P.E.R.C. NO. 97-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and- Docket No. CO-H-96-10

GARDEN STATE PARKWAY CREW SUPERVISORS AND EQUIPMENT TRAINERS UNION, LOCAL 193C, IFPTE, AFL-CIO, CLC

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint, based on an unfair practice charge filed by Garden State Parkway Crew Supervisors and Equipment Trainers Union, Local 193C, IFPTE, AFL-CIO, CLC, against the New Jersey Highway Authority. The Complaint alleges that the Authority violated the New Jersey Employer-Employee Relations Act by ordering unit members, under threat of discipline, to distribute a copy of an Order to Show Cause and Temporary Restraining Order issued by the Superior Court of New Jersey, Chancery Division, against Local 196, IFPTE. The order related to a strike by Local 196. The Commission finds that the Authority had a legitimate and substantial business reason to require Local 193C unit members to distribute the order, it was not motivated by anti-union animus, and did not act to interfere with negotiations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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GARDEN STATE PARKWAY CREW SUPERVISORS AND EQUIPMENT TRAINERS UNION, LOCAL 193C, IFPTE, AFL-CIO, CLC,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy (Maurice J. Nelligan, Jr., of counsel)

For the Charging Party, Bucceri & Pincus, attorneys (Sheldon H. Pincus, of counsel)

DECISION AND ORDER

On July 10, 1995, the Garden State Parkway Crew Supervisors and Equipment Trainers Union, Local 193C, IFPTE, AFL-CIO, CLC, filed an unfair practice charge against the New Jersey Highway Authority. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] by ordering unit members, under threat of discipline, to

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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distribute a copy of an Order to Show Cause and Temporary Restraining Order issued by the Superior Court of New Jersey, Chancery Division, Middlesex County, against Local 196, IFPTE, AFL-CIO. The order related to a strike by Local 196 members on July 4, 1995.

Local 193C alleges that its unit members were directed to act as "process servers" in the dispute between the Authority and Local 196 to: (1) undermine Local 193C's collective negotiations efforts, and (2) disrupt Local 193C's relationship with the other unions which negotiate with the Authority, thereby discouraging them from supporting Local 193C. Local 193C seeks an order directing the Authority to stop such unfair practices and a restraint on any discipline or threat of discipline associated with this incident.

On July 26, 1995, the Authority filed a statement of position in which it denied that the directive violated the Act. It asserted that, in the wake of an illegal strike by Local 196 members, it needed to disseminate the order to those employees

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1/ Footnote Continued From Previous Page

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."

quickly and distribution by Local 193C members -- who supervised the employees represented by Local 196 -- was the best means of doing so.

On August 29, 1995, a Complaint and Notice of Hearing issued. By letter dated September 6, 1995, the Authority requested that its statement of position be deemed its Answer.

On February 22, 1996, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined one witness, introduced exhibits, and filed post-hearing briefs.

On July 10, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-2, 22 NJPER 293 (¶27158 1996). He concluded that the directive requiring Local 193C unit members to serve the court order did not violate subsection 5.4(a)(1) because the Authority had a legitimate and substantial business justification for requiring its supervisors, consistent with their job descriptions, to disseminate work-related information to their subordinates. He also found no evidence to support the claimed subsection 5.4(a)(3) and (5) violations.

On August 2, 1996, the charging party filed exceptions. It claims that the Hearing Examiner erred in failing to find that the Authority violated the Act. On August 6, the Authority filed a response supporting the Hearing Examiner's findings of fact and conclusions of law.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-9) with these additions.

We add to finding no. 4 that the garage supervisors included within Local 193C's unit are supervised by equipment managers (T76). We also add that, in addition to the three district superintendents and Noxon, there were nine non-unionized crew managers and equipment managers in the maintenance division of the Garden State Parkway (T69; T71-T72; T76; T81; T88). Some crew managers supervised crew supervisors at two locations (T69; T71; T72).

We add to finding no. 8 that the Authority's application for an Order to Show Cause and Temporary Restraining Order named Local 196 as the defendant (Exhibit A to charging party's July 28, 1995 brief). We also add that the Court directed that a copy of its order, "which need not be certified," be served on defendant through its officers. The order further specified that the Authority had "leave to serve in the manner set forth above additional copies of the Order, which need not be certified, personally, or by certified mail, return receipt requested, upon any persons acting in concert or combination with the defendant."

