P.E.R.C. NO. 84-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JOHN H. STAMLER, UNION COUNTY PROSECUTOR and COUNTY OF UNION,

Respondent,

-and- Docket No. CO-82-153-70

PBA LOCAL 250, UNION COUNTY PROSECUTOR'S OFFICE,

Charging Party.

PBA LOCAL 250, UNION COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and- Docket No. CE-82-17

COUNTY OF UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the PBA Local 250, Union County Prosecutor's Office filed against the Union County Prosecutor and the County of Union. The Commission also dismisses an unfair practice charge the County filed against the PBA. The Commission holds that the PBA did not prove by a preponderance of the evidence that two detectives and PBA officials were punished for engaging in protected activity. The Commission also holds that the County did not prove by a preponderance of the evidence that PBA officials unfairly interfered with the negotiations process.

P.E.R.C. NO. 84-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JOHN H. STAMLER, UNION COUNTY PROSECUTOR and COUNTY OF UNION,

Respondent,

-and- Docket No. CO-82-153-70

PBA LOCAL 250, UNION COUNTY PROSECUTOR'S OFFICE,

Charging Party.

PBA LOCAL 250, UNION COUNTY PROSECUTOR'S OFFICE,

Respondent,

-and- Docket No. CE-82-17

COUNTY OF UNION,

Charging Party.

Appearances:
For the County of Union, Weinberg & Manoff, P.A. (Richard J. Kaplow, of Counsel)

For PBA Local 250, Schneider, Cohen, Solomon & DiMarzio, Esqs. (David Solomon, of Counsel)

DECISION AND ORDER

On December 29, 1981, PBA Local 250, Union County Prosecutor's Office ("PBA") filed an unfair practice charge against the County of Union ("County") and the Union County Prosecutor ("Prosecutor"), John H. Stamler, with the Public Employment Relations Commission. The charge alleged that the County violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et. seq. ("Act"), specifically

subsections 5.4(a)(1), (2), (3), and (4),[1/] when at a December 11, 1981 meeting, the Prosecutor punished Detective Richard Lazo, PBA President, and Detective Michael Hughes, PBA State delegate and negotiator, by giving them six month penalty transfers, placing them on six months probation, taking away their use of County vehicles, and placing letters of reprimand in their files. The PBA alleged that the Prosecutor punished Lazo and Hughes because of their PBA activities and because Lazo had recently testified against the Prosecutor in Superior Court in connection with a PBA grievance.

On January 14, 1982, the County filed a response. It admitted that the Prosecutor disciplined Hughes and Lazo, but asserted that he did so because the detectives had violated departmental rules, not because of their union activities or positions.

On January 27, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On February 8, 1982, the County filed an Answer re-asserting its previous position.

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

On March 19, 1982, the County filed an unfair practice charge against the PBA with the Public Employment Relations Commission. The charge alleged that the PBA violated subsections 5.4(b)(2), (3), and (5)[2/] of the Act when on October 23 and October 26, 1981, Detective Hughes made disparaging and threatening statements concerning the then County Manager, and, on November 18, 1981, Detective Lazo inquired whether the Prosecutor's car had been in an accident and was being repaired in secret. The charge alleged that Hughes' statements and Lazo's inquiry were intended to interfere with and coerce the County in its negotiations with the PBA.

On April 13, 1982, the County's attorney sent a letter to Commission Hearing Examiner Edmund G. Gerber requesting that both charges be consolidated. The PBA attorney agreed with the County's request. On April 15, 1982, the Hearing Examiner consolidated the charges for hearing.[3/]

On August 9 and 10, 1982, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and

---

2/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the commission."

3/ We note that a Complaint never issued on the County's charge against the PBA and the PBA never filed an Answer. Since both parties agreed to consolidation and have fully litigated the County's charge, we overlook the absence of a Complaint and Answer.

presented evidence. They waived oral argument, but filed post-hearing briefs by October 25, 1982.

