

P.E.R.C. NO. 2001-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY SHERIFF

Respondent,

-and-

Docket No. CO-H-97-364

PBA LOCAL 277,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Camden County Sheriff violated the New Jersey Employer-Employee Relations Act when it reprimanded a sheriff's officer represented by PBA Local 277 for submitting a letter as a PBA delegate directly to the Sheriff. The Commission dismisses the remaining allegations in the Complaint.

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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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY SHERIFF

Respondent,

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Docket No. CO-H-97-364

PBA LOCAL 277,

Charging Party.

Appearances:

For the Respondent, Howard S. Wilson, attorney
(Howard S. Wilson, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein,
Watter & Blader, attorneys (Stuart A. Tucker, of counsel)

DECISION

On April 25, 1997, PBA Local 277 filed an unfair practice charge against the Camden County Sheriff. On January 5 and August 21, 1998, the charge was amended. As amended, the charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4) and (5),^{1/} between 1995 and 1998 by retaliating against

^{1/} These provisions 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

Sheriff's Officer Thomas Aron because of his union activity; by transferring Aron to less desirable assignments; by failing to discipline a lieutenant who allegedly threatened Aron; by reprimanding Aron for filing a safety complaint; and by denying Aron's request for PBA business leave.

On September 5, 1997, a Complaint and Notice of Hearing issued. On September 16, 1997, January 20, 1998, and September 22, 1998, the employer filed Answers specifically denying the allegations.

Between December 1998 and March 1999, Hearing Examiner Elizabeth J. McGoldrick conducted six days of hearing. The parties examined witnesses and introduced exhibits. On May 24, 2000, the Hearing Examiner granted the PBA's motion to reopen the record to

1/ Footnote Continued From Previous Page

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. (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."

admit an affidavit from the Sheriff that had been submitted in connection with another proceeding. Final position statements were filed in July.

On December 1, 2000, the Hearing Examiner issued her report and recommendations. H.E. No. 2001-13, 27 NJPER 71 (¶32031 2000). She found that the employer violated the Act by reprimanding Aron because he corresponded directly with the Sheriff as PBA delegate concerning a safety issue. She further found that the employer did not violate the Act by transferring Aron on November 4, 1996; refusing to discipline a lieutenant who had made threats against Aron; and denying Aron's request for leave to attend PBA meetings. The Hearing Examiner also recommended dismissing, as untimely filed, allegations concerning several of Aron's transfers and a denial of overtime.

On December 29, 2000, the employer filed exceptions. It argues that no evidence supports a finding of hostility to protected rights. According to the employer, the reprimand was based on erroneous information and a mistaken belief about the circumstances surrounding Aron's safety complaint. It asserts that the reprimand has been removed from Aron's file.^{2/}

On January 22, 2001, the PBA filed an answering brief and a request that its brief be accepted as timely filed. The employer agreed to the request so we grant it. The PBA argues that whether

^{2/} We deny the employer's request for oral argument. The issues have been fully briefed.

the Sheriff or his subordinates were acting on incorrect information is irrelevant, as Aron was engaged in protected activity. In addition, it argues that the counseling report had not been removed from Aron's file at the time of the hearing.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-24).

We begin with Hearing Examiner's finding that the employer violated N.J.S.A. 34:13A-5.4a(1) and (3) when it disciplined Aron as an employee when, as PBA State delegate, he wrote a letter to the Sheriff informing him of some safety issues involving the transportation unit. Aron had gone through the chain of command, first bringing the safety issues to the attention of Lieutenant Francis Schilling, his supervisor. When three weeks had passed without a response, he wrote his letter to the Sheriff.

Aron was reprimanded for going outside the chain of command. Undersheriff Anthony Saponare directed Schilling to "counsel" Aron. Schilling did not tell Saponare that Aron had reported the safety concerns to him and Schilling carried out the directive to issue the counseling report. Saponare later learned that Aron had made a report through the chain of command. Undersheriff Thomas Gallagher was asked by the Sheriff to look into Aron's allegation that he was improperly counseled for going outside the chain of command. Gallagher learned from Schilling that Aron had made a report to Schilling. He also learned that Schilling had not reported Aron's complaint to Saponare. Gallagher recommended

that the counselling be rescinded, but, as of the close of the hearing, the employer had not done so.

An employer independently violates subsection 5.4(a)(1) if its personnel 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 and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive. Hardin, The Developing Labor Law, at 75-78 (3d ed. 1992).

Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), teaches that an employer may criticize employee representatives for their conduct, but it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. In this case, the employer disciplined the PBA State delegate for reporting safety concerns outside the chain of command. He did not go outside the chain of command, and thus there was no legitimate reason to discipline him. Further, there was no legitimate reason to maintain the discipline after the undersheriff learned that Aron had gone through the chain of command.

Even if Aron had gone outside the chain of command, any objection the employer might have had should have been raised to

Aron in his capacity as PBA delegate, not as employee. If the employer believed that the PBA should have followed some other procedure when raising safety concerns, it had a right to communicate that belief. But it did not have a legitimate reason to discipline Aron as an employee for his actions on behalf of the PBA. Accordingly, we conclude that the reprimand violated 5.4a(1).

The Hearing Examiner separately found that the employer's action violated 5.4a(3) and, derivatively, a(1). Having found a violation of 5.4a(1) and by issuing an appropriate remedy, we need not reach the question of whether the reprimand was motivated by hostility to his protected activity. Any remedy for that violation would be the same. Cf. City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp.2d 58 (¶39 App. Div. 1979) (order to excise reprimand to remedy independent 5.4a(1) violation upheld; court did not consider whether a(3) was also violated).

In the absence of exceptions, we adopt the Hearing Examiner's recommendation to dismiss the remaining allegations.

ORDER

The Camden County Sheriff is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Sheriff's Officer Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

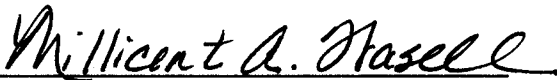
B. Take this action:

1. Withdraw the reprimand imposed against Sheriff's Officer Thomas Aron and expunge it from his record.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: March 29, 2001
Trenton, New Jersey
ISSUED: March 30, 2001



NOTICE TO 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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Sheriff's Officer Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

WE WILL withdraw the reprimand imposed against Sheriff's Officer Thomas Aron and expunge it from his record.

Docket No. CO-H-97-364

CAMDEN COUNTY SHERIFF
 (Public Employer)

Date: _____

By: _____

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 the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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

In the Matter of

CAMDEN COUNTY SHERIFF

Respondent,

-and-

Docket No. CO-H-97-364

PBA LOCAL 277,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Camden County Sheriff violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by reprimanding Sheriff's Officer Thomas Aron because he corresponded directly with the Sheriff as PBA Delegate concerning a safety issue. However, the Hearing Examiner found that the Sheriff did not violate the Act by transferring Aron on November 4, 1996; refusing to discipline a lieutenant who had made threats against Aron; and denying his request for administrative leave for PBA meetings.

