

H.E. NO. 2004-7

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

In the Matter of

ELIZABETH PARKING AUTHORITY,

Respondent,

-and-

Docket No. CI-H-2002-3

WILFRED SCOTT,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint, as amended, alleging that a public employer discriminatorily transferred between work sites an employee serving as shop steward in violation of 5.4a(1), (2) and (3) of the Act. The Hearing Examiner found that the individual did not prove that the public employer was hostile to the exercise of protected rights, specifically the right to process grievances on behalf of a unit employee. The Hearing Examiner found that the individual was transferred because he declined training deemed necessary to a particular site.

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.

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Appearances:

For the Respondent,
Genova, Burns & Vernoia, attorneys
(John R. Vreeland, of counsel)

For the Charging Party,
Cary Charles & Winston, LLC
(Roselyn Cary Charles, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 11 and October 9, 2001 and January 3, 2002, Wilfred Scott filed an unfair practice charge and amended charges against the Elizabeth Parking Authority. The charge as amended alleges that on or about June 8, 2001, Scott was recommended for transfer and soon afterwards was transferred from his position at parking lot no. 6 to parking lot no. 2 in retaliation for performing duties as shop steward for IUOE, Local 68-68A-68B-68C. The charge as amended also alleges that on June 13 and 15, Scott filed grievances on behalf of himself and another unit employee; and that on June 28, an employer representative threatened Scott

not to attend a "grievance proceeding" that day and told him that he had been transferred in an effort to keep him from fulfilling his duties as shop steward. The Authority's conduct allegedly violates 5.4a(1), (2) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On February 13, 2002, a Complaint and Notice of Hearing issued. On April 5, the Authority filed an Answer, admitting some allegations and denying others. The Authority acknowledges that on June 8, 2002, Scott was "recommended for transfer from Lot 6 to Lot 2." It also admits that a meeting, convened on June 28, 2001, was attended by its representative and Scott, among others. The Authority denies that it violated the Act.

On April 16, 2003, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by August 25, 2003.

Based on the record, I make the following:

^{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".

Charging Party moved to add the allegation that the Authority's conduct violated 5.4a(1) of the Act at hearing. I granted the motion.

FINDINGS OF FACT

1. Wilfred Scott has been employed as a lot attendant by the Elizabeth Parking Authority for 22 years (T17).^{2/} In June 2000, Scott prompted interest in union representation among Authority employees (T17-T18; T89). On September 19, 2000, IUOE Local 68 was certified as the majority representative of all full-time and regular part-time blue collar employees, including lot attendants, garage attendants, maintenance employees and enforcement officers (RO-2001-10). Scott is the union's shop steward and informally resolves workplace disputes between unit employees and the Authority, when possible (T20).

In 2001, the parties signed a collective agreement extending from January 1, 2001 through December 31, 2003. The agreement sets forth articles concerning a grievance procedure ending in binding arbitration (Art. III); seniority (Art. XVII); posting of openings (Art. XVIII); and union business (Art. XXII), among others (C-3). Step one of the grievance procedure mandates an "earnest effort" at resolution by the aggrieved employee and immediate supervisor; step two meetings are ". . . between the Operations Manager and the union representative, if requested by the grievant"; and step three meetings are attended by the

^{2/} The transcript of the hearing is identified as "T", followed by the page number(s). "C" refers to Commission exhibits received in evidence; "CP" and "R" refer to Charging Party exhibits and Respondent exhibits, respectively.

aggrieved, the union representative and the Authority Deputy Director (C-3).

2. The Authority operates 15 municipal parking lots and 2 municipal parking garages, the latter known as lot no. 2 and lot no. 6 (T89). The garages are separated by about two city blocks, lot no. 2 being adjacent to the Authority central office (T105; T155). Lot no. 2 is a "cash revenue" or "revenue control" lot, meaning that customers take a time-stamped ticket, park, surrender the ticket upon leaving, and pay an hourly rate to an attendant/cashier (T89; T103). Lot no. 6 was a "coin metered" lot until late May or early June 2001, when it was converted to a "revenue control" format similar to that installed at lot no. 2 (T93; T94; T95). Lot no. 2 has one "cash register" and lot no. 6 has two (T103).

The Authority has 21 employees, 8 of whom work in the lots and garages (T89). Three employees are assigned to lot no. 2 and five are assigned to lot no. 6 (T91; T94). These employees are lot attendants or lot attendant/cashiers (T90). Lot attendants remove debris from lots and "secure" them. Cashier/lot attendants generally accept tickets and payments in cash revenue lots. They also perform "light maintenance" chores (T90).