The issues are whether the Authority's requirement that crew supervisors represented by Local 193C distribute the court order interfered with their statutory rights; was motivated by anti-union animus, or was issued to interfere with negotiations.

Subsections 5.4(a)(1), (3), and (5) respectively prohibit such alleged unfair practices.[2/]

We first address the subsection 5.4(a)(1) allegation. The charging party asserts an "independent" violation of subsection 5.4(a)(1). Cf. UMDNJ, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987)(violation of subsection 5.4(a)(3) is a derivative violation of subsection 5.4(a)(1)). An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not demonstrate an illegal motive. New Jersey Sports & Exposition Auth.; Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3d ed. 1992).

The charging party disputes the Hearing Examiner's finding that the Authority had a legitimate business purpose for selecting the crew supervisors to serve the court order. It argues that the activity did not fall within the crew supervisors' job descriptions, was contrary to court rules, and is inconsistent with the finding that the Authority could have "easily" arranged

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2/ For convenience, we refer to Local 193C unit members as "crew supervisors," although we recognize that the unit also includes garage supervisors and equipment trainers.

for other managers to effect the distribution. It also maintains that the Hearing Examiner improperly ignored evidence that Local 193C's members feared violence as a result of the distribution -- a fear which demonstrates the coercive effect of the Authority's directive.

We agree with the Hearing Examiner that the Authority had a legitimate and substantial business reason to require crew supervisors to distribute the court order. We therefore accept his conclusion that the Authority did not independently violate subsection 5.4(a)(1).

The charging party does not dispute that the Authority had a legitimate and substantial business reason for ensuring that Local 196 members received copies of the court order. Distribution was important to ensure that operations would be restored and not further disrupted by the strike. As the supervisors of Local 196 members, the crew supervisors were a logical choice for distributing the directive since they would see their subordinates at the beginning of the July 5 workday and could distribute the directive along with each employee's work assignment. The crew supervisors' job descriptions required them to "implement directives of the Authority and perform such other duties as delegated." In view of these factors, we agree with the Hearing Examiner that the Authority had a legitimate business reason for choosing to distribute these directives through crew supervisors.

Moreover, contrary to the charging party's contention, the Hearing Examiner did not find that the Authority could "easily" have found other managers to deliver the order. The Hearing Examiner found that, after Authority Labor Relations Manager Creamer told Local 193C President Donnelly that he would have managers on site to ensure that the crew supervisors did not distribute their own notice with the order, Donnelly questioned why those same managers could not deliver the court order in the first instance. The Hearing Examiner further found that Creamer did not respond to Donnelly's query. These findings do not negate the conclusion that distribution through the crew supervisors had a legitimate business justification because it accomplished the Authority's objective without altering the schedules of other managers. That there might have been another way to distribute the court order does not by itself undermine the legitimacy of the method the Authority chose. This is particularly so where the record supports the inference that the order would not have been distributed as quickly if it had been delivered by the crew managers or other non-unionized managers. Some of those individuals would have had to go from one location to another to distribute the order to the Local 196 members supervised directly by crew supervisors.

Nor are we persuaded that a subsection 5.4(a)(1) violation is established because the court order was served on Local 196 members by Authority employees rather than the sheriff's

office. We need not decide whether a finding of a legitimate business purpose would be precluded if the Authority's chosen method of distribution did not comport with court rules. We are satisfied that the charging party has demonstrated no such infirmity.

R. 4:52-1(b) provides that an Order to Show Cause may be served on a defendant in lieu of a summons, but applies the same service of process requirements which pertain to a summons -- i.e., service by the sheriff's office unless the order provides for another means of service. R. 4:4-3 and R. 4:4-4. We surmise that one of the purposes of this rule is to ensure that a defendant has formal notice of the return date of the order.

The defendant named in the order was Local 196 as an entity; the order required that it be served on the defendant, and it was presumably served on defendant's officers in accordance with court rules. A separate paragraph granted the Authority leave to serve the order, personally or by certified mail, upon any persons acting in concert with the defendant. This paragraph appears to allow service by plaintiff or its agents. Cf. In re Education Ass'n of Passaic, Inc., 117 N.J. Super. 255, 262 (App. Div. 1971)(service by board of education employees conformed to court rules where order specified it could be served by plaintiff's attorney or agent). Even if that was not the intent, court rules do not require formal service of a restraining order before an individual is bound by it. See R. 4:52-4 (persons who

receive actual notice of an injunction or restraining order by personal service or otherwise are bound thereby). Thus, the Authority was not required to have the sheriff's office personally serve 350 employees before they could be found to be subject to the order, and its chosen method of distribution did not violate court rules.