On March 16, 1983, the Hearing Examiner issued his report and recommendations concerning the PBA's unfair practice charge, H.E. No. 83-30, 9 NJPER 234 (¶14109 1983) (copy attached). He found that Detective Lazo's investigation concerning the Prosecutor's car constituted protected activity and that the County violated subsection 5.4(a)(1) when it disciplined Lazo for engaging in this protected activity. Although he found that Hughes' threatening statements concerning the County Manager did not constitute protected activity, he also found that the Prosecutor disciplined Hughes in the same fashion and at the same time as Lazo because of Lazo's protected activity and the Prosecutor's perception that Lazo and Hughes were acting together to undermine the integrity of the Detective Bureau. He concluded, therefore, that the County violated subsection 5.4(a)(1) when it disciplined Hughes as a result of Lazo's protected activity. He recommended an order requiring the County to reassign Hughes and Lazo to the same positions they held before the unlawful transfers (or to substantially equivalent positions), reassign County vehicles to them, remove the pertinent notices of discipline placed in their files, and post a notice of its violations and remedial actions. He recommended dismissal of all other portions of the Complaint and specifically found that the Prosecutor was not motivated by anti-union animus in disciplining Lazo and Hughes.

On March 22, 1983, the Hearing Examiner issued his report and recommendations concerning the County's unfair practice

charge, H.E. No. 83-32, 9 NJPER 239 (¶14111 1983) (copy attached). He found that the PBA, through the conduct of Lazo and Hughes, had neither interfered with the County's selection of a negotiations representative, refused to negotiate with the County, nor violated any of the Commission's rules and regulations. He therefore recommended that the County's charge be dismissed.

On March 28 and April 4, 1983, the County filed Exceptions. The County maintains that Lazo's investigation concerning the Prosecutor's car was not protected, that the Hearing Examiner erred in concluding that Hughes had been punished because of Lazo's conduct, that the recommended order requiring the County to reassign Lazo and Hughes to the same assignments they held prior to their unlawful transfers would unduly infringe upon the Prosecutor's right to make assignments based on manpower needs, and that the Hearing Examiner erred in not finding that the PBA violated the Act through Hughes' and Lazo's conduct.

On April 14, 1983, the PBA filed a response. It supports the Hearing Examiner's findings and conclusions.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence and credibility determinations. We adopt and incorporate them here.

The Hearing Examiner found, and we agree, that the County and the Prosecutor were not motivated by anti-union animus in punishing Lazo and Hughes. Accordingly, we accept the Hearing Examiner's recommendation that we dismiss those portions of the Complaint alleging a violation of subsection 5.4(a)(3).[4/]

4/ Our review of the record also reveals no evidence establishing a violation of either subsection 5.4(a)(2) or (4). We dismiss those portions of the Complaint as well.

In the absence of anti-union animus or illegal motivation, the PBA has a burden of proving by a preponderance of the evidence that the County's and Prosecutor's actions interfered with, restrained, or coerced (or tended to interfere with, restrain, or coerce) Hughes or Lazo "...in the exercise of the rights guaranteed to them by this act." Thus, we must determine whether the PBA proved by a preponderance of the evidence that Hughes and Lazo were exercising their guaranteed statutory rights.

The Hearing Examiner found, and we agree, that Hughes' activity was unprotected. We disagree, however, with the Hearing Examiner's conclusion that Lazo was engaged in protected activity when he investigated the Prosecutor's rumored accident. Under all the circumstances of this case, the PBA has not satisfied us by a preponderance of the evidence that he was. In particular, we have serious questions about the manner of the investigation. Lazo did not conduct his own investigation or pursue administrative channels within the Prosecutor's Office. Instead, he placed County employees outside the Prosecutor's office in an embarrassing and compromising predicament by accusing the Prosecutor of covering up an accident, suggesting that the same Prosecutor had treated her father unfairly after he had had an accident, and asking her to help in the investigation. Torn by conflicting loyalties, the secretary both obtained the information Lazo sought and reported the conversation to her boss, the Director of Central Services. Under all the circumstances of this case, we are not persuaded this investigation constituted protected activity. Accordingly, we dismiss these portions of the Complaint alleging that the

County and the Prosecutor violated subsection 5.4(a)(1) when it disciplined Hughes and Lazo.[5/]

We next consider whether the PBA violated subsections 5.4(b)(3) as a result of Lazo's and Hughes' activity. The County bears the burden of proof on these allegations. We are not satisfied that it has carried this burden by a preponderance of the evidence and accordingly dismiss those portions of the charge.[6/]

ORDER

The Complaint in CO-82-153-70 is dismissed.

