

P.E.R.C. NO. 92-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DIVISION OF STATE POLICE),

Respondent,

-and-

Docket No. CO-H-90-311

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated by the full Commission, dismisses a Complaint filed by the State Troopers Fraternal Association against the State of New Jersey (Division of State Police). The Complaint alleged that the State violated the New Jersey Employer-Employee Relations Act when it transferred a trooper in retaliation for engaging in protected activities. The Chairman concludes that the charging party failed to prove that protected activity motivated the transfer.

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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Loccke & Correia, attorneys
(Leon B. Savetsky, of counsel)

DECISION AND ORDER

On November 27, 1990, the State Troopers Fraternal Association filed an unfair practice charge against the State of New Jersey (Division of State Police). The Association 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), (2), (3), (4) and (7),^{1/} by transferring Trooper Kenneth J. McClelland in retaliation for engaging in activities protected by the Act.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights

On September 14, 1990, a Complaint and Notice of Hearing issued. On October 1, 1990, the employer filed an Answer denying that the transfer was related to protected activity.

On February 7, 1991, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On June 28, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-44, 17 NJPER ____ (¶____ 1991). He found that the Association had not proved that McClelland's protected activity motivated his troop commander's decision to recommend that he be transferred or the Division's decision to adopt that recommendation.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due by July 12, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. I incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-24). Pursuant to authority granted to me by the full Commission in the absence of exceptions, I adopt the Hearing Examiner's recommendation to dismiss

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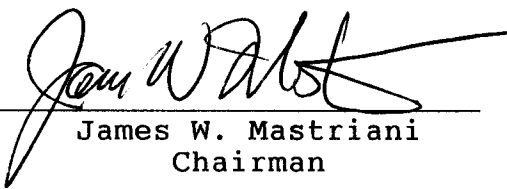
guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

the Complaint. The Association has failed to prove that protected activity motivated McClelland's transfer.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: August 13, 1991
Trenton, New Jersey

H.E. NO. 91-44

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

In the Matter of

STATE OF NEW JERSEY,
(DIVISION OF STATE POLICE),

Respondent,

-and-

Docket No. CO-H-90-311

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the State of New Jersey, Division of State Police, did not transfer Trooper I Kenneth McClelland, an elected officer of the State Troopers Fraternal Association, in violation of the New Jersey Employer-Employee Relations Act. The Hearing Examiner found that the S.T.F.A. did not establish a prima facie showing that McClelland's participation in protected activity was a motivating or substantial factor in his troop commander's decision to recommend that McClelland be transferred or the Division's decision to adopt and act on such recommendation. The Hearing Examiner found no hostility towards McClelland's Association activity on the part of the Division or its agent.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-44

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

In the Matter of

STATE OF NEW JERSEY,
(DIVISION OF STATE POLICE),

Respondent,

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Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Loccke & Correia, attorneys
(Leon B. Savetsky, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 27, 1990, the State Troopers Fraternal Association ("STFA" or "Association") filed an unfair practice charge (C-3)^{1/} with the Public Employment Relations Commission ("Commission") against the State of New Jersey, Division of State Police ("State" or "Division"). The STFA alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1), (2), (3),

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits and those marked "CP" refer to Charging Party exhibits. Transcript citation T1 refers to the transcript developed on February 7, 1991, at p. 1.

(4) and (7)^{2/} by transferring Trooper Kenneth J. McClelland in retaliation for engaging in activities protected by the Act.

On September 14, 1990, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On October 1, 1990, the State filed an Answer denying that McClelland's transfer was related to protected activity and denying that it violated the Act (C-2). A hearing was conducted on February 7, 1991, at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule which provided for the simultaneous submission of briefs on or before March 29, 1991. Both parties filed timely briefs. On May 1, 1991, the State filed a reply brief.

Upon the entire record, I make the following

^{2/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

FINDINGS OF FACT

1. The parties stipulated that the State of New Jersey is a public employer and the STFA is a public employee representative within the meaning of the Act (T9-T10). I find that McClelland is a public employee within the meaning of the Act.

