

H.E. NO. 2014-10

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

In the Matter of

WEEHAWKEN PARKING AUTHORITY,

Respondent,

-and-

Docket Nos. CO-2011-317
CO-2011-378

INTERNATIONAL BROTHERHOOD
ELECTRICAL WORKERS LOCAL 1158,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of an unfair practice charge alleging that the Township of Weehawken Parking Authority violated 5.4a(1) and (3) of the Act when it disciplined a parking enforcement operator in retaliation for his organizing activity for International Brotherhood of Electricians Local 1158. The Hearing Examiner found that the Parking Authority had legitimate business reasons for disciplining the employee.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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
Law office of David Corrigan, LLC, attorneys
(David F. Corrigan, of counsel)

For the Charging Party
Kroll Heineman Carton, attorneys
(Curtiss Jameson, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 14, March 14 and 25, 2011, Local 1158 of the International Brotherhood of Electricians ("IBEW" or "Union") filed unfair practice charges and an amended charge, Docket Nos. CO-2011-317 and CO-2011-378, against the Township of Weehawken Parking Authority ("Parking Authority"). The Union alleges that the Parking Authority violated sections 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq. ("Act"),^{1/} when, in February and March 2011, the Parking Authority disciplined a parking enforcement operator in retaliation for his organizing activity for IBEW Local 1158. On May 21, 2013, the Union withdrew unfair practice charge Docket No. CO-2011-378 (paid lunch period) and I approved the withdrawal. N.J.A.C. 14:1-1.5(c).

On December 5, 2011, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On December 15, 2011, the Parking Authority filed an Answer, admitting it had disciplined the officer, but denying all other allegations and that it violated the Act. It asserts that its actions were for legitimate business and governmental reasons and asks that the charges be dismissed.

On September 18, 2012, the matter was assigned to me. On May 21, 2013 and June 4, 2013,^{2/} I conducted a hearing at which the parties examined witnesses and presented exhibits.^{3/} Both

1/ These provision prohibit public employers, their agents or representative from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, and (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.

2/ The scheduling of the hearing was delayed by the unanticipated unavailability of witnesses and attorneys, and by the unavailability of the first-assigned hearing examiner.

3/ "C" refers to Commission exhibits; R-1 through R-18 refer to
(continued...)

parties filed post-hearing briefs and the Parking Authority filed a reply brief. Upon the entire record, I make the following.

FINDINGS OF FACT

The Parking Authority enforces the parking rules within the Township on lots, garages, and streets. Weehawken's residents have too few available parking spaces near their homes and businesses owing to the Township's close proximity to New York City (1T12, 2T82). The Authority issues parking permits to residents and Parking Enforcement Officers ("PEOs") patrol the Township's residential areas and municipal lots and garages, on foot or in Township cars, and issue summonses to enforce the parking rules (2T127). The PEOs are rotated among the areas of the Township (2T128).

The Parking Authority's operates from 8:00 a.m. to 1:00 a.m., Monday through Saturday, and the PEOs work shifts (2T39, 2T204). Executive Director Robert J. Sosa, the head of the Parking Authority, works from early in the day to late evening. Chief Supervisor William Gohde, who was the second in command during the period of the events in the charge, directly supervised the PEOs, including PEO Joseph Mendez. Godhe was on

3/ (...continued)
Parking Authority Exhibits and U-1 through U-4 are the IBEW's exhibits. The transcript for the hearing on May 21, 2013 is cited as "1T-"; for the hearing on June 4, 2013 is "2T-".

duty from 11:00 a.m. to 4:00 p.m.; Mendez worked 4:00 p.m. to 1:00 a.m. (2T39).

The Parking Authority generally assigns PEOs to work in pairs or in proximity to each other (1T54, 2T204-2T206). After an assault on PEO Charlesworth, a day shift supervisor, Gohde and a Township attorney met with the PEOs to advise them about safety measures, including avoiding confrontations with the public, working as teams, and using a Parking Authority vehicle, when available, for their work and in case of an emergency (1T20, 1T51-1T55, 2T70-2T71). The Parking Authority provided vehicles for some of the patrols (1T55).

Sosa and Gohde explained that PEOs cannot always work in pairs because of their sick leave, vacations, and personal emergencies (2T48-2T49, 2T204-2T206). PEO Mendez confirmed that he generally worked with another employee, unless someone called out sick (1T54-1T55). In January 2011, of the 18 days Mendez worked, he worked alone on 3 days because of others' sick leave or scheduling (2T128). The other 15 days he worked with another PEO (2T129). Between February 1, 2011 and April 9, 2011, Mendez was out sick 13 times and then worked alone on 2 or 3 of the remaining days; Sosa testified that in 2011, Mendez had only worked alone 3 or 4 times out of 30 or 40 shifts (2T206, 2T229).