The Charge in CE-82-17 is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. None opposed. However, Commissioner Graves dissented from that portion of the decision which dismisses the complaint as against the Union County Prosecutor.

DATED: Trenton, New Jersey
October 19, 1983
ISSUED: October 20, 1983

5/ Given that neither Hughes nor Lazo's activity was protected, we need not consider whether the Hearing Examiner erred in determining that Hughes was punished for Lazo's activity.

6/ Our review of the record also reveals no evidence establishing a violation of either subsection 5.4(b)(2) or (5). We dismiss those portions of the charge as well.

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

In the Matters of

JOHN H. STAMLER, UNION COUNTY
PROSECUTOR AND THE COUNTY OF UNION,

Respondent,

-and-

Docket No. CO-82-153-70
(H. E. No. 83-30)

PBA LOCAL 250, UNION COUNTY
PROSECUTOR'S OFFICE,

Charging Party.

PBA LOCAL 250, UNION COUNTY
PROSECUTOR'S OFFICE,

Respondent,

-and-

Docket No. CE-82-17
(H. E. No. 83-32)

COUNTY OF UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Union County Prosecutor committed an unfair practice when he disciplined Richard Lazo for conducting an investigation into matters which could be used in the processing of grievances.

It was found that discipline imposed upon Michael Hughes was motivated by the protected conduct of Richard Lazo and such a discipline is similarly an unfair practice.

In a companion decision, H. E. No. 83-30, the Hearing Examiner recommends that an unfair practice charge brought by the Prosecutor concerning these same actions be dismissed. Since the actions of Lazo were protected by the Act, it follows they could not be simultaneously violative of the Act, and although the actions of Michael Hughes standing by themselves were unprotected, they did not interfere with the selection of an employer representative in negotiations, concern a refusal to negotiate or violate any of the rules and regulations of the Commission as alleged.

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. 83-32

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

In the Matter of

PBA LOCAL 250, UNION COUNTY
PROSECUTOR'S OFFICE,

Respondent,

-and- Docket No. CE-82-17

COUNTY OF UNION,

Charging Party.

Appearances:

For the Respondent
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(David Solomon, Esq.)

For the Charging Party
Weinberg & Manoff, P.A.
(Richard J. Kaplow, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On March 19, 1982, the County of Union on behalf of the Union County Prosecutor's Office filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that PBA Local 250 ("Respondent") violated N.J.S.A. 34:13A-5.1 et seq. when Detective Michael Hughes, a State Delegate of the Respondent "directed intentional disparaging and threatening remarks concerning the then County Manager, George Albanese, to two County administrators" for the express purpose of interfering with and coercing the County of Union in its collective negotiations with PBA Local 250.

It was further alleged that Detective Richard Lazo, President of the respondent PBA Local 250, attempted without authorization to utilize county personnel at facilities to obtain information concerning the private activities of the Prosecutor. It was claimed that Lazo was attempting to use this information for litigation concerning a grievance over the use of county vehicles. It was claimed this action was taken for the express purpose of interfering with and coercing the County of Union.

It was specifically alleged that this activity constituted violations of §5.4(b)(2)(3) and (5) of the Act. 1/

It appearing that the allegations of the charge concerned the identical facts as an unfair practice charge brought by the Respondent, CO-82-153-70, these matters were by mutual request of the parties consolidated for hearing.