2. The organizational structure of the Division of State Police divides the State into five Troops, A through E. Each Troop is headed by a Troop Commander. In August 1989, Captain Clifford Miller was appointed acting Troop Commander of Troop E (T21). In September 1989, Miller was permanently made Troop E Commander (T21). Troop E is responsible for patrolling the Garden State Parkway and contains three stations. The stations are located in Bass River, Holmdel and Bloomfield (T22). Troopers assigned to Bass River, Holmdel and Bloomfield can only be transferred to Troop A, Troop C and Troop B, respectively (T29).

3. Kenneth McClelland was assigned to Troop E, Bloomfield station, in May 1984 (T66). He was promoted to the rank of Trooper I in July 1988 (T65). Within a few months after being assigned to the Bloomfield station, McClelland became the STFA's station representative (T66-T67). As station representative, McClelland handled grievances filed by unit members assigned to the Bloomfield station, acted as liaison between station employees and the STFA office and assisted with the administration of the collective agreement (T67-T68). McClelland served as a station representative for two years (T69).

4. McClelland was subsequently elected a member of the STFA Executive Board, serving approximately two years, until 1988 (T69; T71-T72). As a member of the Executive Board, McClelland interfaced with station representatives who had problems with grievances and other contract administration matters. Additionally, the Executive Board made minor STFA policy decisions (T70-T71). McClelland left the Executive Board when he was elected to the office of sergeant-at-arms in early 1989 (T72). As sergeant-at-arms, McClelland represents grievants in disciplinary proceedings and is also involved in filing unfair practices, collective negotiations, lobbying and major STFA policy decisions (T72-T73).

5. During his term as station representative, McClelland processed two grievances, one involving Trooper Spruiel and the other involving Trooper Duly. As the result of having processed Trooper Spruiel's grievance, McClelland requested that he be moved to a different squad because of a conflict with his sergeant (T69). The sergeants in the other squads refused to accept McClelland (T69). McClelland again encountered difficulty in changing squads after he assisted Trooper Duly with his grievance (T69). The Bloomfield station commander was involved in the squad change problems, however, the Troop E commander was not (T69). The squad change problems occurred several years before Miller was appointed Troop E commander (T98). Miller did not know McClelland prior to his assuming command of Troop E (T23).

6. While serving in the various STFA positions (e.g., station representative, Executive Board member and sergeant-at-arms) McClelland was given time off from his trooper duties to attend Association activities (T73). When the STFA sought McClelland's release from duty, it would contact the Division's labor relations office which, in turn, would contact the proper authority to release him from duty (T73). On one occasion in October 1989, the Division denied the STFA's request for McClelland's release (T73). McClelland was scheduled to work on a Sunday. The STFA sought to have McClelland released from duty for that day. The STFA submitted its request to the Division's labor relations office on the preceding Wednesday (T74; T101). The Division notified Troop E headquarters in Woodbridge on Thursday. Woodbridge headquarters then contacted the Bloomfield station in order to effect a schedule modification for Sunday (T74-T75; T100-T101). McClelland's schedule posted in the Bloomfield station was changed on Thursday to reflect the day off for Association business (T101). On Friday, the schedule was again changed to reflect a rescission of the Association activity time previously granted (T75). McClelland contacted Lieutenant Rysinski, Troop E's executive officer, to try to explain why the Association activity time was needed. Rysinski refused to allow McClelland to take off because he believed the release request submitted by the STFA was not made in a timely manner (T43-T44).

Miller testified that Rysinski told him that McClelland's release request came in late from the Division (T44). Miller stated that he told Rysinski to call the Division to advise them of the situation. The Division requested that McClelland's release be accommodated, notwithstanding the inadequate notice (T44). Miller stated that McClelland received the release time (T44).