3. The conversion of lot no. 6 from a metered lot to a "revenue control" lot required the removal of about 550 parking meters and the installation of gates, fee computers and loop

detectors. The Authority hired Industrial Time Systems, Inc. (ITS), a privately-held company, to install the equipment and train Authority personnel to use it (T93; T94). In anticipation of the changeover and of the early June 2001 opening to the public, Authority Operations Manager Robert McKenna posted a notice for "job openings" at lot no. 6 for "5 full time cashiers/garage attendants" in early May 2001 (CP-1; T93; T94; T95; T116).

The first two enumerated job requirements specified that successful applicants "must be willing to learn the new computer in order to keep accurate records of daily receipts and to balance receipts to computer" and ". . . will be responsible for the collection of money and balance daily cash receipts to the computer" (CP-1). Lot attendant duties were also listed as was a requirement that interested employees must advise Authority Executive Director Angelo Paternoster not later than May 29, 2001 (CP-1).

On an undisclosed date later in May, McKenna posted another notice on Authority stationary, identical in its requirements to the first, seeking "two full-time cashiers/garage attendants" (CP-2; T96). McKenna testified that the second posting was needed because ". . . two people [had] declined to be cashiers" (T97). I credit his testimony.

4. On May 21, 2001, Scott replied to the first notice, filing a note with Paternoster advising of his interest in "the job opening for the full-time cashier/garage attendant for lot no. 6" (R-1). Scott had been assigned to lot no. 6 for the past four years (T133). He cleaned and patrolled one or more of four floors or levels of the garage, exchanged quarters for paper or coin dollars, and occasionally provided ingress and egress to police vehicles (T51; T52; T53; T54).

On May 31, McKenna and Assistant Operations Manager Anthony Stevens issued a handwritten memorandum to Executive Director Paternoster regarding the "cashier/garage attendants [for] lot no. 6" (R-2). They recommended six named employees for the titles, including Scott. (One position was added to those enumerated on the initial posting ". . . for scheduling purposes") (R-2). They also recommended that unit employees Joseph Howard and William Keefe "relocate" to lot nos. 12 and 11, respectively (R-2; T99).

On or about Friday, June 1, 2001, Paternoster issued a memorandum to McKenna and Stevens, writing that after reviewing the applications for cashier/garage attendant, he was recommending that Scott and another unit employee, Davis, ". . . be appointed to this position" (R-3; T100). Paternoster also wrote that "for scheduling purposes", four other named applicants are to be transferred to lot no. 6. He approved the

recommended "relocations" of employees Howard and Keefe.

Finally, Paternoster wrote that "the transfer of personnel is paramount for the success of the conversion of lot no. 6" (R-3).

5. Sometime in early June, before employees received training on the "cash revenue" installation at lot no. 6, McKenna gathered employees together "to figure out scheduling" and how to "proceed [with] ITS coming down for training" (T128). McKenna testified that Scott commented aloud in the presence of several unit employees that the Authority did not know how to "run an organization" or "did not give employees enough training or time or scheduling or enough notice" (T121). McKenna also testified that the "meeting was called off because of several comments Mr. Scott made which disrupted the whole meeting." McKenna promptly informed Paternoster about the aborted meeting and Scott's remarks (T128).

Scott did not testify about any such meeting or remarks.

I find that Scott was openly critical of the Authority's plan to train personnel on the "fee computers" and of McKenna's informal attempts to accommodate scheduling to employee preferences or of his decision(s) which he described as "putt[ing] people on the team where I think they [fit]" (T124; T125).

6. On or around June 4, 2001, ITS trained all the selected unit employees except Scott on "fee computers" (or "demo" fee

computers) which had been or were being installed at lot no. 6. Several ITS trainers instructed Authority employees individually for two to four hours, all within about 18 consecutive hours (T78; T121-T124; T133). Some employees reported early to work in order to be trained before their shifts began, and were paid overtime compensation (T138).

Scott admitted that he "[was] never trained on the revenue control system" (T78). He also conceded that an assignment as a "relief cashier" (i.e., cashiering for periods of time substantially less than an entire shift) would have required his training on the system (T79). Although Scott denied that he refused to be trained, he did not explain why he was not trained in early June, when the other employees received individual training for lot attendant/cashier positions at lot no. 6 (T76).