The Hearing Examiner also recommends that the Commission dismiss several allegations concerning the Sheriff's transfers of Thomas Aron, and a denial of overtime because they were filed outside the Act's statute of limitations. N.J.S.A. 13A-5.4(c).

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 Chair 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. 2001-13

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

In the Matter of

CAMDEN COUNTY SHERIFF

Respondent,

-and-

Docket No. CO-H-97-364

PBA LOCAL 277,

Charging Party.

Appearances:

For the Public Employer,
Howard S. Wilson, Esq.
(Howard S. Wilson, of counsel)

For the Public Employee Representative,
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Stuart A. Tucker, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 25, 1997, January 5, 1998 and August 21, 1998, Camden County PBA Local 277 (PBA or Local 277) filed an unfair practice charge and amended charges with the Public Employment Relations Commission (Commission) against the Camden County Sheriff (Sheriff or Sheriff's Office). The PBA alleges that the Sheriff violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), between 1995 and 1998, by a pattern of conduct against Sheriff's Officer Thomas Aron in retaliation for Aron's union activity. The PBA specifically charges that the Sheriff unlawfully transferred Aron to less

desirable assignments in January 1996, April 1996, and November 1996. The PBA also alleges that the Sheriff failed to discipline a lieutenant who allegedly threatened Aron; improperly reprimanded Aron for filing a safety complaint; and unlawfully denied Aron's request for PBA business leave. The Sheriff's conduct allegedly violates 5.4a(1), (2), (3), (4) and (5) of the Act.^{1/}

On September 5, 1997, a Complaint and Notice of Hearing was issued. On September 16, 1997; January 20, 1998; and September 22, 1998, the Sheriff's Office filed Answers specifically denying the allegations that it had retaliated against Aron for protected activity or for filing an action under the Act; dominated or interfered with the administration of PBA Local 277; refused to negotiate in good faith with the PBA, or otherwise violated the Act.^{2/} A hearing was conducted on

^{1/} These provisions 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; and, (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/} Due to the maternity leave of the original Hearing Examiner, the matter was transferred to me on September 1, 1998.
N.J.A.C. 19:14-6.4.

December 9, 10, and 14, 1998 and March 8, 9, and 10 1999.^{3/} Post-hearing briefs were filed by June 24, 1999, and responsive briefs were filed by August 12, 1999. Along with its post-hearing brief, PBA Local 277 filed a Motion to Reopen the Record to admit into evidence the Sheriff's affidavit submitted in connection with a Petition for Scope of Negotiations, Docket No. SN-99-59. The Sheriff's Office opposed the Motion. On May 24, 2000, I granted the Motion and admitted the affidavit into evidence. The Sheriff filed a position statement on July 13, 2000. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Sheriff and PBA Local 277 are parties to a series of collective negotiations agreements, the most recent of which was effective from January 1, 1996 to December 31, 1998 (J-1). PBA Local 277 represents all sheriff's officers, sheriff's investigators, senior I.D. officers, and sheriff's officers sergeants employed by the Sheriff's Office. Thomas Aron has been a sheriff's officer for 15 years and is a member of PBA Local 277 (1T42, 1T44-1T47). Aron has been president of the Local from June

^{3/} No testimony was taken at the hearing on December 9, 1998. "1T-" represents the transcript for the hearing on December 10; "2T-" represents the transcript for the hearing on December 14; "3T-" represents the transcript for the hearing on March 8, 1999; "4T-" represents the transcript for the hearing on March 9, 1999; and "5T-" represents the transcript for the hearing on March 10, 1999, followed by the page number. "J-" represents joint exhibits; "C-" represents Commission exhibits; "CP-" represents Charging Party's exhibits, and "R-" represents Respondent's exhibits.

1998 to the present, and state delegate and chief shop steward at various times for six years (1T44-1T45). Aron participated indirectly in contract negotiations for the PBA (1T47).

2. The Sheriff's Office is divided into three divisions (administrative/civil, uniform, and investigative) with the following major units: administrative, civil process, hall of justice, transportation, special investigations unit, and identification. The Office's mission is to provide security for the courts in Camden County, maintain records and identification in the form of fingerprints, photographs, and arrest records; serve civil process and criminal warrants throughout the county; search for and retrieve fugitives; transport incarcerated persons between prisons, courts, and medical facilities; conduct special investigations; and cooperate with local and federal law enforcement agencies in police activities within the county (5T36-5T37).

3. In January 1995, Sheriff Michael McLaughlin began the first of two terms (5T34). During McLaughlin's election campaign, he learned that many officers felt frustrated by the lack of opportunity to move to other jobs in the office (5T42-5T43, 4T35, 1T72). To address this perception, McLaughlin established a policy and procedures to regularly transfer officers among divisions (5T42-5T44, 3T5-3T6, 3T64-3T66). McLaughlin believed that cross-training officers in multiple areas would mean more efficient deployment (5T43-5T44, 1T72).

4. The transfer process began with requests from officers seeking reassignments (5T45, 2T76). Three months before each round of transfers took place, McLaughlin began holding a series of meetings with undersheriffs and captains to decide who to transfer. Transfer requests, superior officers' recommendations, the abilities and availability of officers were discussed (2T75-2T76, 3T66-3T68, 4T36-4T37, 5T45-5T46). The topic of officers' union activity was never raised in these discussions (3T68, 4T40, 5T46).

As a PBA official, Aron is not exempt from transfers or reassignments (2T57, 4T39-4T40). Aron was never directly told by the sheriff or undersheriffs that his transfers were in retaliation for union activities (2T77).

5. Transfers of 15 to 30 officers occurred approximately every six months in the spring and fall (5T44, 3T5-3T6). From January 1995 through November 1997, about 175 officers were employed by the Sheriff's office; 215 transfers occurred; ten to fifteen officers were transferred more than four times; and 80 officers were not transferred at all (R-15, 5T15, 5T17, 5T19, 5T21-5T23).^{4/} Not all transfers were "voluntary" or requested by the officer; in many cases officers were transferred

^{4/} Lieutenant Raymond Alkins is assigned to the administrative division and works primarily on budget and personnel matters (5T15). Alkins compiled all employee status change reports (which represent transfers) for the period January 1995 through November 1997 (5T15-5T16, R-15).

out of an assignment to accommodate those transferring in; and, some transfers were delayed until a subsequent round for efficiency reasons (3T16, 3T76-3T77, 4T37, 4T40-4T42).

Transfer in December 1995

6. Aron worked in the special investigations unit (SIU) for six years from 1990 to 1996 (1T52). In August 1995, he was assigned to gather intelligence in support of the civil process unit's attempt to serve eviction notices to the occupants of a house in Pennsauken (2T66, 3T49-3T50, 3T49, 3T58-3T59).^{5/} Aron surveilled the house to determine the number of occupants; their identities and criminal backgrounds; the presence of children; and the probability that the occupants had weapons or explosives (3T49, 3T58-3T59).