McClelland testified that after having been denied release time by Rysinski, he telephoned Miller. After listening to McClelland's explanation concerning the situation, Miller told McClelland that he was required to work on Sunday (T75-T76).

I credit McClelland's testimony. I find that McClelland had a better recollection of the time sequence and other details pertaining to the release. Miller's testimony on this point was more tentative and lacked conviction.

7. About six or seven weeks after Miller became Troop E commander, he called a meeting of all STFA officials assigned to Troop E (T36). It was during this meeting that Miller found out that McClelland was an active STFA union official (T35). While Miller knew that McClelland helped individual troopers with their problems and worked with station representatives, he did not know exactly what McClelland did as an STFA officer (T36). During the meeting, Miller announced that he would have an open-door policy to all STFA representatives and invited them to discuss problems with him directly (T102). The only times Miller became aware of McClelland's Association activities were on those occasions when the

Division called his office to arrange for McClelland's release from duties (T43). Other than on the single occasion when the problem arose with McClelland's release, Miller and McClelland did not interact with respect to labor/management issues. Problems arising at the Bloomfield station were worked out with Lt. DeFranko, Bloomfield Station Commander (T102). Miller was never involved in a grievance in which McClelland participated (T44). Since Miller took over command, Troop E has had the fewest grievances as compared with the four other troops (T36).

8. During a meeting of Troop commanders in late August or early September, 1989, the issue of equalizing the number of Troopers I assigned to each of the five troops was raised (T24-T25). The view expressed in the meeting was that Troops A, B and C were understaffed in terms of Troopers I, so the commanders of the toll roads, Troops D and E, would undertake a review to evaluate their Trooper I staffing levels. Equalization of Troopers I among the troops was discussed at several meetings (T25).

9. On March 29, 1990, Miller submitted the names of five Troopers I to the Field Operations Officer at State Police Headquarters which he recommended be transferred out of Troop E (T26; CP-1). The final determination regarding which Troopers I would be transferred was made at Division Headquarters (T45). On April 4, 1990, the transfer order was issued to be effective April 21, 1990 (T35; T78).

10. Each station houses five squads. Each squad is normally led by a sergeant and a Trooper I. Holmdel and Bass River stations each had eight Troopers I and Bloomfield had six. In order to maintain a minimum of five Troopers I at each station, Miller recommended that only one Trooper I be transferred from Bloomfield and two Troopers I from Holmdel and Bass River, respectively (T27-28).

11. Miller recommended in CP-1 that Douglas Jablonski and Patrick Sullivan, Troopers I at the Bass River Station, be transferred from Troop E to Troop A. Sullivan was the most senior and Jablonski the next most senior Trooper I at Bass River (T38).^{3/} Jablonski was a STFA Executive Board member. Since the collective agreement between the State and the STFA prohibits the transfer of Executive Board members, Jablonski was never transferred (T39). Upon discovering that Executive Board members could not be transferred, Miller replaced his recommendation to transfer Jablonski with Trooper I Buhan (T62). Troop E contained five STFA officials: three station representatives, Executive Board member Jablonski and sergeant-at-arms McClelland (T38; T110).

3/ McClelland testified that Jablonski was not one of the three most senior Troopers I at Bass River Station (T91-T92); whereas, Miller stated that Jablonski was the second most senior. I credit Miller's testimony. As Troop Commander, Miller is the chief administrator of Troop E and in a better position to have access to accurate records reflecting Jablonski's seniority. McClelland's statement is equivocal and unsupported.

12. Troopers with 18 months' service on the Parkway may apply at anytime for voluntary transfers. Since Troopers may seek voluntary transfer at any time after the minimum service period, Miller did not survey Troopers I to determine whether any wished to be transferred out of Troop E (T36-T37).