Hearings on the instant matter, as well as Docket No. CO-82-153-70, were conducted on August 9 and 10, 1982, at which time both parties were given an opportunity to examine and cross-examine witnesses, submit evidence and argue orally. Both sides submitted briefs which were received by October 25, 1982.

In the companion decision, H.E. No. 83-30, findings were established and are hereby incorporated into the instant decision.

The undersigned makes the additional findings in this matter.

1/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purpose of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (5) Violating any of the rules and regulations established by the commission."

1. Richard Lazo knew the Mello family and had visited their home on social visits. Lazo knew Laurie Mello from those occasions as well as contact at work (see para. 6 in H.E. No. 83-30).

2. When Hughes told Perselay and Cirigliano that he was publishing pictures in the Star Ledger, he said that they were of County Manager George Albanese playing tennis during county business hours. (See H.E. No. 83-30, paras. 14 and 15)

3. Hughes also told Perselay and Cirigliano in the conversations in H.E. No. 83-30, paras. 13, 14 and 15, that Hughes understood that Albanese was leaving the county.

4. Hughes made these statements "to needle" Albanese because Hughes believed Albanese was responsible for the detectives losing the use of county vehicles on their own time and for their loss of meal money.

Analysis

As found in H.E. No. 83-30 the conduct of Richard Lazo was protected activity within the meaning of the Act. He approached Laurie Mello only at the suggestion of her father and he made it clear to her that the information he sought was not pursuant to his duties as a detective but rather in his capacity as a union president.

The Charging Party did not demonstrate that personal conversations or union business could not be conducted during business hours.

There is nothing to support the charge that Lazo's conduct violated the Act.

Michael Hughes' conduct, which was a crude attempt to get back at Albanese, was outside the protections of the Act and, as was found in H.E. No. 83-30, subject to employer discipline. (It was only because of the particular circumstances in the instant matter that Hughes' discipline constituted an unfair practice.) It does not follow however that because conduct is outside the protections of §(a)(1), such conduct must be violative of §(b)(2), (3) or (5).

Subsection 5.4(b)(2) protects an employer from interference with the selection of a representative in negotiations in grievance processing; §(b)(3) concerns the refusal to negotiate with the public employer, and §(b)(5) relates to violating any of the rules and regulations of the Commission.

Hughes' conduct does not violate any of these specific subsections. Even if one does not accept Hughes' expressed rationale for his conduct 2/ and Hughes' conduct is seen as an effort to interfere with or coerce the negotiations between the parties, such conduct does not go to the selection of an employer's negotiations representative, constitute a refusal to negotiate or violate a rule or regulation of the Commission.

Accordingly, it is hereby recommended that the instant charge, CE-83-17, be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: March 22, 1983
Trenton, New Jersey

2/ Which, absent evidence to the contrary, the undersigned has accepted (see para. 4).

H. E. No. 83-30

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

In the Matter of

JOHN H. STAMLER, UNION COUNTY
PROSECUTOR AND THE COUNTY OF UNION,

Respondent,

-and- Docket No. CO-82-153-70

PBA LOCAL 250, UNION COUNTY
PROSECUTOR'S OFFICE,

Charging Party.

Appearances:

For the Respondent
Weinberg & Manoff, P.A.
(Richard J. Kaplow, Esq.)

For the Charging Party
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(David Solomon, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On January 29, 1981, PBA Local 250, Union County Prosecutor's Office ("PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that John H. Stamler, Union County Prosecutor, and the County of Union ("Prosecutor") violated N.J.S.A. 34:13A-5.1 et seq. when at a mandatory meeting of employees "the Prosecutor publicly berated, demeaned, criticized, punished and threatened" Richard Lazo, President of the PBA, and Michael Hughes, State Delegate to the PBA, because of their activities on behalf of the members of the bargaining unit and the PBA. It was alleged that during that meeting, the Prosecutor stated, among other things, he believed the members of the bargaining unit did not want the type of leadership and representation afforded to

them by the officers of the PBA. It was specifically alleged that these activities violated §5.4(a)(1), (2), (3) and (4). 1/

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 27, 1982.