Gohde testified that the way the Parking Authority determined whether the PEOs would work with someone or alone

depended on the available staff who reported - ". . .if two people showed up [to work] we would give one section to an officer on foot and the other section [of Weehawken] would be given to a person in a car." (2T49). The car was used for the farthest points from the office (2T49).

Gohde denied having assigned Mendez to work alone because of his union activity (2T49). Sosa also denied ordering Mendez to work alone in retaliation for his union activities (2T129).

The Authority also provided telephones to the officers that were pre-programmed with certain numbers, and after 2010, all phones have had a "push-to-talk" radio-type feature to communicate with each other and for emergencies (2T43, 2T47, 2T86, 2T107). The numbers of the Parking Authority office, Sosa's and Gohde's cell phones, and other PEOs' numbers were programmed into the phones (2T86). Mendez testified that the PEOs had no radios, cell phones, or business cards, but I do not credit this testimony; both Sosa and Gohde testified that phones were provided; I credit their testimony and no other evidence corroborates Mendez's claim (1T57, 2T86, 2T107).

Mendez's employment (background)

In October 2009, Sosa hired Mendez for the full-time supervisor PEO position on the evening shift, from 5:00 p.m. to 1:00 a.m. (2T84). Mendez supervised two other PEOs, patrolled residential areas and lots, and issued summonses. Sosa

accommodated Mendez's educational pursuits by allowing him to alter his days and hours (2T94-2T95).

In June 2010, 8 months after he was hired, Mendez was involved in an on-duty altercation with a tour bus company driver (1T159-1T160, 1T169, 1T170-1T171, 2T88-2T89; R-10). On June 11, 2010, the driver filed a complaint against Mendez with the Weehawken police department, alleging Mendez harassed him (2T87-2T88; R-10). The driver stated that Mendez ordered him and his passengers to leave an area, cursed at them, and became aggressive and offensive, despite their cooperation (R-10). Mendez pled guilty to a municipal ordinance violation and on August 10, 2010, Sosa suspended him for ten (10) days (1T96-1T97, 2T87-2T89; R-1, R-10).^{4/}

On or about October 23, 2010, Gohde asked Mendez to document where he was and what he was doing during his shift that day (1T103). R-4 is a sarcastic, responsive memorandum from Mendez to Gohde and Sosa that includes toileting details (1T103-1T105). Mendez admitted that he was offended that Gohde, who works a day shift, asked Mendez to account for his on-duty activities (1T104-1T106). Mendez admitted that he resented the fact that neither

^{4/} R-1, an unsigned photocopy of Sosa's suspension letter to Mendez, dated August 24, 2010, imposed a 30-day suspension. Sosa explained he had initially imposed that discipline, then decided it was too severe (2T89).

Sosa nor Gohde were on duty on the night schedule when Mendez worked (1T104-1T106).

Mendez also admitted that on another occasion, when the Parking Authority sent Mendez certified mail, he signed a USPS return receipt form "Fidel Castro," instead of his actual name, knowing the Parking Authority would see the false signature (1T106-1T109; R-5).

On October 25, 2010, Mendez, while on duty in his Parking Authority uniform and stepping out of his Parking Authority vehicle, engaged in a physical altercation with a Weehawken resident on the resident's property (2T89-2T90; R-11). Formal charges of assault and trespass were brought and sustained against Mendez. Director Sosa suspended Mendez again without pay for an indefinite period beginning October 28, 2010 (2T89-2T91; R-2, R-3). When he was handed the suspension letter, Mendez crumpled it and threw it away in anger (1T99-1T100, 2T91-2T92; R-3). Several days later, Mendez was permitted to return to work.

In September or October 2010, Mendez was involved in another physical altercation at the recreational field with a recreation employee (1T70-1T71, 2T93).

The IBEW Petition

At some point in early 2011, Mendez became interested in seeking union representation and contacted a representative of IBEW Local 1158 ("Union"). He began to organize the other

Parking Authority employees by distributing authorization cards and encouraging coworkers to decide whether they wanted union representation (1T14-1T16).