13. While it was not Miller's suggestion to transfer Troopers I to equalize the seniority among the troops, he was solely responsible for developing the selection process by which Troop E's Troopers I were identified for transfer (T56; T83-T84). Miller decided that he would only consider Troopers I who had a minimum of three years' service on the Parkway (T29; T39). Of those, he looked at the top three most senior Troopers I at each station (T30; T48). While Miller concedes that he could have considered the five most senior troopers rather than three, he decided to only consider the three most senior troopers because he believed that represented a reasonable number on the basis of the Trooper I complement at each station. Further, he believed the three most senior Troopers I would have the most promotional potential after transfer to the other troops (T51; T53).

14. At the Bloomfield station the three most senior Troopers I were Kooney, Spruiel and McClelland (T30). Of those three troopers, Kooney had the most and McClelland the least seniority (T30-T31). Kooney and Spruiel were among the top ten on the promotional list; McClelland was number 29 (T31). Miller knew that Sgts. Hubbard and Kempe, serving at the Bloomfield Station,

were considering retirement, and that Sgt. Hubbard's retirement could potentially occur at around the same time as the Trooper I transfers (T30).^{4/} Since he was the most senior, Kooney would have been Miller's first choice for transfer out of Troop E. However, after considering Kooney's promotion potential at the Bloomfield station, and since Kooney was Miller's top candidate for promotion to sergeant, Miller did not recommend that Trooper I Kooney be transferred. The next most likely to be promoted to sergeant at the Bloomfield station was Trooper I Spruiel. Accordingly, Miller considered Spruiel to be in the same situation as Kooney and did not recommend him for transfer (T30-T31). Thus, under Miller's selection procedure, McClelland was the next Trooper I eligible for transfer, since the two more senior Troopers I were slated to fill the two anticipated sergeant vacancies at the Bloomfield station (T48-T50).

15. Miller believed that McClelland's promotion potential would be enhanced as the result of his transfer into Troop B (T31). Although McClelland would remain eligible for promotional opportunities arising in Troop B while assigned to Troop E, Miller believed that since Troop B had 40 sergeant positions as compared to the Bloomfield Station's five sergeant positions, McClelland was

^{4/} As of the date of the hearing, neither Sgt. Hubbard nor Kempe had retired. While Hubbard applied for a job outside the State Police which would have likely resulted in his retirement, he was not accepted for that position and, consequently, did not retire (T58).

more likely to be appointed into an acting sergeant capacity in Troop B (T31-T32; T56-T57).^{5/}

16. Prior to the time he submitted his recommendations to the field operations officer at State Police headquarters, Miller did not discuss with anyone the Troopers I he decided to recommend for transfer, nor did he seek input from the employees' station commanders (T34-T35). Miller did not speak with the troopers he recommended until after the transfer order was issued on April 4, 1990 (T34-T35).

17. At sometime between April 4, 1990, the date the transfer order was issued to affected Troopers I, and April 21, 1990, the effective date of the transfer, McClelland telephoned Miller to discuss Miller's rationale for transferring him (T35; T40; T79). Their conversation lasted between 45 minutes and one hour (T40; T79). McClelland did most of the talking (T81). McClelland asked Miller for the reason that he was selected to be transferred (T79). McClelland suggested that other Troopers I were more appropriately transferred. McClelland pointed out that the next promotional opportunity was likely to be offered to Kooney and since the promotion would probably arise in Troop B, Kooney was better suited for the transfer (T81; T87). McClelland also asked about

^{5/} This does not mean that a Trooper I in Troop E is not eligible or will not be provided the opportunity to transfer to another troop in order to take advantage of an acting promotional position. This occurred when Kooney, while serving in Troop E, was offered and accepted an acting sergeant position in Troop B (T60-T61).

Trooper I Belleran who McClelland contended had approximately the same seniority on the Parkway, if not more (T81).^{6/} McClelland also suggested that Trooper I Lamana might be a better choice for transfer, since he had not yet proven his administrative abilities in Troop E and could more easily do so in Troop B (T108). However, McClelland concedes that Lamana has less seniority than him (T81-T82).