Hearings were conducted on August 9 and 10, 1982, at which time both parties were given an opportunity to examine and cross-examine witnesses, submit evidence and argue orally. Both sides submitted briefs which were received by October 25, 1982.

Upon the entire record the Hearing Examiner makes the following findings of fact.

1. Richard Lazo and Michael Hughes are detectives in the Union County Prosecutor's office and serve as PBA President and State Delegate respectively.

2. In the fall of 1981 the PBA and the Prosecutor were engaged in negotiations for a new contract. There was pending litigation between the parties concerning the detectives' use of county vehicles for personal use.

3. Members of the unit represented by the PBA were disciplined when they were involved in accidents in county vehicles.

4. Lazo heard that a vehicle from the Prosecutor's office

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

was damaged and was sitting in a private auto body shop. The owner of the body shop was known to be a personal friend of the Prosecutor's.

5. Lazo suspected that the car was being repaired by the Prosecutor without going through the established office procedures.

6. Lazo approached Bill Mello, an investigator with the Prosecutor and a former PBA President, and asked him how to make inquiry to determine if there was an impropriety concerning the car. Mello suggested that Lazo talk to his daughter, Laurie Mello, who at the time was secretary for the Division of Motor Vehicles for the County. Her job was coordinating the assignment and maintenance of the County's vehicles.

7. Lazo approached Lauri Mello and explained his suspicions to her and asked if there was a car being repaired at a certain private auto body shop that had been in an accident.

8. Laurie Mello replied that she couldn't check unless she had a license plate number. Lazo supplied her with the plate number.

9. Mello called the auto body shop. They told her there was no such car there.

10. When Mello asked him why he wanted this information Lazo responded that a "lot of people were getting in trouble for things and he didn't think it was fair what they did to my father and he wanted to see if (the Prosecutor) was trying to cover up an accident that he had." That is, Lazo suspected the Prosecutor was trying to have the car repaired without the County knowing about it.

11. Lazo also told Mello that he didn't want to arouse suspicion by having a member of the Prosecutor's investigative staff

making inquiries as to the vehicle.

12. When Lazo determined that the Prosecutor's car was not at the auto body shop he abandoned his inquiry. Lauri Mello however felt there was something improper about the inquiry and she told her supervisor who, in turn, contacted the Chief of the County Detectives Roy H. Earlman. Earlman then interviewed Mello and sent a memorandum concerning this incident to the Prosecutor on November 19, 1981.

13. On the evening of October 23, 1981, Detective Hughes met Geoffrey S. Perselay, Director of the Office of Intergovernmental Relations for the County, at a local tavern. They began a friendly discussion. The conversation switched to the ongoing negotiations between the parties.

14. During the conversation Hughes stated that he heard some detectives had followed the County Manager George Albanese and had pictures and other information which they would use against Albanese; they would release this information shortly before the upcoming election in an ad in the Newark Star Ledger.

15. On the evening of October 26 Hughes was again at the same tavern when he met Rocco Cirigliano, the Director of the Division of Budget Management for the County, Hughes told the same story to Cirigliano, that he was going to take an ad in the newspaper concerning Albanese.

16. On Tuesday, October 27th, Hughes was asked to speak with the Prosecutor. Hughes admitted to the Prosecutor that he had made the statement to Perselay but the statements were untrue and he was just trying "to needle" Perselay. The Prosecutor gave Hughes a

verbal reprimand but took no further action against him.

17. It is noted that on or about December 3, 1981, the parties were engaged in the litigation in Superior Court concerning the use of County vehicles and the detectives' meal allowance. Lazo testified on behalf of the PBA. It is noted that the grievance was filed in January of 1981 and the Prosecutor prevailed in the litigation.

18. On December 11, 1981, the Prosecutor held a regularly scheduled mandatory meeting of detectives and investigators. Lazo and Hughes were both in attendance.

19. The Prosecutor admitted that he gave an impassioned talk that lasted about ten minutes.

20. The Prosecutor recounted the benefits received by the investigators and detectives that exceed express rights under the contract.