McKenna testified that Scott told him that he was "declin[ing] the training" (T102; T103; T133). No evidence suggests that Scott was denied the opportunity to be trained for the "cash revenue system" or that he could not have attended the training. I infer that he was provided the same opportunity as other employees who were trained by ITS representatives on or around June 4, 2001 (June 2 and 3 were Saturday and Sunday). In the absence of any conflicting evidence explaining why Scott was not trained, I credit McKenna's testimony and not Scott's.

7. On June 5, Scott and IUOE Business Agent Michael Gann met with Paternoster and Stevens regarding the Authority's relocation of employees Howard and Keefe. Scott was concerned that the relocations were in derogation of seniority rights. Scott testified that Stevens "did not have much to do" about any proposal regarding Keefe's discipline. Scott testified that he ". . . called Mr. Paternoster and asked if Bill Keefe and I could come in [for a meeting] . . . and [Paternoster] told me, "No, if Mr. Keefe has anything to say, put it in writing" (T39). Scott understood "writing" to mean "grievance" (T39). I infer that Scott phoned Paternoster on June 5, perhaps soon after their meeting. It is not clear from Paternoster's reply to Scott in the phone conversation just how thoroughly "the issues regarding Keefe" were discussed in their meeting earlier that day. Gann, Paternoster and Stevens did not testify at the hearing.

Scott also testified that in the meeting he proposed to be a "relief person" at lot no. 6, substituting for employees at lunch or on breaks; and that Paternoster and Stevens "really didn't say anything" (T29). Scott said: "I'd rather do that than be in a booth all day long" (T26; T29). Stevens did not object to the proposal, which Scott understood to mean that he would ". . . come in at 6:30 am.; open up; be relief for lunch breaks, bathroom, etc." (T32). I infer that Scott also understood that he would perform "lot attendant" or "garage attendant" duties on

his shift when not obligated to "relieve" a cashier. No specific evidence shows that on June 5, Stevens or Paternoster knew that Scott had not been trained or had not intended to be trained on the newly-installed system at lot no. 6. Paternoster was aware that Scott had disapproved of certain Authority procedures regarding the cash revenue format at lot no. 6 (see finding no. 5). Scott's admitted preference "not to be in a booth all day long" is consistent with a lack of interest in the "fee computer" or an unwillingness to be trained on it.

8. On June 8, 2001, Scott sent a handwritten note to Executive Director Paternoster advising that he "[is] not interested in the position of cashier/garage attendant at lot #6" (CP-4). Scott testified about his reasons for withdrawing his interest:

. . . [A]t the meeting on June [5], when Stevens told me that he had planned for me to open up the garage in lot no. 6 and be a relief person, I told him that I liked that better, and they sent around a memo stating that anybody who wasn't interested in the position any more, to let them know and that's what I did on June 8th. [T37]

Scott had earlier admitted that he proposed to become a "relief person" and that Stevens and Paternoster "didn't say anything" (see finding no. 7). Scott also testified earlier that "[the Authority] sent a memo around saying that anybody that wasn't interested in this position anymore, to let them know by a certain day, I think it was May 20 - May something" (T29).

Scott's purported motive for withdrawing interest in the cashier/garage attendant position is contradicted by his earlier testimony; specifically, that he and not management proposed "relief" cashiering. He also testified earlier that an Authority memorandum seeking voluntary retractions of interest in the "cashier" position was posted or disseminated days or weeks before the June 5 meeting. (No such memorandum was proffered). Assuming that Scott is correct about the memorandum, I do not credit the gist of Scott's later testimony that by virtue of his interest in becoming a "relief person", the Authority in any way solicited, encouraged or validated his retraction of interest in the "cashier/garage attendant position in lot no. 6." Nor do I find that the Authority at any time approved the notion that a "relief person" assigned to lot no. 6 could forego training on the "fee computer." The facts permit an inference that on or before June 8, Scott (for an indeterminate reason that cannot be attributed to the Authority) believed or hoped that a "relief cashier" at lot no. 6 would not have to be trained on the fee computer and could perform garage attendant duties for most of the shift. Such a position would have been to Scott's liking. I find it possible or likely that Scott tendered his withdrawal of "interest" note to Paternoster with such beliefs or wishful thinking.

9. Also on June 8, Paternoster issued a memorandum to McKenna and Stevens regarding "lot no. 2-security visibility" (CP-6). Paternoster wrote of the "need for garage attendants at lot no. 2":

No longer having a need for all the garage attendants at lot no. 6, I recommend that Wilfred Scott be transferred to lot no. 2, commencing Monday, June 14, 2001.^{3/} I will be transferring another employee to lot no. 2 as soon as a decision is made. [CP-6]

Stevens gave Scott the memorandum to read on that date (T69).