Before their shifts, the PEOs congregate in the office for a short amount of time (2T63). Employees do not take lunch or breaks in the office. The Parking Authority facility consists of the office, Mr. Sosa's office, and a room upstairs in which there is a toilet. I infer from Gohde's testimony that the office he described is the one in which the PEOs congregate for assignments prior to shifts; I also infer that the office functions as Gohde's office (2T63). My inference is based on Gohde's testimony in which he stated that he spoke with Mendez "outside the office" prior to when Mendez "stormed back in the office and into the office of Mr. Sosa" (2T44). One night in January or February 2011, in the Parking Authority office, Mendez handed authorization cards to the other supervisors/officers and gave one to Gohde (1T17-1T21). Gohde informed Mendez he was not allowed to hand out cards in the office, which I infer meant the location of Gohde's office, which was for Parking Authority business only (1T25-1T27, 2T47, 2T67-2T70). Gohde believed Mendez could distribute the cards outside of the office (2T47). Mendez testified Gohde said that the matter had already been discussed and that "you can't organize a union; it's not going to happen," but I do not credit Mendez's testimony; Gohde denies

saying this and no other witnesses corroborated Mendez's version (2T79). Gohde credibly testified that he simply told Mendez that distribution in the office was inappropriate unless it was for Parking Authority business (2T47). There is no evidence to suggest that Gohde directed Mendez to refrain from speaking to employees in other locations. Director Sosa confirmed that no other forms of solicitations are permitted in the Parking Authority office (2T217-2T220).

On or about February 8, 2011, Sosa became aware that Mendez was involved in union activities when Sosa received correspondence from the Commission notifying him that a petition had been filed for a representation election among parking employees to determine whether they wanted representation by the Union (2T93-2T94). Sosa posted the notices provided by the Commission (2T94-2T95).

Sosa responded to the organizing effort by seeking information about the Union from the Parking Authority attorney (2T98-2T100). Sosa planned to share that information with the Parking Authority employees so that they could make an informed decision when they voted. On February 7, 2011, Sosa wrote to the employees to advise them of the salaries and benefits that the employees and officers of the Union enjoyed, and urged them to vote against representation (2T98, 2T100; U-3). He wrote:

IBEW Local 1158 will be asking you to pay union dues and initiation fees.

!!!HOWEVER!!!

Did they tell you that these dues will pay high salaries to their
leaders in their national headquarters?

I enclose the union leader's yearly salaries

2 of them make over \$300,000

10 of them make over \$200,000

185 of them make over \$100,000

You work hard, too hard for your money to pay for these bloated
salaries

!!!VOTE NO!!!

Robert Sosa
Executive Director WPA
(U-3).

The format and bold typeface of the letter make clear that U-3 was Sosa's answer to the petition in which he urged, but did not direct, the employees to vote against the Union. Attached to U-3 are seven (7) pages of names, titles, salaries, benefits and total compensation of IBEW officers (2T98; U-3).

Sick Leave Call out Procedure

If a PEO intends not to report to work because of an unanticipated illness, he or she must call Gohde or Sosa at least one hour before his or her shift begins (2T30, 2T42, 2T50-2T51, 2T101; R-9). R-9 is an approved leave form for Mendez for 5 days in July 2010 (2T100; R-9). R-9 and R-12 are leave request forms

used by the Parking Authority that contain procedures, including, in relevant part:

. . . employees calling in sick should notify their supervisor no later than one hour before the start of duty or as soon thereafter as possible (2T100; R-9, R-12).

R-12 is a vacation leave request for Mendez for March 2010; both R-9 and R-12 were signed by Mendez and Sosa (2T50, 2T102; R-9, R-12). Several documents show that Mendez had received and used paid sick time between 2009 and February 25, 2011, though he denied using any sick time (1T67-1T68, 1T135, 2T103-2T106; R-13, R-14, R-16).

R-13 is time sheet number 17, kept in Parking Authority's files for the department employees for Thursday, July 29, 2010 through Wednesday, August 11, 2010 (2T103; R-13). On Friday, August 6, 2010, Mendez was out sick (2T104; R-13). R-14 is a time sheet for the Parking Authority for pay period number 26, from Thursday December 2, 2010 through Wednesday, December 15, 2010 (2T104-2T105; R-14). R-14 indicates Mendez was out sick on Friday December 3, 2010 (R-14; 2T105). R-16 and R-17 are the time sheets from January 27, 2011 through February 9, 2011, but R-16 is the handwritten one completed by employees and R-17 is the typed, official version showing Sosa's approval and signature. In this period, Mendez was out sick on February 3, 2011, and docked on February 5, 2011 (2T106-2T107; R-16, R-17).

As Mendez signed R-9 and R-12 and used leave without incident in the past, I infer that he was aware of the procedures in place that required notifying a supervisor when calling out sick, despite denying the existence of any procedures or policies (1T67, 1T175, 2T101-2T105; R-13, R-14, R-16). In addition, Mendez admitted that he was aware that when he was absent from work, he was obligated to notify the Parking Authority (1T125).