21. He stated that when he was in private practice he represented PBA locals and "While (he) supported the goals and objectives of the PBA, he would not discount misconduct that (he) felt would be detrimental to the objectives of the Union County Prosecutor's office."

22. The Prosecutor announced that Hughes and Lazo (and another detective who was accused of insubordination but was not a PBA member) would be given six-month penalty transfers, lose the use of County cars, receive written warnings and be placed on probation.

23. These steps were taken although the written reprimands were not placed in their respective files for some seven months. 2/

24. The PBA charged that at this meeting the Prosecutor stated that he believed the members of the bargaining unit did not want the type of leadership and representation afforded to them by the officers of the PBA.

Lazo testified that he didn't recall if these statements were made and Stamler denied ever making these statements, although Hughes did testify that the Prosecutor did make these statements. Given Hughes' admission that he knowingly lied to Perselay and Cirigliano, I cannot credit his testimony over that of the Prosecutor and must find by a preponderance of the evidence that the PBA failed to prove these statements were made.

25. There is no dispute that this was the first and only time in the Prosecutor's office that an employee's discipline was announced at a meeting and further, Lazo was the first PBA president to ever file a grievance.

26. Stamler testified as to his motivation that what offended him was, "Detective Lazo did not come and speak to me, and ask me or the Prosecutor or man to man, if I had an accident (or) where my car was. He did not go to the Chief of County Detectives and ask him about my car."

27. The Prosecutor testified that, "Perhaps standing alone, I might not have thought as much of it. But following right on the heels of Detective Hughes' statement it appeared to me that Hughes

2/ When the written memorandums were placed in Lazo's and Hughes' files, reference was made to other minor misconduct but these items were not raised at the meeting, and since they were not brought to the attention of the employees until after their disciplinary duty had been served, these reasons were given no weight here.

and Lazo were out to undermine the integrity of the Detective Bureau in its relationship with county government."

Analysis

The Commission has consistently held that

> An employee may not utilize his or her employee organization position to undermine an employer's supervisory and management status, or to engage in offensive behavior. But neither may an employer utilize its power to punish an employee for engaging in protected activity which happens to annoy the employer... In re Asbury Park, Local 95 IFPTE, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199, 1979). See also In re Hamilton Twp, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); In re City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 140 (¶4006 1978).

The key element in establishing whether an employer has the right to discipline a union officer who is functioning in his or her capacity as a union officer is to look at whether the activity itself is protected. See Jamesburg Bd/Ed v. Jamesburg Ed/Assn, P.E.R.C. No. 81-92, 7 NJPER 102 (¶12042, 1981).

In the case of Lazo, his conduct never went beyond a simple inquiry. When he found out that the Prosecutor's car was not involved in an accident he simply abandoned that inquiry.

What Lazo would have done with this information if there was an accident is a matter of conjecture. His answer to the question what would he use this information for, "Morale," cannot be dispositive of this issue. He admitted that he did not intend to use it in the upcoming litigation and it would not be relevant in that proceeding. Given that employees have been disciplined for auto accidents, it might well be that this information could legitimately be used in a grievance concerning reporting accidents.

Here Lazo's conduct did not defame or besmirch the Prosecutor. He quietly conducted his inquiry and only approached Mello at the suggestion of her father.

In a union-employer situation the parties must be considered adversary parties on an equal footing. It cannot be expected that in the role of a union advocate an employee must conduct himself as a subordinate.

> As long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected. In re Hamilton Twp, supra.

Admittedly Lazo was not processing a particular grievance but he was gathering information which could very well be used in cases which did, in the past, arise in the Prosecutor's office and the gathering of information for processing grievances must be considered an integral part of the grievance process and is therefore protected activity.