McClelland also indicated during the telephone conversation that leaving Troop E would affect him financially. McClelland pointed out that Troop B did not have as much overtime work as did Troop E. Further, while some Troopers I in Troop E did not work much overtime, McClelland reminded Miller that he did (T40-T41). McClelland suggested that Miller consider transferring a Trooper I who did not work overtime. McClelland told Miller that the transfer represented a punishment because of the loss of overtime (T103-T104).

^{6/} McClelland states that Belleran had the same or more seniority on the Parkway as him. Miller states that Belleran was not eligible for transfer consideration because he was not one of the top three senior Troopers I at the Bloomfield Station. Miller testified that while Belleran and McClelland had approximately the same overall seniority in the Division, Belleran had approximately two years less time on the Parkway (T33). Absent more than the mere assertion by the Charging Party that Belleran's seniority on the Parkway equaled McClelland's, I credit Miller's testimony. As previously stated, Miller, as administrative head of Troop E, is more likely to know the employees' relative seniority since he is in a better position to have access to the official records and be knowledgeable as to their content.

18. McClelland contends that when he asked Miller for the reason that he was being transferred, Miller only indicated that he was required to make a decision with which none of the Troopers I would be happy. Miller told McClelland that he looked on his list and picked his name along with the others for transfer (T80-T82; T107). The Association contends that Miller never mentioned seniority and promotional potential as criteria in his decision-making process (T79-T80). Miller contends that he told McClelland that seniority was one of the criteria he used to identify transferees and was unsure whether he mentioned promotional potential during their discussion (T41). Whether Miller specifically told McClelland that seniority and promotional potential were criteria he used to identify potential transferees is not a critical factor, since the facts establish that those issues were raised by McClelland and discussed during the telephone conversation.

ANALYSIS

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates subsection 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). In order to determine whether an employer has illegally discriminated against employees in retaliation for participation in protected activity,

...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [Citation deleted.] Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. [Bridgewater at 224.]

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

In this case, there is no direct evidence of anti-union motivation.^{7/} Consequently, the Charging Party must rely on circumstantial evidence to show that McClelland's protected conduct was a substantial or motivating factor in his transfer. Clearly, McClelland was engaged in protected activity and the Division was aware of such activity. Since 1984, McClelland served in a variety of positions for the STFA. He was a station representative for two years, a member of the Executive Board for two years and, since

^{7/} This point is conceded in the Charging Party's brief, p. 4.

1989, the STFA's sergeant-at-arms. Shortly after he was appointed Troop E station commander, Miller met with all of the STFA officials, including McClelland. Accordingly, the evidence shows that McClelland engaged in protected activity and the Division knew of this activity. However, in order to establish the prima facie showing that McClelland's protected conduct was a motivating or substantial factor in the employer's action, Charging Party must establish hostility on the part of the Respondent, or its agent. I find that the State was not hostile toward McClelland's exercise of protected activity and, consequently, no prima facie case is established under the facts of this case.

The Association contends that McClelland's protected conduct was the motivating factor in Miller's decision to transfer him. The STFA argues that McClelland has been an extremely active Association representative and was involved in numerous matters which were unpopular with his superiors. Specifically, McClelland was involved in processing grievances for Troopers Spruiel and Duly. After the completion of each grievance, McClelland sought reassignment to a different squad in light of conflicts which developed between the sergeant and himself. McClelland had difficulty obtaining squad changes because the sergeants in the other squads refused to accept him. While McClelland's difficulties may have been related to his participation in protected

activity,^{8/} both incidences occurred several years before Miller was appointed as the Troop E commander and do not indicate any improper motivation on Miller's part regarding McClelland's transfer.

The STFA cites an incident involving McClelland's release from work for union activity. The release request came into Troop E's Woodbridge headquarters, McClelland's schedule was changed to reflect the release, and later changed again as the result of a determination to rescind the release. McClelland spoke first to Lt. Rysinski and later to Miller. Rysinski refused the STFA's release request for McClelland because he believed the request was not submitted in a timely manner. Miller supported Rysinski's decision. This incident represents the only situation cited by the Association showing any conflict between Miller and McClelland. I find that this incident does not establish hostility. The denial of a release request, one time during Miller's tenure as Troop E Commander, is insufficient to establish animus, especially since the request may have been submitted untimely.