7. In the middle of the investigation, Aron took three weeks vacation leave and, on or about December 20, he requested an additional day off (3T50). During his absences, Aron's immediate supervisor, Lieutenant Leonard DeCord, had used other investigators, but did not want to continue to assign other officers to this investigation (3T54-3T55). DeCord initially denied Aron's request for an additional vacation day (3T50). Aron became angry and told DeCord he would not be intimidated into

^{5/} Aron was technically still attached to the SIU, but this "intelligence officer" assignment was regarded as a special detail (2T58, 3T48).

foregoing leave to which he was entitled under the PBA contract (3T50).^{6/}

8. Undersheriff Joseph Dougherty was DeCord's supervisor and had been under pressure from the Sheriff to complete the investigation; the banks were anxious to evict the occupants (3T69, 5T52-5T53). In turn, Dougherty urged DeCord to complete the investigation quickly (3T50-3T52).

DeCord informed Dougherty about his conversation with Aron, and recommended that Aron be removed from the intelligence assignment and returned to regular SIU unit work (3T51, R-2). Aron was permitted to take the day off (3T52). Dougherty told DeCord to "write it up", meaning issue an incident report, counseling report or reprimand (3T51, 3T59-3T60). Dougherty felt that Aron was not interested in the assignment, had done an incomplete job, could have completed the investigation earlier, and was now insubordinate (3T70-3T71, R-3, 3T61). Dougherty recommended to McLaughlin that Aron be disciplined for insubordination and transferred from the SIU (3T61). Instead, McLaughlin decided that Aron should not be disciplined but removed from that particular detail (3T62). On or about December 20,

^{6/} DeCord testified that Aron said he was fed up and disgusted with the assignment, but Aron denied having said this. I infer from all of the testimony that Aron was frustrated with the investigation and angry that his request for leave was denied. Aron admitted saying to DeCord that he was "tired of being forced not to use his time," and "that [he] had already reported that nothing was going on." (2T68, 3T50-3T51).

1996, Aron was reassigned to SIU (3T70). On January 11, 1996, Aron filed a grievance contesting his "transfer" from the intelligence assignment; on January 18, 1996 the Sheriff's Office denied the grievance (2T30-2T31, J-14(A) and (B)).

Transfer April 1996 to Civil Process

9. Between spring 1995 and June 1996, the PBA pursued grievances concerning the Sheriff's alleged improper change of work hours; payment methods and overtime entitlements for three initiatives known as the "spring sweep" (a fugitive round-up); "dead beat dad" raid (child support); and birthday leave (birthdays as holidays) (J-3, J-4, J-10, 2T8-2T9, 2T24-2T27). The outcomes of these grievances could affect other raids which were being planned (2T21-2T22). Aron represented the PBA at the informal stage of the grievance, and served as a resource to PBA's counsel at the arbitration on all grievances (2T11, 2T28-2T29). Sheriff McLaughlin was aware of Aron's participation in these grievances (5T41-5T42).^{7/} The grievances were denied and

^{7/} Aron also had a reputation with other superior officers for being active on behalf of PBA causes. Sergeant Robert Otto, Lieutenant Todoro, Undersheriffs Dougherty, Gallagher and Saponare were all familiar with Aron's role in having filed grievances or holding offices in the PBA (2T110, 3T60, 4T11, 4T44).

proceeded to arbitration (2T11-2T19, J-3C). On April 23, 1996, Aron testified at a consolidated arbitration hearing (2T19).^{8/}

10. According to a memo dated April 24, 1996, from Undersheriff Gallagher to all personnel, Aron and 21 other officers were listed for transfer, "in furtherance of the previously stated policy...to rotate personnel on a regular basis in an effort to achieve equality, for evaluation purposes and for the overall good of the department." (R-15, memo April 24, 1996, pg. 1). Effective May 5, 1996, Aron was transferred from SIU to civil process (2T40).

11. For Aron, the work in SIU is more desirable because there is more freedom and the work is more like traditional police work in that one sees the process from investigation to apprehension (2T40-2T41). He had not requested a transfer and was told his transfer was part of the policy on rotating personnel (2T30).

McIntyre Grievance

12. Lieutenant Frank Todoro is in charge of the internal affairs unit (2T109). For a short period in 1996, Todoro was the

^{8/} On June 18, 1996, an arbitrator sustained the grievances and ordered compensation for officers denied overtime and ordered the sheriff to permit officers to choose to holiday pay or time off on their birthdays (J-5, 2T19, 2T23, 2T28). On October 8, 1996, the PBA, believing that the County had misinterpreted the arbitrator's order, sought clarification (2T20, J-6). On October 15, 1996, the arbitrator explained that the County should pay officers for hours they did not work (2T21, J-8).

Sheriff's administrative aide who coordinated overtime assignments on the High Intensity Drug Trafficking Areas (HIDA) program, a cooperative drug raid program between the Sheriff's Office, Camden City Police and Camden County Prosecutor's Office (2T111). Todoro selected the participating officers from a list of volunteers (2T112). In 1996, Aron was initially selected and worked one detail, but, without explanation to Todoro, Undersheriff Dougherty ordered him removed from the HIDA overtime list; Aron was the only one removed during Todoro's brief involvement (2T112).

13. Sergeant Robert Otto is a supervisor in the civil process unit, has been an employee for 19 years and a supervisor for 7 years (3T3-3T4). Aron reported to Otto from April 1996 to November 1996 (3T5).

Under Article V, section 6, of the parties' agreement, civil process officers are not entitled to overtime (J-1, page 8). According to Otto, civil process officers are not entitled to overtime while performing civil process functions (3T9-3T10). However, Otto believed that they were eligible for overtime in non-civil process areas such as DARE, crime prevention, bomb squad, SWAT and public information work at schools (3T9-3T10). Aron was permitted to work overtime in these areas (3T10). On or about September 1996, Otto received an order from some supervisory level that several civil process unit officers, including Aron, were not to work overtime, even in these other areas (3T10-3T12).

14. On July 12, 1996, Identification Officer Shawn McIntyre was denied overtime on a HIDA raid because of excessive sick leave (2T101-2T102). Aron and PBA President Tom Gladden met with Sheriff McLaughlin to resolve the issue for McIntyre. Later, on August 15, 1996, McIntyre filed a formal grievance (J-17, 1T63, 3T28, 2T102). After further investigation, the Sheriff ordered McIntyre restored to the HIDA overtime list (1T64, 5T48-5T49). While investigating the grievance, McLaughlin learned that the parties' agreement prohibits civil process officers from working overtime because they work flexible hours in order to complete process duties (5T48-5T49, J-1, Article V, section 6). He instructed the undersheriffs to strictly abide by the contract; he did not specifically name Aron or any other officers for removal from overtime lists (5T49-5T50).