Finally, we reject the charging party's assertion that the Hearing Examiner improperly ignored testimony that Local 193C members feared violence and were called scabs and strikebreakers for distributing the court order. The Hearing Examiner did find that Donnelly believed there was a potential for violence. Moreover, this finding, even if expanded upon as suggested, would not establish a subsection 5.4(a)(1) violation: it still would not negate the fact that, as discussed above, the Authority had a legitimate and substantial business justification for requiring Local 193C unit members to distribute the court order.

The charging party also contends that the Hearing Examiner erred in failing to find a violation of subsection 5.4(a)(3). In re Bridgewater Tp., 95 N.J. 235, 246 (1984) articulates the standards for finding a subsection 5.4(a)(3) violation. The charging party must prove, 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 or 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.

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.

The charging party urges that the directive to serve a court order "on fellow union members" was intended to interfere with and coerce Local 193C in its successor contract negotiations with the Authority. The Hearing Examiner concluded that the charging party had not met its burden under Bridgewater. We agree.

Local 193C engaged in protected activity by participating in negotiations, and the Authority was aware of the activity through its own participation. However, the record does not

demonstrate that Local 193C members were chosen to deliver the order in retaliation for Local 193C's conduct in past negotiations or to influence it in future sessions.

Timing is an important factor in assessing motivation and understanding the context of events. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). The Authority's directive occurred six months after the parties' last negotiations session and after talks recessed. The parties did not meet again until five months after the directive, when the Authority resumed its practice of negotiating with all Local 193 unions.[3/] Given the gap in time between any negotiations activity and the directive, and the absence of any other nexus between the two, we find no violation of subsection 5.4(a)(3). We also reject the argument that anti-union animus was demonstrated because court rules did not permit the crew supervisors to be used as "process servers." For the reasons already stated, we find no violation of court rules.

We turn finally to the charging party's contention that the Authority violated subsection 5.4(a)(5) because, by requiring Local 193C members to distribute the court order, it intended to undermine Local 193C's negotiations efforts.

3/ We surmise that joint negotiations were beneficial to Local 193C because, in explaining the importance of being able to receive information from Local 196, the charging party characterizes itself as a small union which would be weakened if it had to negotiate with the Authority on its own.

When an employer is charged with a refusal to negotiate in good faith under subsection 5.4(a)(5), we will evaluate the totality of its conduct and attitude and determine whether it had an open mind and a sincere desire to reach an agreement. State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd sub. nom. State v. Council of N.J. State College Locals, 141 N.J. Super. 470 (App. Div. 1976). In addition, we will consider whether an employer attempted to harass or coerce negotiators in an attempt to make them buckle under at the negotiations table. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 135 N.J. Super. 269 (Ch. Div. 1975), aff'd 142 N.J. Super. 44 (App. Div. 1976).

We agree with the Hearing Examiner that the charging party demonstrated neither a refusal to negotiate in good faith nor an attempt to coerce Local 193C. The Authority negotiated with Locals 193C, 193B, and 193 before the mediator recessed the talks and it resumed negotiations when the mediator scheduled a negotiations session in December 1995. In view of these circumstances, the Authority did not refuse to negotiate, and there is no evidence that it negotiated in bad faith.

Nor has the charging party shown that the Authority attempted to coerce Local 193C by undermining its relationship with Local 196 and other Local 193 unions. We agree with the Hearing Examiner, for the reasons he stated, that there is no evidence that the directive to distribute the court order coerced Local 193C's negotiators. Moreover, the allegation of coercive

effect is more appropriately analyzed under subsection 5.4(a)(1) as opposed to subsection 5.4(a)(5). As we have discussed, the charging party's 5.4(a)(1) claim fails because the Authority had a legitimate and substantial business reason to require Local 193C unit members to distribute the court order.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration.

DATED: February 27, 1997
Trenton, New Jersey
ISSUED: February 28, 1997

H.E. NO. 97-2

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Respondent,

-and- Docket No. CO-H-96-10

IFPTE, LOCAL 193C,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the New Jersey Highway Authority did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by requiring its supervisors to distribute a court order to subordinate employees in an affiliated labor organization.