McKenna testified that the Authority "needed cashiers at lot no. 6" and "since [Scott] pulled himself out of the running, it was well, 'what are we going to do with him?'" (T141). No evidence suggests that Paternoster's June 8 memorandum was issued or delivered earlier in the day than Scott's note to him. Considering McKenna's testimony and both writings, I infer that Scott delivered his note to Paternoster before the Executive Director wrote his memorandum to McKenna and Stevens. I also infer that McKenna's phrase ". . . pulled himself out of the running . . ." refers to Scott's note and to his refusal of training on the "fee computer" for the full-time position. Finally, I infer that Paternoster's June 8 memorandum was a direct response to Scott's note. I find that the promptness of

^{3/} June 14, 2001 was a Thursday. Scott testified that he was transferred from lot no. 6 to lot no. 2 on June 12, 2001, a Tuesday (T58). In the absence of conflicting evidence, I credit Scott's testimony.

Paternoster's decision on June 8 is consistent with the facts that lot no. 6 had opened to the public earlier that week as a "cash revenue" lot and that the new installation demanded "cashiers" and not lot or garage attendants. I also infer that Paternoster and the Authority were immediately responsive to Scott's unsolicited request because he had earlier criticized Authority efforts at training and scheduling of unit employees for the converted lot no. 6 (see finding no. 5).

McKenna testified that Scott declined training on the fee computer twice, once after being offered a full-time cashier/lot attendant position at lot no. 6 and again, "a short time afterwards" when he was offered a "relief position" there (T130; T131; T133-T134). This proffered sequence of denials is logical in light of finding nos. 6, 7 and 8. I infer that Scott wished to remain a lot attendant assigned to lot no. 6 and did not want to be a "cashier" if he was required to be trained on the fee computer. During the brief time Scott believed that a relief cashier at lot no. 6 might not or would not have to be trained on the fee computer he withdrew his interest in the full-time position. I credit McKenna's testimony.

10. Scott testified that he "believed" but was "not sure" that he filed a grievance on behalf of employee Keefe on June 11, 2001 (T39). He testified that his concern was that "[the union] had never heard about it" (T38). He also testified that on June

11, he sent Paternoster a "letter" about a complaint filed against Keefe ". . . and Mr. Keefe had no prior notice" (T40). Scott did not proffer any writing dated June 11, 2001. I do not find that the grievance and the "letter" are separate writings.

The Authority placed in evidence a copy of his "grievance report" dated June 15, 2001 regarding ". . . Mr. Keefe [having] not [been] informed of the complaint and knew nothing about it until . . . he got the letter from the shop steward" (R-7). I do not find that Scott filed a grievance and/or a letter on June 11 on behalf of Keefe. I find that the grievance or letter was filed on June 15, 2001.

11. On June 12, 2001, Scott was transferred from lot no. 6 to lot no. 2 (T48; T58).^{4/} Scott was assigned to the rear of lot no. 2, where automobile ingress exclusively was permitted from 7 a.m. - 11 a.m. and no cashiering was performed (T103). Scott "covered the rear entrance" of lot no. 2 and performed "some light maintenance and removed debris and cleaned up" (T141). Scott has remained in the title of lot attendant and does not operate a "cash register" (T78; T91; T104). Scott was one of three employees assigned to lot no. 2. The two others were

^{4/} Scott testified that he was moved to lot no. 2 "after [he] spoke with Mr. Paternoster about Bill Keefe and I gave him the letter" (T49). I do not credit Scott's testimony to mean that he was initially transferred to lot no. 2 after delivering his grievance or "letter" about Keefe's possible discipline (see finding no. 10).

cashier/lot attendants (T91). Scott testified that before June 12, no lot attendant had been assigned to the "back booth" of lot no. 2 and that he did not "replace" another employee (T55).

Scott conceded in testimony that maintenance employees "worked the back booth" at lot no. 2 (T51).

On June 12, maintenance employee Joe Howard was transferred from lot no. 2 to lot no. 6. Howard had also provided "short-term [lot attendant] coverage" at lot no. 2 (T141; T143; T144). Howard agreed to be trained on the "fee computer" in order to be a "relief cashier" at lot no. 6 (T145; T154). Although Scott generally denied that he "replaced" another employee at lot no. 2, he did not specifically rebut McKenna's testimony that Howard, a maintenance employee, was reassigned from lot no. 2 to lot no. 6. I credit McKenna.