15. Aron was removed from the overtime list at the same time McIntyre was restored to it, but Aron was not the only civil process officer who was affected by the order. Aron was not singled out by the Sheriff's direction to the undersheriffs.^{9/}

^{9/} Aron, Gladden, McIntyre and Todoro mistakenly believed that Aron "replaced" McIntyre and that Aron was the only officer affected by the order, but the weight of the testimony shows that they were not fully informed. I credit the testimony of Sergeant Otto and Sheriff McLaughlin. Otto testified that he was told that "several process officers will not work overtime" (3T10). McLaughlin testified that he intended to have the contract followed strictly and that he did not specifically identify any officer, including Aron,

Mischief Night Detail October 1996

16. On October 30, 1996, the Sheriff's Office provided assistance to the City of Camden in patrolling the City on mischief night (1T67-1T68). Sheriff's officers were offered payment in the form of compensatory time (1T68). The agreement between the PBA and City provides for payment in the form of either cash or compensatory time at the officer's choice (1T68). The PBA threatened that any officer who volunteered for the mischief night detail would be charged with injuring a fellow member, and fined in the amount of the money earned on mischief night (1T68). Aron suggested the punishment and authored a letter, issued by PBA President Gladden, announcing it to all unit members (1T68). Aron learned that after the letter was distributed, all but 2 of the 20 volunteers had withdrawn (1T69).

17. Within a few days, on November 4, 1996, Aron was transferred from civil process to the transportation unit (1T70). Aron learned that prior to the "mischief night" warning letter, he had not been previously selected for transfer (1T70-1T71). Aron

9/ Footnote Continued From Previous Page

be removed from overtime lists (5T48-5T49). McLaughlin testified that Aron's removal from overtime eligibility did not have anything to do with Aron's having processed a grievance (5T47). Aron testified that he was the only officer not permitted to work overtime (1T65). Todoro coordinated the scheduling of the HIDA overtime for only a short period, during which Aron was the only one removed; McIntyre's understanding was based upon Todoro's belief (2T103-2T104). Gladden's information came from Aron (3T30).

thought his transfer was suspicious because of the closeness to the PBA's response to the mischief night detail, and because, he had not been in civil process very long; he thought it was premature to move him (1T71-1T72).^{10/} Sergeant Otto was asked by his supervisor, Undersheriff Gallagher, for the two most senior officers in the unit (for transfer), and he gave Officers Fields and Reinmuth (3T5, 3T12). Gallagher, who chose Aron over the two initial selectees, explained to Aron that his motive in transferring Aron was to give him more opportunities for outside work and overtime, and because the transportation unit work was more like police work than the work in civil process (1T73, 2T5, 4T42, 4T56, 5T90-5T92). Sergeant Otto and Captain Garcia, who supervised Fields and Reinmuth, asked that their transfers be delayed because their absence would create a hardship for the unit. They performed specialized, difficult work which no one else was trained to do (3T17, 4T40-4T41).^{11/} Gallagher did not

^{10/} Otto also assumed that the more senior employees are the ones transferred to facilitate cross training, but he also believed Aron has worked in the civil process unit previously (3T6, 3T16).

^{11/} Officer Reinmuth served writs of execution, levies on bank accounts, personal property, real estate, sheriff's sales, and prepared inventories of properties to be levied upon (3T16). He also helped out with summonses, complaints and orders to show cause (3T16). Otto considered Reinmuth's job one of the hardest in the department (3T16). In October 1996, no one else in Civil Process was trained to do this work (3T16), so if Reinmuth had been transferred, it would have been a hardship to the unit, and Otto had so advised Undersheriff Gallagher (3T17).

want any officer immune from the transfer policy but he agreed to delay their transfer and chose Aron instead (4T41). Fields and Reinmuth were transferred at the next round (R-15, 3T16, 4T41).

18. McLaughlin and Gallagher were aware that Aron had initiated the collective refusal to volunteer on mischief night 1996, but there is no evidence in this record that they resented the action. There is also no direct evidence of a connection between the action and the decision to transfer Aron from civil processing to transportation at the November 4, 1996 round of transfers (4T40-4T42, 4T56, 4T58-4T59, 5T70-5T71).^{12/}

19. Aron's opinion is that civil processing is more desirable than transportation because it is a daytime job and there is greater schedule flexibility and more freedom to think; it is not routine or repetitive (1T76).

The PBA attempted to impeach Sheriff McLaughlin's credibility on the legitimacy of the transfer policy, as it applied to Sheriff's Officer Aron, by submitting McLaughlin's sworn certification in another Commission case, Docket No. SN-99-59. There, the Sheriff stated, in response to a PBA proposal for a bidding procedure, that officers in the SIU and civil process units should not be subject to the bidding process, where they possess specialized qualifications because of the

^{12/} Both McLaughlin and Gallagher testified credibly that Aron's objection to volunteering on mischief night had nothing to do with Aron's transfer later that month (5T50).

inefficiencies and disruption to those units' missions. It is alleged that Aron possessed those qualifications and should not have been transferred at all, or with as great frequency, according to the Sheriff's certification. I found that Aron was transferred from an intelligence assignment because he had not performed to the Office's satisfaction and was disinterested in the intelligence detail. I find nothing in the Sheriff's statement which would have made Aron exempt from transfer from SIU to civil process, in April 1996. And, Undersheriff Gallagher picked Aron for transfer from civil process in November 1996 because he had to leave Fields and Reinmuth in that unit to avoid a hardship. I do not find that the certification impeaches the Sheriff's earlier testimony, as the PBA suggests.

Mogck Incident

20. William Ruff is a sheriff's officer assigned to the transportation unit (2T113-2T114). On February 12, 1997, in front of five employees, Ruff heard Lieutenant Edward Mogck ask then-PBA President Tom Gladden for his PBA cards, but since Gladden did not have them he referred Mogck to Tom Aron (2T116-2T117). Mogck then stated: "[Aron had better give me my cards or] I am going to kick Tommy Aron's ass" (J-18, 2T116, 4T32). Mogck told Gladden he should have them since he was the PBA president, Gladden repeated that Aron, as state delegate, had the cards. Sheriff's Officer Winnie Yackle was also present. Ruff felt that Mogck's remarks were humorous since he (Mogck) was "not known throughout the

department as a tough guy" (2T118). Later, when Gladden and Ruff encountered Aron, they joked with him: "we were surprised he was still alive," after what Mogck had said (2T78, 2T93, 2T118).

21. Aron did not hear the remarks and testified he had not taken Mogck's comments as serious threats, and yet, Aron filed a formal incident report charging Mogck with violations of the rules against unbecoming conduct and violations in general (1T77-1T79, J-18, 2T78-2T79). Aron wanted the Sheriff to reprimand Mogck (2T93-2T94). J-18 states, "On 2/12/97, ...Mogck did threaten to cause serious bodily harm to this officer, ..." (J-18). Aron felt the comments were improper because Mogck was a superior officer serving in internal affairs and had an apparent inability to control his temper (2T93). Aron was of the opinion that if he had said the same things he would have been charged with improper conduct (2T93). Gladden did not take the remarks seriously, and advised Aron not to charge Mogck (3T40).