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.

H.E. NO. 97-2

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

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-and- Docket No. CO-H-96-10

IFPTE, LOCAL 193C,

Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy (Maurice J. Nelligan, Jr., of counsel)

For the Charging Party, Bucceri & Pincus, attorneys (Sheldon H. Pincus, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On July 10, 1995, the Garden State Parkway Crew Supervisors and Equipment Trainers Union, Local 193C, IFPTE, AFL-CIO, CLC ("Local 193C") filed an unfair practice charge against the New Jersey Highway Authority ("Authority") alleging that the Authority violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act")[1/] The charge alleges that the Authority ordered unit

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

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members of Local 193C, under the threat of discipline, to distribute to employees represented by Local 196, IFPTE, AFL-CIO, ("Local 196") a copy of an Order to Show Cause and Temporary Restraining Order issued by the Superior Court of New Jersey, Chancery Division, Middlesex County, relating to a job action which occurred on or about July 4, 1995.

Local 193C alleges that its unit members were directed to act as process servers in an effort to undermine its collective negotiations efforts with the Authority and to disrupt its good relationship with other unions which negotiate with the Authority. Local 193C seeks an order directing the Authority to cease and desist from such unfair practices and a restraint on any discipline or threat of discipline associated with this incident.

A Complaint and Notice of Hearing was issued on August 29, 1995. By letter dated September 6, 1995, the Authority requested that its earlier submitted statement of position dated July 26, 1995 be deemed its Answer. A hearing was held on February 22, 1996.[2/] Both parties filed post-hearing briefs by April 24, 1996.

1/ Footnote Continued From Previous Page

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."

2/ The transcript will be referred to as "T."

Based upon the entire record, I make the following:

Findings of Fact

1. The Authority is a public employer and Local 193C is an employee representative within the meaning of the Act (T7).

2. Local 193C is one of four other unions that is affiliated with the International Federation of Professional and Technical Engineers, AFL-CIO, CLC ("IFPTE"), which represents Authority employees (T13). The other three Locals are 193, which represents toll supervisors; 193B which represents craft employees; and 196, which represents toll collectors, maintenance employees and utility workers (T32-34).

3. Local 193C represents a unit comprised of crew supervisors, equipment trainers and garage supervisors. It has approximately thirty-eight members (T9-10). The crew supervisors of Local 193C directly supervise the maintenance employees of Local 196. There are approximately 350 maintenance workers in the unit (T34).

4. The crew supervisors of Local 193C are supervised by unrepresented personnel called crew managers (T10). The crew managers report to district superintendents who in turn report to Chief Maintenance Engineer Noxon (T67-68, 72). Noxon is in charge of the entire maintenance division of the Garden State Parkway (T19).

5. Local 193C and the Authority are parties to a collective negotiations agreement which expired on June 30, 1994 (J-1).[3/] Locals 193 and 193B each have collective agreements which also expired on June 30, 1994 (T33). Local 196 had a collective negotiations agreement which expired on June 30, 1995 (T34).

6. Locals 193, 193B and 193C began negotiating jointly with the Authority in August, 1994, for successor agreements (T36). All three locals and the Authority requested a mediator from the Public Employment Relations Commission ("PERC" or "Commission") to assist in negotiations. The parties met with the mediator in the

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3/ The contract provides a job description for the title of roadway crew supervisor. The duties include in part:

> Responsible for knowledge and implementation of Policies, Procedures, or Directives of the Authority or the maintenance Department as it applies to the assigned area of jurisdiction. (J-1, p. 52.)
>
> * * *
>
> Performs other related duties as may be delegated. (J-1, p. 53.)
>
> * * *
>
> The aforementioned job duties and responsibilities are appropriate and may be subject to additions or deletions. The job duties and responsibilities as they are written should in no way be interpreted to indicate that any additional function deemed appropriate to be performed by the Supervising Crew Manager is subject to any modification in the job specification. (J-1, p. 53-54.)

fall, 1994, and again in January and December, 1995, in an effort to negotiate a new agreement (T36-38). Locals 193, 193B and 193C intended to continue to negotiate together with the Authority. The next negotiations session was scheduled for March 1, 1996 (T104-105).