12. On June 13, 2001, Scott filed two grievances. One grievance protested his transfer "because of his job as shop steward." The second protested that a garage attendant position at lot no. 2 was "not posted" and that "an employee" [i.e., Scott] was transferred from lot no. 6 to "fill the opening" (R-4; R-5; T64). The Authority denied the "posting" grievance (T108). The record does not indicate the path of the "transfer" grievance. No evidence shows that any grievance has proceeded to arbitration.

On June 15, Scott filed another grievance, protesting a written reprimand of Keefe, particularly noting that the aggrieved employee "was not informed of this complaint [filed against him by a customer] . . . (T64; R-7) (see finding no. 10). Scott testified that a "grievance hearing" on the Keefe matter was scheduled with the Authority for June 28, 2001. Scott did testify about the date it was scheduled and did not name the Authority representative who scheduled it (T41). McKenna denied that any "grievance hearing" was scheduled for June 28, 2001 (T115; T119). I credit McKenna's testimony (see finding no. 14).

13. On June 25, 2001, McKenna informed Scott that he was being transferred from lot no. 2 to lot no. 6 (T58-T59; T70). The record does not amply clarify why Scott was reassigned. Scott had filed a June 13 grievance over his initial reassignment; he was "somewhat angered" by that employment action (R-5; T106). The Authority may have transferred Scott back to lot no. 6 to assuage him. (See finding no. 19; Scott had reportedly agreed to become a "relief" cashier/garage attendant). Maintenance employee Joe Howard was reassigned from lot no. 6 to lot no. 2 when Scott was reassigned from lot no. 2 to lot no. 6 on June 25, 2001 (T59; T145-T146). I infer that Howard had received training on the "fee computer" by that date.

Scott testified that he took vacation leave sometime between June 25 and July 9, 2001 and that upon his return, he reported to

work at lot no. 2 (T58). He also testified that he was working at lot no. 6 on June 27 and 28, 2001 (T42). He also filed a grievance dated June 29 (see finding no. 18). I infer that Scott took vacation leave between June 30 (Saturday) and July 8 (Sunday).

14. On June 27, 2001, Scott was advised to call McKenna (T42). Scott testified that McKenna told him: "There's no need for you to come to the grievance hearing [concerning employee Keefe] on the 28th of June" (T42). McKenna denied that any grievance hearing was scheduled or convened on June 28, 2001 (T115). He testified that he told Scott not to attend a "meeting" scheduled for the next day (T117). He warned Scott that he would not be "paid" for his attendance or attempted attendance at the meeting (T45). I do not credit Scott's testimony that McKenna told him not to attend "the grievance hearing" on June 28; it is undermined by Scott's writing of a "meeting" in a handwritten letter (see finding no. 15).

15. On the morning of June 28, Scott delivered a handwritten letter to McKenna, memorializing recent events concerning the two of them (CP-5; T45). Scott wrote:

On June 27, 2001 at 3:30 p.m. you sent a message to me to call you at the office. When I called, you told me that you were told to tell me that I did not have to come to the meeting on June 28, 2001 at 9:30 a.m.

When I informed you that I would be there you told me that I would not be allowed to sit in

at the meeting and that if I came I would not be paid.

The contract that Local 68 has with the Authority states that the Shop Steward would be excused from duty without loss of pay to attend grievance hearings.

On June 11, 2001, I stated in a letter to the Parking Authority that I was being transferred from lot #6 to lot #2 because of my job duties as shop steward. What you told me over the phone on June 27, 2001 is the Authority's way to trying to keep me from fulfilling my duties as shop steward at the Parking Authority and particularly at lot #6. This constitutes harassment. [CP-5]

McKenna testified that he never told Scott the Authority was trying to prevent him from ". . . fulfilling his duties as shop steward" (T110). I do not find that the next to last sentence of Scott's June 28 letter to McKenna purports to quote the Operations Manager. I find that the sentence only characterizes McKenna's conduct. I also credit McKenna's testimony.