22. Undersheriff Thomas Gallagher conducted a preliminary investigation based on Aron's complaint (J-18; 4T43-4T44). Gallagher wrote a report of the incident (R-7; 4T44). Gallagher spoke individually to everyone who had been present: Sheriff's Officers Yackle, Smith, Gladden and Ruff (4T45). He concluded that Mogck's comment was made in jest (4T45). R-7 states, "If Sheriff's Officer Aron found the remark to be truly life threatening then I would have concern about his psychological well being." Mogck was not disciplined because an

officer is disciplined for making bonafide threats (4T62-4T63). Gallagher did not interview Aron because he concluded that the remark was made in jest and should not be regarded as a serious threat (4T61-4T65).

23. McLaughlin adopted Gallagher's recommendation not to take any further action (5T51). McLaughlin directed Aron's supervisor, Undersheriff Anthony Saponare, to formally respond to Aron (4T12; J-9). Saponare testified: "[McLaughlin] instructed me to advise [Aron] that the investigation was concluded and to offer him some assistance, if need be." (4T12). Saponare based his response on Gallagher's report and findings (4T20-4T21, J-9). On March 7, 1997, Saponare responded:

An inquiry was conducted into the allegation contained in your report...dated February 15, 1997. The investigation concluded that your complaint was unsubstantiated. An examination of the facts in the case did, however, raise some questions as to your current psychological well being. Feelings of anxiety and fear for personal safety are sometimes byproducts of police related employment. Professional counseling is usually recommended.

Should you wish to discuss this matter privately, I would be pleased to do so.

Saponare marked the envelope into which J-9 was placed "personal and confidential" (4T12-4T13). Aron later posted it on the bulletin board in the transportation headquarters in Pennsauken to show his fellow officers how unfair the administration was (2T81, 2T94, 4T13). Saponare did not hear further from Aron (4T13).

24. To Aron it appeared the Sheriff's response was evidence that he was both protecting Mogck's bad behavior and turning the issue around and targeting Aron, implying that Aron had a psychological problem (2T94, 1T84-1T86).

25. Saponare and Gallagher stated that if Aron truly found the remarks to be life threatening, and/or feared for his safety, they would have had concerns about Aron's psychological well-being (R-7, J-9, 4T21). Saponare did not really believe Aron had a serious problem (4T22). Gallagher did not form an opinion as to whether Aron really had a psychological problem; he did not interview Aron because the matter did not go into a full internal investigation (4T62-4T63, 4T47).

Safety Complaints

26. On September 25, 1997, Aron wrote to Sheriff McLaughlin about certain safety issues which Aron had earlier reported to Lieutenant Francis Schillig (J-15, 2T41). Schillig was Aron's supervisor (5T25). The Office had acquired some new vans which were not equipped with protective biohazard kits, Tyvek suits, disinfectant, decontaminate or gloves (2T41-2T42). The vans arrived in August 1997. Aron approached Schillig who was unaware of the deficiency. Schillig prepared a form and sent it to Captain Albert Pine, a supervisor in the transportation unit (2T42-2T43). When three weeks had passed without any response, Aron wrote directly to McLaughlin (J-15, 2T41, 2T43).

27. However, instead of responding to the safety equipment issue, on October 15, 1997, Captain Pine and Lieutenant Schillig gave Aron a verbal counseling and formal reprimand for having gone outside the chain of command (J-16; 2T43-2T44).

28. On December 14, 1997, Aron sent a letter to the State Public Employee Occupational Safety and Health Division (PEOSH) complaining that the Sheriff had failed to comply with blood pathogen safety standards and had discriminated against Aron for raising the issue (2T45). The state inspector came to inspect (2T45-2T46).

29. On about September 29, 1997, Saponare received a memo from McLaughlin, "the attached is self explanatory. Inquire as to whether any notification of these equipment shortages have been reported through the chain of command using the administrative report. If not, advise Officer Aron to submit a report. In the meantime, make contact with Undersheriff Gallagher and Special Services to obtain a cost estimate" (R-13; 4T14).

30. Saponare decided that Aron should be counselled, and directed Schillig to do so (5T27). Schillig did not tell Saponare that Aron had previously reported the incident to him (4T15-4T16). Captain Pine had told Saponare that no report of the equipment deficiency had been administratively reported (4T16). Despite the fact that Aron had gone through the chain of command by reporting the matter to Schillig verbally, Schillig failed to so inform Saponare, and Schillig carried out the order to issue the counseling

report (5T28). Schillig says he made an error in not telling Saponare, but at the time, since he was a new lieutenant and had just recently assumed command, he was intimidated by the undersheriff and admitted it was a mistake; Schillig testified that at the time, though the counseling report would go into Aron's file, he did not consider it a "big deal" (5T27-5T30). On October 15, 1997, Aron received a counselling/reprimand signed by Schillig, for failing to follow the chain of command by writing directly to the Sheriff about the absence of safety equipment in the transportation vans (J-16, 2T43-2T44).

31. Saponare later learned that Aron had made a (verbal) report to Schillig (4T16). Saponare testified that he would not have had Aron counselled if he had known Aron had made a verbal report through the chain of command (4T17). In general, Saponare admitted, if an officer is acting in his capacity as a PBA officer or delegate, he is not required to follow the chain of command. J-15 identifies Aron as "state delegate" (J-15; 4T28).

32. Undersheriff Gallagher was asked by McLaughlin to look into Aron's allegation that he was improperly counselled for going out of the chain of command to file a safety concern (4T47). Gallagher learned from Schillig that Aron had made a verbal report to Schillig who was the first in the chain of command (4T48). He also learned that neither Schillig nor Pine had reported Aron's complaint to Saponare (4T49, 4T71). Despite Gallagher's recommendation that the counselling be rescinded, the Sheriff's Office has not done so. (2T47, 4T49).

33. McLaughlin felt that officers were underusing the administrative procedures, and that, if there were complaints about equipment shortages or safety hazards, management should be made aware of them via a written report made through the chain of command so that problems could be corrected before they escalated to grievances (5T59-5T62). McLaughlin did not order that Aron be disciplined and acknowledged that in his capacity as PBA state delegate, Aron could permissibly write directly to Mclaughlin to advise him of a problem (5T60, 5T64).

Leave to Attend PBA Meetings

34. Article XV of the parties' agreement, "Leave of Absence", provides:

Section 6. Official Duties-officers of P.B.A. will be given leaves of absence with pay to perform official duties of P.B.A. subject to the following

(a) Provided such activities relate to employment.

(b) Provided the Sheriff is given not less than five (5) days notice of such intended leave, if possible. If less than five (5) days notice is given, it shall be necessary for P.B.A. to show that five days could not be given.

(c) Provided the names of shop stewards are contained on the list furnished by P.B.A. to the Sheriff.

(d) Excused P.B.A. Officers not to exceed three (3) in number, except that this limitation shall not apply to Executive Board meetings and general membership meetings, and other extraordinary circumstances.

(e) Provided such leave does not unreasonably interfere with the work performance and efficiency of the Department.