7. During the summer of 1995, Local 196 was engaged in negotiations with the Authority for a successor agreement. These negotiations were independent of the negotiations with Local 193C (T12).

8. Beginning in the morning of July 4, 1995, the toll collectors, members of Local 196, called out sick (T54). This conduct was determined by the Superior Court of New Jersey, Chancery Division, Middlesex County, to be a strike prohibited by law. On July 4, 1995, the Court issued an Order to Show Cause and Temporary Restraining Order ("Court Order") directing Local 196 members to return to work. The Order broadly commanded that all members of Local 196 "return to work immediately [and] remain at work." The order restrained Local 196 members from "...carrying on [or] participating in, ... any sick out [or] work stoppage" (CP-3).

9. The maintenance employees belonging to Local 196 were not scheduled to work on July 4, 1995 (T57). They were scheduled to report to work at 7:00 a.m. on July 5, 1995 (T57). Except for two out of the 28 maintenance workers assigned to the Clifton yard and a full complement of maintenance personnel at the Cape May facility, all other maintenance employees called out sick on July 5, 1995 (T58).

10. Michael Donnelly is a crew supervisor at the Clifton yard and President of Local 193C (T9, T69). Early in the morning on July 5, 1995, Donnelly's immediate supervisor, Crew Manager Peter Strumolo, instructed Donnelly to distribute a copy of the Court Order to all Clifton yard maintenance workers when they returned to work. They were anticipated to return to work at 7:00 a.m. on July 6, 1995. Additionally, Donnelly was instructed to have these workers sign a sheet indicating that they had received a copy of the Court Order (T64-65). It was Donnelly's understanding that all crew supervisors of Local 193C were being directed to do the same at other yards (T19-20). Donnelly told Strumolo that he did not think it was the crew supervisors' job to hand out the Court Order to Local 196 members, because the crew supervisors were not process servers (T23).

11. Donnelly then contacted Chief Engineer of Maintenance Noxon, in an effort to have the directive to distribute the Court Order rescinded (T19). Donnelly told Noxon he objected to serving the Court Order on Local 196 maintenance workers, because they were members of the same international labor organization, IFPTE. Noxon reaffirmed the directive stating that this was the most efficient means of distributing the Court Order because the crew supervisors would see the maintenance workers first thing the next morning when they returned to work and could give them the Court Order along with their work assignments (T20). Noxon stated that he could not use non-unionized management personnel to distribute the Court Order,

instead of the crew supervisors of Local 193C, because he could not have them in place by the time the maintenance employees returned to work (T24).

12. Donnelly requested Noxon's permission to speak with Labor Relations Manager Creamer about modifying the directive to serve the Court Order on Local 196 members. At approximately 4:30 p.m. on July 5, 1995, a telephone conference occurred among Sheldon H. Pincus, Attorney for Local 193C, Donnelly and Creamer (T20-21). During the telephone conference, Donnelly objected to serving the Court Order on the following grounds: (a) the intended recipients are members of the same international union, (b) there was a potential for violence if members of Local 193C served the Court Order, (c) crew supervisors are not process servers and (d) the Authority could use non-unionized managers to serve the Court Order instead of members of Local 193C (T23).

13. Creamer refused to alter the directive and ordered the crew supervisors to distribute the Court Order or face a written reprimand (T25).

14. In the same conference call, Donnelly told Creamer that if forced to hand out the Court Order, Local 193C would also hand out a notice explaining to Local 196 members that they were serving the Court Order under threat of discipline (T24-25, CP-2). Creamer responded by stating that if this was Local 193C's intention, he would have someone at each site to prevent the dissemination of the notice. When further queried during the

conference call as to why he could have someone in place to stop the notice from being distributed, but could not have personnel in place to serve the Court Order in the first instance, Creamer simply reiterated that the supervisors should distribute the Court Order and not the notice (T25-26).

15. Beginning on July 6, 1995, the crew supervisors handed out the Court Order and Local 193C's notice to Local 196 employees as they returned to work at the various yards(T26-27).[4/]

16. Being locals of the same international labor organization, Locals 193, 193B, 193C and 196 had historically shared information pertaining to contract negotiations and had generally supported each other. When Local 193C had demonstrated in front of the Chairman of the Authority's place of business in May, 1995, a couple of Local 196 members participated as a show of support (T45). Before serving the Court Order, Local 193C had shared information with Local 196 concerning a medical package being negotiated (T30) and the cost of a medical expert (T106). In addition, Local 196 offered to rent space in one of its buildings to Local 193C (T106-107).

