officer. The officer told him that he was dispatched in response to a call from the Prosecutor (2T115). A police report entitled "History Complaint Expanded" indicates that on June 23, 1995, at 4:09 p.m., a security guard called the police requesting the investigation of a suspicious person (3T57-3T59; CP-18). The report indicates that an officer was dispatched to the Corporation at 5 p.m. and arrived at 5:03 (3T58). After the police officer finished investigating the call, the officer completed a Camden Police Department Incident Report (3T59; CP-19). The report indicates that Balzano is the complainant and that he reported:

...that he wanted a police unit to stand by while a disgruntled employee, Joseph Epstein, resigned

from his position as a security guard. Mr. Balzano reports that Mr. Epstein has been causing various disturbances at the Terminal but voluntarily resigned today. Mr. Epstein was escorted off of the premises by police along with the Terminal security. Complaint procedures were advised. [CP-19]

Epstein testified that Burch called the police (3T57). However, on cross-examination, Epstein conceded that Burch's name is not contained on CP-18 and that he really had no idea who called the police (3T67). By 4:09 p.m., Epstein, Balzano, Burch and Lang were already in their meeting. The record contains no evidence that any of those individuals actually placed the call to the Camden Police Department. Had Balzano called the police during the meeting, Epstein would have been aware of it. Moreover, CP-19 would lead the reader to believe that the police officer communicated directly with Balzano, however, Balzano did not leave the office and there is no evidence that Balzano spoke with the police officer. Epstein speculates in testimony that the police officer spoke to Burch and got his information from him. Epstein believes that Burch told the officer that Epstein resigned, the Corporation is letting him leave the premises and that there is no problem (3T69). While there is no evidence proving Epstein's hypothesis, a reasonable person could infer that Epstein's suggested scenario is accurate. Nevertheless, I find that CP-18 and CP-19 do not establish that Balzano called the police nor show that Prosecutor Audino had not made the call.

30. Shortly after the Union was certified as the majority representative of the Corporation's guards, five or six of the guards asked Burch questions concerning Union dues payment (2T163-2T164; 2T170-2T171). Burch brought the guards' question to Lang who advised Burch on or about July 1, 1995, that at that time guards did not have to pay Union dues if they did not wish to do so (2T163-2T164; 2T166-2T167; CP-15). Burch posted CP-15 in the guard shack so that all guards on the various shifts would be notified of Lang's answer (2T164; 2T166-2T167). Burch had no other conversation with the guards regarding Union dues (2T168).

#### ANALYSIS

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates section 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.



If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

I find no direct evidence that Epstein's protected activity was a substantial or motivating factor in his termination.<sup>9/</sup> Consequently, in order to determine whether a

---

<sup>9/</sup> The Union argues that Epstein was constructively discharged from his guard's position. The Corporation argues that Epstein voluntarily resigned. For purposes of this decision, I assume, without specifically finding, that Epstein was constructively discharged by Balzano. Balzano told Epstein that he was going to make a "big deal" out of the fact that he was selling fireworks on Corporation property, but would provide him with the opportunity to resign. Such actions by Balzano may have resulted in the creation of sufficient pressure on Epstein, under the circumstances, to undermine the execution of a truly voluntary resignation.

Bridgewater violation has occurred, I must be guided by the circumstantial evidence presented in the case.

Epstein engaged in activities supportive of the Union's organizing efforts. Epstein signed a Union authorization card and asked Lassiter for additional blank authorization cards for him to pass out among the other guards. He wrote pro-Union slogans in the dirt on Corporation vehicles and prepared and distributed pro-Union fliers. Epstein's organizing activities on behalf of the Union clearly constitute protected activity. See Newark Housing Authority, H.E. No. 96-12, 22 NJPER 164 (¶27086 1996), adopted P.E.R.C. No. 97-43, 22 NJPER 395 (¶27214 1996).

I find however that the knowledge element of the test has not been met. I previously indicated that I would assume that Epstein was constructively discharged. Balzano was the individual responsible for that action. Only Balzano had control over whether Epstein would receive any discipline, or no discipline, for selling fireworks. Balzano had no knowledge that Epstein was involved in Union activity or participated in the Union's organizing campaign. By Epstein's own testimony, his role in organizing the other security guards was limited. Only Burch had any information that Epstein engaged in activities supportive of the Union and Burch never mentioned it to Balzano. Absent Balzano's knowledge that Epstein was engaged in Union activity such activity could not have constituted a substantial or motivating factor in Epstein's constructive discharge.

Consequently, Epstein's termination did not violate section 5.4(a)(3) or, derivatively (a)(1) of the Act.

In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in pt., rev'd in pt., NJPER Supp.2d 78 (¶61 App. Div. 1980), the Commission held that employees within the meaning of the Act are entitled to the protections as provided in the U.S. Supreme Court's holding in NLRB v. Weingarten, 420 U.S. 251 (1975). In UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 22 NJPER 221 (¶27118 N.J. 1996), the New Jersey Supreme Court found that P.E.R.C.'s identification of the Weingarten right within the Act is a permissible construction of the statute. 22 NJPER at 225. A charging party must prove three elements in order to establish a Weingarten violation. The affected employee must have a reasonable belief that disciplinary action might result from an interview or meeting. The employee must not have waived the right. The decision to impose discipline must not be a foregone conclusion prior to the interview. Id. In this case, Epstein had a reasonable belief that disciplinary action might result from the meeting. On June 23, 1995, the day Epstein was terminated, he had called in sick. The day before Epstein had received a memorandum suspending him for excessive absenteeism. It is reasonable to conclude that Epstein believed that he was being summoned to Balzano's office for further disciplinary action resulting from that day's absence. Further, the decision to

impose discipline was not a foregone conclusion prior to the interview. Balzano expressly stated that he called Epstein into his office for the purpose of continuing his investigation into Epstein's sale of fireworks on Corporation property. Balzano had not settled on any particular course of discipline prior to his meeting with Epstein. However, the facts establish that Epstein waived his right to a Union representative when he failed to request that a Union representative accompany him into the meeting. Epstein only asked for his son. Consequently, under these circumstances, the Corporation did not breach Epstein's Weingarten rights and did not violate section 5.4(a)(1) of the Act by proceeding with an investigatory interview regarding matters that might lead to Epstein's discipline without a Union representative present.

The record contains no evidence supporting the Union's allegation that the Corporation refused to negotiate in good faith with it concerning terms and conditions of employment of employees in the unit or refused to process grievances it presented. Thus, I find that the Corporation did not violate section 5.4(a)(5) of the Act.

Accordingly, based upon the above findings and analysis, I make the following:

#### CONCLUSIONS OF LAW

The South Jersey Port Corporation did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) by terminating Joseph Epstein.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the  
Complaint be dismissed.

A handwritten signature in black ink, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman  
Hearing Examiner

Dated: August 15, 1997  
Trenton, New Jersey