35. On July 1, 1998, Aron sent a letter, as PBA president, to Sheriff McLaughlin requesting time off for various officers to attend PBA functions/duties between July 14 and October 27, 1998 (Exhibit A, B, C-1; 2T48). Aron provided detailed information, names, dates and times (2T48). Some of the requested time off was approved (2T49). On August 7, 1998, Aron received a letter from Undersheriff Gallagher. Gallagher wrote:

"After further review of the block of dates requesting PBA administrative leave for executive members of the Local, I feel that the provided information is too vague for me. In order to make a decision that is fair, both for the department and the local, whether to grant or deny the request, I need more specific details. Therefore, ... all request [sic] for administrative leave will be sent on a date by date individual basis.

In your request submission, please include the scheduled time for the meeting, location, purpose of the meeting, and a brief summary as to why attendance by the individual is necessary. Again, I feel that this added information will greatly assist me. I assure you that request [sic] for such leave time will not be unreasonably denied.

Additionally, I receive calls from command officers, who have advised that their units do experience scheduling problems because of the request. Occasionally, the request [sic] create unnecessary overtime situations. And, at times, the request [sic] interferes with the operational efficiency of the department.

If you should need to discuss this matter, please contact me. As always, i am available to meet with you...on all issues of mutual concern. All such meetings, i believe, are intended as a means

of fostering good employment relations through communications between both parties.
(Letter August 7, 1998, C-1)

36. The letter does not specifically deny the leave (2T90). Aron believed that Gallagher's letter represented "a complete reversal" of his position on PBA leave time, and that the agreement does not require the PBA to advise management about the purpose of PBA meetings or necessity of an officer's attendance (2T50).

37. The previous PBA president did not have to submit the type of information regarding purpose and reasons for attendance at meetings for which Aron was being held responsible (2T50, 3T33). A letter dated February 6, 1997, from Gallagher to past-PBA President Gladden, suggests that the determination of the time and officers selected for attendance is solely the PBA's (2T51). Gladden's previous request only covered executive board meetings, whereas Aron's more comprehensive letter contained times, officers names, general membership meetings and state delegate meetings (2T52-2T53). Gladden requested the release of nine officers in calendar year 1997, at one in the afternoon on 16 dates over nine months, to attend bi-monthly executive board meetings (C-1, attachment B to amendment August 21, 1998). Aron's request of July 1, 1998, covers four months, and appears to cover more than bi-monthly executive board meetings. Some of the leave requests only apply to an individual, while others appear to include all eleven officers (C-1, August 28, 1998 amendment, attachment A).

38. Gallagher did not deny Aron's request for administrative leave for PBA meetings (2T90, 4T50-4T51). Aron's request includes much more leave over a shorter period of time and differed significantly from past-President Tom Gladden's requests (4T72). All of the meetings Gladden identified were executive board meetings (4T74-4T75). But Aron's list provides instances where only one or two officers attend, and others where all but one or two officers attend, raising questions about the type of meetings and need for specific officer's attendance; in Gladden's request, all officers identified attended all meetings (C-1, attachments A and B, 4T72-4T73).^{13/}

ANALYSIS

The Act provides that "no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge." N.J.S.A. 34:13A-5.4. Several of the PBA's allegations occurred before the statute of limitations began in this case. The charge was filed on April 25, 1997 and thus, the statute of limitations period began on October 25, 1996. The transfers on

^{13/} At the hearing, Gallagher questioned the requests for August 12, 1998 from 1200 to 1700 hours, for Sheriff's Officer Greenwood alone; and requests for Officers Adams and Franzen for October 13, 0800 to 1600 hours (4T72-4T73). He testified that commanding officers complain about the absences and he wants to be able to defend the leave approvals (4T73).

December 20, 1995; April 24, 1996 and the denial of overtime which occurred sometime in August or September 1996 (the McIntyre incident) are untimely, and I recommend that they be dismissed.

The charge raises the issue of whether the Sheriff discriminated against or interfered with Sheriff's Officer Tom Aron's rights under the Act by transferring Aron on November 4, 1996; refusing to discipline a lieutenant who had made threats against Aron; reprimanding Aron for writing directly to the Sheriff as a PBA delegate on safety issues; and denying his request for administrative leave for PBA meetings, in violation of 5.4a(1) and (3) of the Act. The charge also raises the issue of whether the Sheriff dominated or interfered with the administration of PBA Local 277 by the above actions, in violation of 5.4a(2) of the Act; discriminated against Aron for filing a petition, affidavit or making other appearances under the Act in violation of 5.4a(4) of the Act; or refused to negotiate in good faith in violation of 5.4a(5) of the Act.

In re Tp. of Bridgewater, 95 N.J. 235 (1984) (Bridgewater), articulates the standards for evaluating whether subsection 5.4(a)(3) has been violated. A 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. Id. at 246.

If the employer does 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 union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

A public employer independently violates 5.4a(1) of the Act if its actions tend to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987) (no violation of 5.4a(1) where employer's referral to employee assistance program was intended to help, not harm employee); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986) (Commission found township violated Act, where mayor threatened PBA Local with reprisals if it

proceeded to interest arbitration and then introduced ordinance reducing the number of sergeants).

In N.J. College of Medicine and Dentistry, the Commission noted:

In determining...whether particular actions tend to interfere with, restrain or coerce a[n]... employee...we will consider the totality of evidence proffered ...and the competing interests of the public employer ...and/or affected individuals.
Id. at 422-423.

In N.J. Sports and Exposition Authority, the Commission restated the 5.4a(1) standard, holding:

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 to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.
[Id. at 551 n. 1] [Emphasis Added].

In determining whether an employer has violated 5.4a(1), the Commission in Fairview Free Public Library , P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998), recently held:

[W]e must first determine whether the disputed action tends to interfere with the statutory rights of employees.... If the answer to that question is yes, we must then determine whether the employer has a legitimate operational justification. If the employer does have such a justification, we will then weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act.
[citation omitted]
25 NJPER at 21.

Transfer on November 4, 1996

The PBA argues that the Sheriff's transfers of Aron were discriminatory. Applying the above standards, the PBA has established that Aron engaged in protected activity and that the Sheriff and his managers were aware of that activity. There is no dispute that Aron filed grievances, etc., and that the Sheriff was aware of Aron's activity. There is no direct evidence that Aron was transferred because he filed grievances or protested the Sheriff's policies.

The PBA asserts that in each instance Aron was transferred between 1995 and 1997, the transfer occurred shortly after Aron had actively protested one of the Sheriff's policies or practices. Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity.^{14/} In many cases where the timing of a personnel action establishes hostility toward protected activity, the personnel action is unanticipated and takes place at a time or in a manner inconsistent with the ordinary course of business. In Bridgewater, for example, a recently promoted employee was transferred and demoted, without advance notice, soon after he protested a unilateral change in wages.

^{14/} City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498 (¶18183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

The earliest transfer in December 1995, from an intelligence assignment to regular SIU work did not evidence hostility toward protected activity. The PBA alleges that because Aron requested one day of leave, and/or protested Lieutenant DeCord's denial, he was punitively reassigned to regular SIU duties. However, the record shows other reasons for the reassignment: there was pressure on the Sheriff to complete the investigation quickly and a belief by his supervisors that Aron was disinterested in it. Undersheriff Dougherty believed the information Aron gathered was incomplete and it was taking too long. DeCord had permitted Aron three weeks vacation in the middle of the detail and was frustrated that Aron wanted to take more time off because of the pressure to end the investigation. Most importantly, Dougherty thought Aron's reaction to the denial of the request for another day off was insubordinate.