17. Since serving the Court Order, members of Local 196 no longer communicate with the executive board of Local 193C (T104), do

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4/ While Donnelly testified that he only had direct knowledge of the Court Order and notice being served upon the employees he supervises, he testified that he was informed that the Court Order and notice also had been distributed at other work sites (T90, T92-93, T97-98). I credit his testimony.

not share any information with Local 193C directly, including information concerning the medical package (T30, T104), no longer share in the cost of the medical expert (T106), and have withdrawn the offer to rent space (T106-107).

18. Local 196 continues to share information with locals 193 and 193B (T104). Locals 193, 193B and 193C continue to share information about negotiations with each other (T105).

ANALYSIS

Local 193C contends that the Authority has violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by directing Local 193C members, under threat of discipline, to distribute an Order to Show Cause and Temporary Restraining Order to maintenance employees of Local 196 when they returned to work. Specifically, Local 193C asserts that this directive was an attempt by the Authority to undermine Local 193C's negotiations effort and interfere with its relationship with the other IFPTE unions.

The Commission enunciated the standard for finding an independent violation of subsection 5.4(a)(1) in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550, 551, n. 1 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

I find the directive requiring crew supervisors to serve the Court Order on the maintenance workers they supervise did not violate subsection 5.4(a)(1) of the Act.

I find that there existed a legitimate and substantial business justification in having the crew supervisors disseminate the Court Order. I also find that the task of handing out the Court Order falls within the broad job description of roadway crew supervisor contained in the collective agreement. Distributing the Court Order is "...implementation of...Directives of the Authority..." or performance of "...other related duties as may be delegated." (J-1 pg. 52-53).

Job description aside, requiring supervisors to disseminate work related information on behalf of the Authority to their immediate charges is an appropriate supervisory job assignment. The whole purpose of prohibiting supervisors from being in the same negotiations unit as those whom they supervise is to avoid work related conflicts and divided loyalties. See, N.J.S.A. 34:13A-5.3 and 6(d), and Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971). Though the charging party argues otherwise, it does not matter that the crew supervisors of Local 193C and the maintenance personnel of Local 196 are members of the same international union. See, Camden Police Department, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982).

The directive to serve the Court Order was spawned by a job action. The Authority wanted all members of Local 196 to be aware

of the requirements of the Court Order as soon as possible so that the effected members would comply with it. The crew supervisors directly manage the maintenance employees of Local 196 and give them their work assignments at the start of the day. It is reasonable, without the need for altering any other managers' work schedules, to have the crew supervisors distribute the Court Order along with the daily work assignments. It is not for Local 193C to decide who on the Authority's staff is more appropriate to execute an otherwise legitimate work order.

To find a violation of subsection 5.4(a)(3), the charging party must prove, 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. In re Tp. of Bridgewater, 95 N.J. 235, 246 (1984).

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 the Commission to resolve.

Here, the charging party avers that by ordering the crew supervisors to serve the Court Order under the threat of discipline, the Authority discriminated against Local 193C unit members' terms and conditions of employment to discourage their exercise of rights guaranteed under the Act. There is no direct evidence of anti-union animus. Thus, I must examine the circumstances as a whole to determine whether negotiations were a substantial or motivating factor behind the directive.

While at the time of the directive negotiations were suspended, the parties were in negotiations for a successor agreement in the broad sense of the term. By participating in negotiations, the Authority knew of this activity. The only question that remains is whether the directive to disseminate the Court Order manifested hostility toward Local 193C. For the reasons below, I do not find the directive to have been a hostile act on the part of the Authority and, therefore, do not find a violation of section 5.4(a)(3) of the Act.

The Commission has held that timing is an important factor when assessing circumstantial evidence of discriminatory conduct.

Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). Here, at the time the crew supervisors were directed to hand out the Court Order, the parties had not actively negotiated since January 1995, approximately six months before the crew supervisors were told to distribute the Order. Further, the parties did not meet and negotiate again until December of that year, so the directive could not have been imposed in anticipation of an upcoming negotiations session. I find the timing of the directive to be too remote to give rise to an inference of anti-union animus.