The STFA contends that McClelland's union activity provides the only rational basis to explain his selection for transfer. The Association asserts that Miller's attempt to transfer Jablonski, another STFA official, exposes Miller's plan to remove Association

^{8/} I make no specific finding with respect to whether McClelland's difficulties in moving between squads was, in fact, the result of his participation in protected activity.

officers from Troop E. However, the Association's argument is premised on the fact that Jablonski was not one of the three Troopers I who had the most seniority on the Parkway at the Bass River station. I have found that the facts do not support that allegation. On the contrary, but for his contractual protection, Jablonski would have been properly included on Miller's list of recommended transfers. Additionally, while Jablonski and McClelland may be the highest level Association officials assigned to Troop E, there are also three STFA station representatives in Troop E which were not affected by the transfer recommendations.

The STFA asserts that two Troopers I with greater Parkway seniority than McClelland were assigned to the Bloomfield station but were not recommended for transfer. Since neither of these troopers were Association activists, the Association asserts that this demonstrates that Miller was motivated by McClelland's union activity. I disagree. Miller knew that two sergeants were considering retirement in the near future. In light of Troopers Kooney's and Spruiel's standing on the promotional list, Miller considered them prime candidates to fill the sergeants' vacated positions upon their retirement. The fact that the retirements did not occur as anticipated does not transform the manner in which Miller handled the situation into one involving union animus. Further, although it may have been possible to develop a variety of alternative systems to identify employees for transfer -- for example, considering the top five rather than only the top three

most senior employees -- the possible existence of such alternative systems does not make the selection process developed and used by Miller improper.

In finding that Miller was not hostile toward McClelland's exercise of protected activity, I note that during Miller's tenure as Troop E commander, Troop E has had the least number of grievances filed as compared to the four other troops. Also, the facts establish that Miller and McClelland had almost no personal contact and that Miller was never involved in a grievance in which McClelland participated.

While Miller independently developed the procedure by which Troopers I would be identified for potential transfer, he merely made recommendations to the field operations office at State Police headquarters. It was headquarters, and not Miller, that made the final decision regarding the transfer of Troopers I.

For the reasons set forth above, I find insufficient evidence to establish that either Miller or the Division was hostile toward McClelland's participation in protected activity. Consequently, the Association failed to make a prima facie showing sufficient to support the inference that McClelland's protected activity was a substantial or motivating factor in Miller's or the Division's decision to transfer him. Accordingly, I find that the Division did not violate section 5.4(a)(3) of the Act.

The STFA also alleges that the Division violated sections 5.4(a)(1), (2), (4) and (7) of the Act. However, the Association

has introduced no evidence showing that the Division has interfered with, restrained or coerced McClelland in the exercise of the rights guaranteed to him by the Act; dominated or interfered with the formation, existence or administration of the Association; discharged or otherwise discriminated against him because he has signed or filed an affidavit, petition or complaint or given any information or testimony under the Act; or violated any of the rules and regulations established by the Commission.

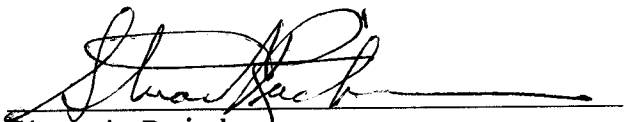
Accordingly, based upon the entire record and above analysis, I make the following:

CONCLUSIONS OF LAW

The State of New Jersey, Division of State Police did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) or (7) by transferring Kenneth McClelland from Troop E to Troop B.

RECOMMENDATION

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


Stuart Reichman
Hearing Examiner

Dated: June 28, 1991
Trenton, New Jersey