16. On June 28, Paternoster convened a morning meeting with McKenna and Local 68 Business Agent Michael Gann (T115). McKenna testified that the subject of the meeting was Scott; specifically, the Authority's view that Scott was ". . . trying to create a hindrance [to] opening the garage [i.e., the converted lot no. 6]" (T117-T118). McKenna testified:

[Scott] made several statements and comments to other employees and to me and [to Assistant Operations Manager] Stevens that the Authority knew nothing of how to run an organization . . . [that] the Authority did

not give the employees enough time for proper training, and he just went on and on. [T118]

The Authority invited Gann ". . . to figure out what [it] could do with Wilfred Scott so [he] does not delay the opening of the garage" (T118). Keefe did not attend and was not invited to attend the meeting (T73; T117).

Scott appeared at the time and place of the meeting on June 28, and was insistent upon attending. McKenna told Scott that he was "not supposed to attend the meeting" and "wouldn't be allowed in" (T62; T63; T117). Scott was soon admitted to the meeting upon Gann's remark that the Authority "couldn't keep [him] out" (T63, T119). Scott was not docked pay for attending the meeting (T73).

Scott testified that the entire 30-minute meeting or hearing was devoted to the Keefe grievance. The dispute was not resolved until August 2001 (T74). Scott testified that no one discussed the punctual opening of converted lot no. 6 (T73-T74). He also testified that ". . . it wasn't necessary [that Keefe attend the grievance hearing]. He doesn't have to be present" (T73).

McKenna denied that a grievance hearing was convened on June 28 (T119). He testified that near the "tail end" of the meeting, the Keefe grievance was discussed to the extent that the parties agreed to try to resolve the matter on a later date (T150).

I credit McKenna's testimony about the substance and purpose of the June 28 meeting, despite an inconsistency revealed in his

account. McKenna had testified that the converted lot no. 6 opened to the public about one week after Memorial Day (or June 4, 2001). A meeting about Scott more than three weeks after the opening does not jibe with McKenna's other testimony that Gann was summoned for the purpose of "figuring out [how] Scott [would] not delay the opening of the garage." McKenna nevertheless answered questions openly, candidly, and eagerly, sometimes not waiting until the entire question was asked before responding. My impression was that McKenna was without guile and that the inconsistency was an error of memory.

I do not credit Scott's testimony that the purpose or essential substance of the gathering was a "grievance hearing" about possible discipline of unit employee Keefe. I do not credit Scott for several reasons; his writing of the word "meeting" in his June 28 letter to McKenna anticipates a purpose for the gathering which differs from a "grievance hearing" of which he also wrote in the context of referring to the collective agreement; nowhere in Scott's letter is a reference to Keefe; the absence of both the aggrieved employee from the purported "grievance hearing" and of any evidence that Keefe requested it or was informed of it suggests an unrelated purpose for the gathering; a step two grievance meeting would not likely have been attended by Executive Director Paternoster; the omission of Gann's appearance at the hearing and of his corroboration of

Scott's version of events permits an inference that he would not corroborate his testimony; and I have also not credited other of Scott's testimony.

17. Sometime later on June 28, McKenna told Scott in lot no. 6 that upon his return from vacation leave he was to be assigned to lot no. 2. McKenna denied Scott's request that the transfer be memorialized "in writing" (T61). No evidence indicates that the Authority routinely memorialized transfers or reassignments.

McKenna testified that Scott's brief return to lot no. 6 "didn't work out; he refused training a second time" (T108). He did not testify precisely when Scott again refused training on the "fee computer." Nor did he testify why Scott was informed of the reassignment on June 28. McKenna knew that Scott would be on vacation leave after the next day.

I have found that Scott refused training on the "fee computer" in early June 2001, despite his denial (see finding no. 6). I have also credited McKenna's testimony that Scott again refused training ". . . a short time afterwards . . .", when he was offered a "relief position" at lot no. 6 (see finding no. 9). Scott did not testify generally about his duties at lot no. 6 between June 25 and 28, 2001, nor specifically about "relief" cashiering. He admitted that his (brief) return to lot no. 6 was intended to fill the position of "relief" cashier (T78-T79).

Whether the approximate three weeks between early June and June 25 is "a short time afterwards" is unclear; in the context of the length of time passed in litigation of this case, I am not suspicious of McKenna's characterization or lack of specificity. I infer that Scott refused training again, sometime between June 25 and 28, 2001, during his reassignment to lot no. 6. That Scott was never trained on the fee computer leads me to conclude that he could not fulfill the "relief" assignment, consequently negating his potential utility at lot no. 6. (The Authority wanted all employees assigned to lot no. 6 after conversion to be trained on the fee computer). I find it probable that the Authority would reassign Scott away from lot no. 6 to a post which demanded no cashiering skills.