In addition, the Authority, both before and after the directive, chose to negotiate jointly with all three of the Local 193 unions. If the Authority wanted to discriminate against the Local 193C unit, it could have isolated Local 193C by insisting on negotiating with Local 193C alone. Nothing obligated the Authority to include Local 193C in joint negotiations. Thus, the charging party has not proved by the preponderance of the evidence on the entire record that the mandate to serve the Court Order was intended to disrupt or undermine negotiations in violation of subsection (a)(5) of the Act.

Local 193C argues that the directive to serve the Court Order was an attempt by the Authority to undermine Local 193C's negotiations effort and chill support from the other locals engaged in negotiations. In support of its claim, Local 193C relies on the fact that before serving the Court Order, Local 196 and 193C shared negotiations information and generally supported each other, and

after serving the Court Order the two locals do not even communicate with each other.

In its post-hearing brief, Local 193C urges the Commission to apply the totality of conduct test to measure bad faith negotiations elucidated in State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd sub nom State v. Coun. of N.J. State Coll. Locs., 141 N.J. Super. 470 (App. Div. 1976). There, it was stated:

> A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions seeking to avoid, rather than reach, an agreement.
>
> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement. Id. at 40.

In State of New Jersey, there was no allegation of an attempt to undermine the union's negotiations efforts. Hence, in addition to the totality of conduct test, the charging party wishes the Commission to consider whether the directive had a "coercive effect" during ongoing contractual negotiations and whether the Authority is "harassing the associations' negotiators in an attempt to make them buckle under at the negotiating table." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 135 N.J. Super. 269 (Ch. Div. 1975), aff'd 142 N.J. Super. 44 (App. Div. 1976).

In examining the total conduct of the Authority, I find that the directive to serve the Court Order did not have a "coercive effect" nor did it otherwise undermine Local 193C's negotiations efforts. Thus, I conclude that there was no violation of section 5.4(a)(5) of the Act.

There were no ongoing, active negotiations to disrupt at the time of the directive. Also, there is no evidence on the record that the Authority did not meet to negotiate when requested or that it did not negotiate with an open mind and an intent to reach an agreement. There is no direct evidence on the record that indicates the serving of the Court Order is the reason why Local 196 no longer shares information regarding medical insurance with Local 193C, will not share the cost of a medical expert with Local 193C and withdrew its offer to rent office space to Local 193C.[5/] Local 193C failed to establish that Local 196 severed its relationship with Local 193C because of its (Local 193C) members serving the Court Order. The argument that the Court Order was the cause of any rift between Local 196 and 193C is further undermined because Local 193C distributed its notice along with the Court Order explaining that it was handing out the Court Order against its will and under duress. The notice could only mitigate the potential negative impact of serving the Court Order.

5/ I do not address the support given by Local 196 to the demonstration outside of the Chairman of the Authority's place of business because there is no evidence that a similar opportunity to show support has since occurred.

Finally, neither the Authority's conduct nor Local 196's lack of direct communication with Local 193C has harmed or prejudiced the negotiations efforts of Local 193C. Locals 193, 193B and 193C continued to negotiate with the Authority as a team after the service of the Court Order. Specifically, the parties negotiated in December of 1995 and intended to negotiate jointly again on March 1, 1996.

The uncontroverted evidence shows that Local 196 continued to share negotiation information with Locals 193 and 193B after the Court Order was served. It also shows that Locals 193 and 193B continued to share negotiation information with Local 193C. Therefore, by virtue of its relationship with Locals 193 and 193B, Local 193C received the negotiations materials and information given by Local 196 to Locals 193 and 193B and benefited accordingly.[6/] I find that Local 193C has failed to prove that the Authority's actions had a chilling effect on the negotiations.

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

6/ The charging party maintains that the service of the Court Order has had a chilling effect on the relationship of Local 193C and the other three unions, especially Local 196. Locals 193 and 193B still negotiate as a team with Local 193C. Local 196 continues to share information with Locals 193 and 193B knowing full well they in turn share the information with Local 193C.

CONCLUSION OF LAW

The Authority did not violate Sections 5.4(a)(1), (3) and (5) of the Act when it directed the crew supervisors of Local 193C to serve the Court Order upon the maintenance employees of Local 196.

RECOMMENDATION

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

Stuart Reichman
Hearing Examiner

Dated: July 10, 1996
Trenton, New Jersey