The two remaining transfers: in May 1996 from SIU to civil process and November 1996 from civil process to transportation were part of a group of transfers made in the normal course of business. The overwhelming evidence shows that early in his first term in 1995, Sheriff McLaughlin instituted a policy of transferring personnel to broaden opportunities, improve skills and enhance deployment of officers. Officers were transferred between units on a fairly regular basis, approximately every six months in the spring and fall.

Officers were transferred in January and October 1995, while Aron remained in SIU, which he ranked as one of the more desirable unit assignments (R-15). The determination of who would be transferred began well before the date on which Aron appeared at an arbitration hearing on April 23, 1996. His name appeared on a transfer of personnel memo dated April 24, 1996, along with 21 others. There is no evidence that the decision to move Aron was last minute, or in any way an exception to the ordinary course of business at the time. The proximity of the one event to the other was coincidence. Aron had been in SIU for six years. As a PBA officer, Aron was not exempt from the transfer policy. All of the superior officers who testified about the transfer policy corroborated that union activity was not considered in determining who or where officers would be transferred. Absent any evidence of the contrivance^{15/} suggested here by the PBA, I decline to find that the Sheriff's transfer of this entire group was a pretext to retaliate against Aron for pursuing grievances. Around 95 of the 175 officers were transferred between 1995 and 1997; and ten to fifteen officers were transferred more than four times, at least as frequently as Aron.

^{15/} If one accepts Charging Party's argument, the Sheriff transferred 20 or so officers twice a year for two years, and hauled his managers into meetings to decide the transfers as a pretext to retaliate against Aron for pursuing grievances and appearing at arbitration hearings.

As to the transfer in November 1996, it was also made in the ordinary course of business. The PBA asserts that its proximity to Aron's mischief night protest is evidence of hostility, and argues that Aron would not have been transferred so soon after having been assigned to civil process only six months earlier, but I disagree. Undersheriff Gallagher, who chose Aron over the two officers originally selected, did so because their supervisors specifically requested a delay in their transfer because moving them would cause a hardship in the civil process unit.^{16/} Like Aron, they were not exempt from the policy, and were transferred at the next rotation. Further, Gallagher wanted to give Aron more opportunities for outside work and overtime, and he thought Aron would prefer the work in transportation because it was more like police work than the work in civil process (1T73, 2T5, 4T42).

McIntyre Incident/Denial of Overtime

Nor has it shown that the removal of Aron's name from overtime eligibility in August 1996 was evidence of hostility toward Aron for his pursuit of McIntyre's grievance. McLaughlin had suggested to the undersheriffs that they insure the terms of the PBA contract were being followed. The contract appeared to prohibit civil process officers from overtime. McLaughlin did not specifically order that anyone, including Aron, be pulled from the HIDA overtime list.

^{16/} This testimony was corroborated by Sergeant Otto.

Accordingly, PBA has not proven that the timing of the transfers or the overtime incident give rise to an inference of hostility towards Aron's protected activity.^{17/}

The Sheriff would have violated 5.4a(1) if its actions interfered or had the tendency to interfere with protected activity and lacked a substantial business justification. I do not find that the transfer of November 1996 directly interfered with protected activity, or tended to interfere with anyone's protected activity. But even if I had found such interference, on this record, I would conclude that there was a legitimate business reason for the transfer in November 1996, the sole timely transfer.^{18/}

Mogck Incident

The incident which occurred on or about February-March 1997, known as the Mogck incident, also does not evidence either hostility or the tendency to chill or interfere with protected activity. No one, including Aron, took the threat made by Lieutenant Mogck, as a "threat of serious bodily harm." Despite that Aron believed the conduct was unbecoming and merited

^{17/} Those events which occurred prior to October 25, 1996, are untimely and have been considered only to determine whether the Sheriff's Office was hostile toward's Aron's protected activity. See W. Orange Tp., P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998) (events occurring outside the statute of limitations can be examined as evidence of discriminatory motivation leading to adverse actions within the statutory period).

^{18/} The allegation concerning the denial of overtime was filed outside the statute of limitations.

disciplinary action, the undersheriffs and sheriff, after an investigation, disagreed. In their judgment, the incident required no further action, except to respond to Aron's charges. Mclaughlin testified credibly that he directed Gallagher's informal investigation, adopted his recommendation not to take further action and directed Saponare to respond and offer assistance. Saponare personally drafted the memo which turned the focus to Aron's reaction and psychological well-being. It was Saponare who suggested that counseling could be available and marked the envelope to avoid disclosing the communication to others. Given these facts, I do not impute the sarcasm or hostile motive to Saponare that the PBA suggests. Majority representatives and aggrieved individuals do not have the prerogative to decide whether to discipline an employee. That is inherently an employer's responsibility. Here, the Sheriff did not ignore Aron's charges or force Aron to undergo evaluation and counseling. Merely suggesting and offering help in a memo delivered in a discrete manner does not demonstrate hostility.^{19/} Accordingly, the PBA has not met its burden of proving that the Sheriff discriminated against Aron with regard to the Mogck incident in violation of 5.4a(3) of the Act.

Further, even if I were to find that the focus on Aron's psychological well-being in Saponare's memo had the tendency to

^{19/} See UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987) (no violation found where employer's referral to employee assistance program was intended to help, not harm employee.

interfere with his protected activity, I would find that the tendency was slight. On the other hand, the Sheriff has a substantial operational interest in encouraging officers to seek assistance if they desire it. Aron had described the issue in his charge as "a serious threat." Considering all the circumstances, the Sheriff's right to decide not to discipline Mogck, given that no one interpreted Mogck's remarks as serious threats, and to offer Aron assistance outweighs the PBA's "right" to have the Sheriff discipline Mogck. Fairview Free Public Library. The PBA has not proven that these actions violated 5.4a(1) of the Act.

The Safety Complaint

Aron was unfairly disciplined on October 15, 1997, for having gone outside the chain of command in bringing a safety equipment problem directly to the Sheriff in his capacity as PBA delegate. Despite the fact that Aron had gone through the chain of command by reporting the matter to Schillig verbally, Schillig failed to so inform those superior officers who could have exonerated Aron to the Sheriff. Schillig later admitted his error. Saponare testified that he would not have had Aron counselled if he had known Aron had made a verbal report through the chain of command. Saponare admitted an officer acting as a union delegate may not be required to follow the chain of command. Undersheriff Gallagher also learned that Saponare acted on a mistaken belief about the circumstances surrounding Aron's complaint and he recommended that the written counselling report be rescinded.