18. On June 29, 2001, Scott filed a handwritten grievance protesting his ". . . continuous harass[ment] by Executive Director Paternoster and Operations Manager McKenna for doing his duty as shop steward." Scott also wrote that "he is being persecuted and tormented by these two persons" (R-6).

19. On July 6, 2001, McKenna issued a memorandum to Scott, and sent copies to Paternoster and Gann, among others (CP-3; T113). McKenna wrote that he found "no basis for [the] charges" levied in the June 29 grievance and that management "relocated lot attendants and garage attendants to best serve the Authority." McKenna wrote that Scott had been assigned to lot #2

"only after you removed yourself from the cashier/garage attendant position at lot no. 6." He next wrote:

After a discussion with you on the grievance of the transfer of employees on June 12, 2001 you verbally gave me your word that you will go back to lot no. 6 as cashier/garage attendant for reliefs, breaks and lunches. You were then advised to report to lot no. 6 on Monday June 25, 2001. At the meeting held at lot no. 6 for cashier/garage attendants to explain scheduling and training, you remarked that you did not think it was fair that the Parking Authority did not give proper notice and you were not being informed on anything. You also stated that the Authority was negligent in not informing employees of their rights concerning seniority, etc. You also stated you were going to straighten everything out with the union rep [representative] at the meeting on Thursday, June 28, 2001. You gave the impression that you were trying to delay the opening of lot no. 6. [CP-3]

Finally, McKenna wrote that Scott's accusations of persecution and torment were ". . . an insult to [him] personally . . ." McKenna wrote that Scott must list the "date and time of all alleged incidents of harassment . . . in writing before proceeding to step no. 2 of your grievance" (CP-3).

The July 6 memorandum generally corroborates the facts of this matter, despite McKenna's concession in cross-examination testimony that it does not refer to Scott's refusal to be trained on the fee computer (T135). I disagree and do not credit McKenna's testimony, in deference to the document. I infer that his writing, ". . . on June 12, 2001 you verbally gave me your

word that you will go back to lot no. 6 as [a relief] cashier/garage attendant . . ." implies that Scott did not fulfill his "promise" to be trained on the fee computer as a necessary condition for becoming a relief cashier at lot no. 6. The July 6 memorandum does not indicate the date of the meeting ". . . for cashier/garage attendants to explain scheduling and training . . ." It corroborates a finding that Scott openly protested Authority conduct at that meeting (see finding no. 5).

20. On July 9, 2001, Scott began working at lot no. 2 (T57; T58).

On July 11, 2001, Scott sent a handwritten letter to McKenna requesting a "second step meeting" on his June 29 grievance. Scott wrote that "nothing in the contract states that I have to give you any dates or times of any incidents as your letter of July 6 stated before I can have a step two meeting." Scott also wrote: "You cannot add to the contract what you feel you want and delete from it what you can't use for your own benefit" (CP-7).

ANALYSIS

The primary issue in this matter is whether Scott was transferred between parking lot nos. 6 and 2 in retaliation for engaging in protected conduct. Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13a-5.3.

In re Bridgewater Tp., 95 N.J.235 (1984), sets forth the standards for determining whether a personnel action was discriminatorily motivated in violation of subsections 5.4a(1) and (3) of the Act. To establish such a violation, the charging party must prove, by a preponderance of evidence on the entire record that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise or protected rights. Id. at 246.

If the employer does not present any evidence of a motive not illegal under the 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 unlawful motives under the 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.

Scott is Local 68's shop steward at the Authority and has administered the current collective agreement on behalf of unit employees with the public employer, particularly the grievance procedure. Accordingly, he has proved the first two elements of the Bridgewater test. I must next determine if a preponderance of evidence proves that the Authority was hostile to Scott's protected conduct.

Scott contends that he was transferred from lot no. 6 to lot no. 2 ". . . in response to his attempts to informally resolve [unit employee] Keefe's matter . . ." (brief at 6). I disagree.

On June 5, 2001, Scott and Local 68 Business Agent Michael Gann met with Authority Executive Director Paternoster and Assistant Operations Manager Stevens. Keefe's seniority rights were discussed. No evidence indicates that either employer representative was hostile in any way. Soon afterwards, Scott phoned Paternoster and requested to meet with him about Keefe's possible discipline. Paternoster declined and directed Scott to file a grievance. No hostility may be gleaned from Paternoster's directive. I have also found that on June 4, Authority Operations Manager McKenna abruptly cancelled a meeting he convened with employees about training on the fee computers and shift scheduling when Scott openly criticized the Authority's efforts or actions. Scott did not testify about this event; nor was it cited in his post-hearing brief. Assuming that Scott's

criticism was protected under the Act, no evidence indicates that the Authority responded angrily to Scott's conduct or was hostile to him as shop steward before his June 12 reassignment. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177 (932057 2001).