It cannot be said however that Hughes' conduct was so protected. The conditions in which the threats were made were in amicable social conversations. Hughes' actions can be seen as a crude coercive measure (see companion decision H. E. No. 83-32) and fall outside the protections of the Act. The Prosecutor was free to discipline Hughes. However when this incident occurred, Hughes' discipline was limited to a verbal warning. See para. 17. As the Prosecutor testified he only imposed the sanctions announced at the meeting against Hughes after he found out about Lazo's inquiry and it appeared to him that "Hughes and Lazo were out to

undermine the integrity of the Detective Bureau."

The Prosecutor, in imposing the disciplinary assignment, placing the officer on probation, revoking the use of the county car and inserting a written reprimand in Hughes' file was influenced by matters which were protected under the Act, i.e. Lazo's inquiry.

Absent Lazo's activity Hughes would not have received the severe penalties. Yet Lazo's activity was protected. Accordingly, Hughes was punished for the exercise of protected rights by Lazo. The imposition of penalties in December on Hughes because of the exercise of rights under the Act does interfere with the exercise of protected rights.

The manner in which the Prosecutor announced the penalties is also suspect for this was the only instance when any discipline was announced at a meeting by the Prosecutor and the relationship these men had with the PBA was known to all. The totality of conduct exhibits evidence of unlawful animus which would be violative of §5.4(a)(3). However the testimony of the Prosecutor as to his motivations is convincing and sufficiently credible to overcome a §(a)(3) violation. However, the Commission in Asbury Park, supra, adopted the federal standards expressed in Crown Central Petroleum, 430 F.2d 724 (CA5, 1970). That is, if an employee is engaging in concerted activities for the purpose of mutual aid and protection, the imposition of a disciplinary sanction for insubordination may violate §8(a)(1) whether or not the employee has exhibited union animus.

> The inquiry in insubordination cases and §8(a)(1) focuses not on the intent of the employer but upon whether the employee was engaged in protected, concerted activities and whether or not (his actions) were indefensible under the circumstances...The issue of indefensibility turns upon the distinctive facts of each case. NLRB v. Florida Medical Center Inc., 576 F.2d 409 (CA5, 1981), 107 LRRM 3249.

ORDER

Accordingly, it is hereby recommended that the Commission issue the following Order.

It is hereby Ordered that the Union County Prosecutor

(1) Cease and desist from imposing discipline on union officers Richard Lazo and Michael Hughes because Richard Lazo was engaged in the protected activity of conducting investigations which would assist in the processing of grievances.

(2) Reassign Richard Lazo and Michael Hughes to the same assignments that they held prior to their unlawful transfers. If these assignments are unavailable, they must be assigned to substantially equivalent positions to those they held prior to their unlawful transfers.

(3) Reassign county vehicles to Richard Lazo and Michael Hughes.

(4) Remove from the files of Richard Lazo and Michael Hughes notices of discipline which were placed there because of Richard Lazo's investigations to gather information which was to be used in the processing of grievances and strike all references in their files concerning their being placed on probation.

(5) Post in all places where notices to employees are

customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondents' authorized representatives, shall be maintained by respective Respondents for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the respective Respondents to ensure that such notices are not altered, defaced or covered by other materials.

(6) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondents have taken to comply herewith.

Edmund G. Gerber
Hearing Examiner

Dated: March 16, 1983
Trenton, New Jersey

Recommended Order

Appendix "A"

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 impose discipline on union officers Richard Lazo and Michael Hughes because Richard Lazo was engaged in the protected activity of conducting investigations which would assist in the processing of grievances.

WE WILL reassign Richard Lazo and Michael Hughes to the same assignments that they held prior to their unlawful transfers. If these assignments are unavailable, they must be assigned to substantially equivalent positions to those they held prior to their unlawful transfers.

WE WILL reassign county vehicles to Richard Lazo and Michael Hughes.

WE WILL remove from the files of Richard Lazo and Michael Hughes notices of discipline which were placed there because of Richard Lazo's investigations to gather information which was to be used in the processing of grievances.

WE WILL strike from the files of Richard Lazo and Michael Hughes any reference to their being placed on probation.

JOHN H. STAMLER, UNION COUNTY PROSECUTOR
AND THE COUNTY OF UNION

_____
(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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.