McLaughlin felt that officers should apprise management about equipment deficiencies through the chain of command using administrative procedures and forms, so that it could address these issues. Acting on incorrect information, McLaughlin and Saponare ordered a counselling or reprimand, which has apparently not been rescinded. Under these circumstances, animus is presumed.^{20/} I find that they punished Aron for acting in his role as PBA delegate and therefore directly discriminated against him in violation of 5.4a(3) of the Act.^{21/}

The Commission's decision in Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), is instructive in analyzing this allegation. There a Board official sent letters to the association vice president criticizing him for comments he made in representing a teacher. The letters were initially placed in his employee personnel file. The Commission found that the letters were intended to discourage the vice president's future conduct, and punish him for the conduct, not simply to protest the representative's actions which it believed were inappropriate. The Commission did not find the letters were per se violative of the Act, but in finding a(1) and (3) violations, it said:

^{20/} I do not believe that either McLaughlin or Saponare bore personal animosity toward Aron as PBA delegate.

^{21/} Having found evidence of direct discrimination in this count does not alter my earlier conclusion that there was no evidence of hostility or union animus in other counts of the charge which do not evidence direct discrimination.

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, ...the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977). (emphasis added)

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, ...may be initiated to halt or remedy the other's actions. However, ...where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. 7 NJPER at 503. (emphasis added)

* * *

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. 7 NJPER at 504.

Applying Bridgewater and Black Horse Pike, I find that the Sheriff violated 5.4a(3) and, derivatively, a(1) of the Act by

reprimanding Aron for acting as PBA delegate in writing directly to the Sheriff outside of the chain of command.

The issuance of a reprimand also independently violated 5.4a(1) of the Act. An employer independently violates this section if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. In Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994), a principal interfered with the association by calling a meeting to criticize the union leadership. There, the Commission found no legitimate business justification for making those remarks at a meeting where attendance was required. In this case, the imposition of discipline has no legitimate business reason because Aron had reported the shortage properly. Accordingly, I recommend that the Sheriff violated 5.4a(1) of the Act because its actions interfered with Aron's protected activity without any legitimate and substantial business justification.

Request for leave to attend PBA meetings

The PBA argues that the Sheriff's "denial" of PBA leave and the requirements set forth in Gallagher's August 7, 1998 letter are changes in established practices and discriminatory acts against Aron. I do not agree.

Initially, I note that Gallagher invited Aron to discuss the PBA leave and gave assurances that the leave would not be unreasonably denied. He testified and wrote about the problems that staffing shortages raised for him and the units. But Aron did not

follow up by letter or by meeting with Gallagher. Nor did Aron file a grievance under the negotiated agreement. Despite the assertion that the agreement does not require what Gallagher appears to be seeking, the plain language of Article XV, section 6 permits leave conditioned upon that "(a)...such activities relate to employment; (d) excused P.B.A. Officers not to exceed three (3) in number, [excluding] executive Board meetings ... general membership meetings, and other extraordinary circumstances; and (e) provided such leave does not unreasonably interfere with the work performance and efficiency of the Department." These provisions do not guarantee that all leave will be approved, and imply that the Sheriff may be entitled to inquire into the purpose of meetings and necessity of attendance. It appears that PBA is objecting to the Sheriff's application of the parties' agreement. In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission held that:

a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

In that case, the Commission set forth some examples of situations where a breach of contract claim bears a sufficient relationship to an alleged violation of the Act so as to warrant the processing of the charge and the possible issuance of a complaint: (1) The employer repudiates an established term or condition of employment. (2) The employer decides to abrogate a contract clause based on its

belief that the clause is outside the scope of negotiations. (3) The contract clause is so clear that an inference of bad faith arises from a refusal to honor it. (4) Factual allegations indicate that the employer changed the parties' past and consistent practice in administering the disputed clause. (5) Specific allegations of bad faith over and above mere breach of the collective negotiations agreement are present. (6) Breach of the agreement places the policies of the Act at stake. None of these situations apply here. Accordingly, there is not a sufficient connection between the duty to negotiate in good faith and the alleged contractual violation and this allegation should be dismissed.

The other interpretation of Gallagher's letter urged by the PBA is that this was additional evidence of hostility towards Sheriff's Officer Aron because of his protected activity. It points to the fact that Gallagher treated past-PBA President Gladden's requests differently and always approved those requests. But Gladden did not ask for as much leave as Aron, and thus, it is reasonable to treat his requests differently. Based on a review of the agreement, the content and tone of Gallagher's letter and all the testimony I do not find evidence of hostility or union animus. Accordingly, there is no violation of 5.4a(3) by the Sheriff's request for clarification of PBA leave requests in August 1998.

The Alleged Violation of section 5.4a(2)

The PBA also alleges that the Board violated 5.4a(2) of the Act which prohibits public employers from "dominating, or

interfering with the formation, existence or administration of any employee organization." The type of activity prohibited by 5.4a(2) must be pervasive employer control or manipulation of the employee organization itself. North Brunswick Twp. Bd. Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). However, no facts placed into the record support this allegation. Accordingly, I recommend that the 5.4a(2) allegation be dismissed.

The Alleged Violation of section 5.4a(4)

With respect to its 5.4a(4) allegation, there was no evidence of hostility in the Mogck incident, or PBA business leave issue. The sole timely transfer (November 4, 1996) occurred prior to the filing of the unfair practice charge. Accordingly, an essential element of an allegation of 5.4a(4) was not proven as to these allegations. No evidence was put into the record connecting the reprimand for the safety issue with the filing of the unfair practice charge. Charging party's post hearing brief also advances no legal argument as to this allegation. Accordingly, this allegation is dismissed.

Based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. The Camden County Sheriff violated 5.4a(1) and (3) of the Act by reprimanding Sheriff's Officer/PBA Delegate Tom Aron on October 15, 1997. for writing to the Sheriff directly as PBA delegate

2. The Sheriff did not violate 5.4a(1), (2), (3), (4) or (5) of the Act by transferring Aron on November 4, 1996 from the civil process unit to transportation unit; refusing to discipline a lieutenant who had made threats against Aron on March 7, 1997; and requesting additional clarification on Aron's request for administrative leave for PBA meetings on August 1998.

3. The allegations concerning events which occurred before October 25, 1996 are untimely under N.J.S.A. 34:13A-5.4.

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the Camden County Sheriff cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Sheriff's Officer Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

2. Discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by imposing discipline on Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

B. That the Camden County Sheriff take the following action:

1. Withdraw the discipline imposed against Sheriff's Officer Thomas Aron and expunge it from his record.

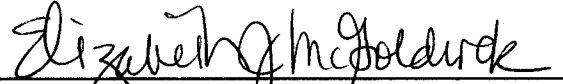
2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

H.E. NO. 2001-13

42.

C. That all other allegations in the charge, and amended charges be dismissed.



Elizabeth J. McGoldrick
Hearing Examiner

Dated: December 1, 2000
Trenton, New Jersey



RECOMMENDED



**NOTICE TO 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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Sheriff's Officer Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

WE WILL cease and desist from discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Sheriff's Officer Thomas Aron for submitting a letter as PBA delegate directly to the Sheriff.

WE WILL withdraw the reprimand/counseling imposed against Thomas Aron and expunge it from his record.

Docket No. CO-H-97-364

Camden County Sheriff
(Public Employer)

Date: _____

By: _____

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 the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"