On June 8, Scott withdrew his interest in the full-time cashier/lot attendant position because he much preferred "relief" cashiering, which ostensibly would not restrict him to a "booth" for his entire shift. Even the relief position, Scott conceded on the record, required training on the fee computer. I have found that Scott was unwilling to be trained. It is possible or even likely that in the June 5 meeting, Scott never articulated his unwillingness to be trained for the full-time position, hoping (passively, if it was not mentioned) that the training requirement was either unnecessary for or would be shed from the relief position he proposed. Scott did not mention in the meeting that he would formally "withdraw" interest in the full-time position (His motive for so doing may have been well intended to benefit his fellow and less senior unit members). On June 8, a few days after Scott had openly criticized Authority training practices and scheduling efforts at the new cash-revenue installation, his letter withdrawing interest probably appeared to Paternoster to have superceded the "relief" position accommodation suggested on June 5; Paternoster's June 8 directive

transferring Scott from lot no. 6 to lot no. 2 implies that Scott had decided to remain a garage attendant. Although Paternoster may have been incorrect about Scott's intentions for withdrawing interest, no evidence indicates that his decision to transfer Scott to lot no. 2 was pretextual. That is, Paternoster did not transfer Scott because he was angered by his efforts on behalf of Keefe; he was transferred because cashier/lot attendants were needed in lot no. 6.

On June 25, Scott was transferred from lot no. 2 (where his duties did not include cashiering) back to lot no. 6. On June 13 and 15, Scott had filed three grievances; one protesting the Authority's failure to post the position in lot no. 2 to which he was assigned for about two weeks; another contesting his initial transfer; and a third regarding unit employee Keefe.

Scott does not contend that the transfer back to lot no. 6 violates the Act. The Authority's action undermines Scott's argument that he was transferred from lot no. 6 in retaliation for his efforts on behalf of Keefe; why would the Authority transfer Scott back to lot no. 6 after receiving his grievance on behalf of Keefe? For that matter, why would it transfer him back to lot no. 6 after receiving his grievance protesting his own transfer?

The facts show that McKenna reassigned Scott to lot no. 6 as a "relief" cashier after receiving the garage attendant's promise

to be trained on the "fee computer." By June 25 (or earlier, according to McKenna's July 6 memorandum), the Authority understood (if only from Scott's own grievance) that Scott had not entirely disavowed interest in cashiering by the terms of his June 8 note to Paternoster. McKenna wanted to accommodate Scott's preference for lot no. 6 within the well-articulated need for cashier/lot attendants. The accommodation was consistent with his attested willingness to reasonably adjust employee work schedules or assignments according to individual preference, notwithstanding Scott's concern for seniority rights.

The June 28 meeting attended by Paternoster, McKenna, Gann and (following brief dispute) Scott substantively concerned the successful operation of the newly-converted lot no. 6, particularly Scott's "hindering" of it. Near the end of the meeting, Keefe's possible discipline was briefly discussed and all agreed to consult again sometime in August 2001. Scott was to be transferred back to lot no. 2 on July 9, upon his return to work from vacation leave. I have found that Scott again declined training between June 25 and 28, 2001, during his reassignment to lot no. 6 (see finding no. 17).


In discrimination cases, timing is a factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (17002 1985). In this case, it is the only factor which supports a possible finding that the Authority retaliated against Scott

for engaging in protected activity; specifically his demanding to attend and attending over objection the June 28 meeting.

Under all the circumstances, I decline to find that the Authority discriminatorily transferred Scott back to lot no. 2 from lot no. 6. Scott was permitted to attend the June 28 meeting and was not docked pay; the Authority invited Local 68's Business Agent to a meeting largely devoted to Shop Steward Scott's conduct; the Keefe matter received little or no substantive attention in the meeting and the parties agreed to discuss it on a future date; and Scott had been transferred about two weeks earlier from lot no. 6 to lot no. 2 because he declined training on the fee computer. The Authority's June 28 decision was for the same reason.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.


Jonathan Roth
Hearing Examiner

DATED: October 27, 2003
Trenton, New Jersey