Sosa testified he was regularly contacted by employees, including Mendez, on his cell phones - both his personal phone and on his official Parking Authority cell phone - to report incidents, request or advise of their time off and discuss other Parking Authority business (2T107-2T109). On many occasions from January 2010 to February 2011, according to Sosa, Mendez called him using Mendez's Authority-issued phone to discuss Parking Authority business and to report out sick (2T107-2T109). Gohde also had a Township-issued phone (2T39). Sosa's testimony in this regard was un rebutted; I credit Sosa's testimony. In addition, Mendez admitted on cross-examination that he knew the Parking Authority's phone number, Sosa's phone number, and Gohde's phone number (1T125).

Discipline February 8, 2011

On February 5, 2011, Mendez did not call Gohde or Sosa and did not show up for work (2T50-2T51). On February 7, 2011, when Mendez reported to work, Gohde asked Mendez why he had not called

in or reported to work on February 5th (2T41). According to Gohde, Mendez claimed not to have a phone or phone numbers to call (2T43).

Mendez responded to Gohde by becoming very angry and told him he was not going to work alone or without a vehicle, used "a few choice words," and claimed not to have a phone (1T30, 1T57-1T58, 2T43-2T45). Mendez sarcastically told Gohde he called into himself to report illness, especially late at night (1T21, 2T42-2T43). Then, Mendez "stormed" into Sosa's office, barged by Mr. Negron, and banged on Sosa's desk, and became belligerent by yelling and cursing (2T44, 2T115-2T116). Among other things, Mendez also complained about being blamed for damage to a Township vehicle.^{5/} Sosa tried to explain he was only being questioned because he was the last known person to use the vehicle, but Mendez continued to rant about not having phone numbers (2T116-2T117). Gohde followed Mendez into the office, repeatedly ordered him to calm down and leave, and told him he was suspended (2T45). Gohde thought Mendez's actions were alarming, unwarranted and amounted to conduct unbecoming an officer in the Parking Authority (2T45-2T46, 2T48; R-8). Mendez eventually left the office (2T46, 2T118). Neither Gohde nor Sosa believed that Mendez did not have the phone numbers because they

^{5/} Another PEO had reported minor damage to a vehicle, parked in a large lot overnight (2T117).

had issued Mendez a pre-programmed phone that Mendez had used previously to call them (2T119).

In describing his reaction to Gohde on February 7, 2011, Mendez testified that he became upset after Gohde told him to begin his shift alone and without a vehicle (1T30). Gohde could not recall that he had told Mendez he would have no vehicle and be alone that evening, but did corroborate that Mendez complained about it, among other things, in R-8 (2T72-2T73; R-8). I credit Gohde's testimony; Mendez has a selective recall of these events. Specifically, on direct-examination, Mendez remembered the incidents of February 7, 2011 pretty clearly, but on cross-examination, he did not remember the substance of the conversations, or having been angry or why he was angry (1T55-1T58, 1T123-1T132). On direct examination, Mendez could not say for certain when the February 7, 2011 incident occurred; he thought it was right after his attempt to solicit authorization cards and concluded it was retaliation for the petition. He also acknowledged there were other times when he worked alone (1T29, 1T54-1T58).^{6/}

^{6/} On direct and cross-examination, Mendez initially denied having becoming loud and angry at Gohde, bursting into Sosa's office, pushing past Mr. Negrón and using foul language, but later Mendez clarified that he did not deny these things happened, but that he did not remember them, had no recollection of the incident at all, and had difficulty remembering certain incidents from 2 years earlier (1T29-1T30, 1T123-1T132).

On February 7, 2011, Gohde wrote an incident report to Sosa, which detailed Mendez's behavior of the same day and recommended suspending Mendez (2T73, 2T77; R-8). On February 8, 2011, Sosa, in part based upon Gohde's recommendation, suspended Mendez for not calling in on February 5, 2011, insubordination, falsely claiming to be unaware that he was required to call out sick, and his foul language and unruly behavior on February 7, 2011 in Sosa's office (2T119-2T120; R-8; U-1). Sosa testified that Mendez's Union activity had nothing to do with the discipline (2T120).

On February 8, 2011, Sosa wrote to Mendez, in relevant part:

I write to advise that you are being suspended without pay for you[r] insubordinate conduct on February 5 and February 7, 2011. You are being suspended five (5) working days without pay for each incident (ten (10) days total) beginning Monday February 7, 2011.

I have put in writing and verbally told you that your conduct (yelling, using foul language, banging your fists on office desk and cabinets, your belligerence, your aggressive behavior and intimidating posture) is unacceptable. Any further infraction caused by you will result in your termination as an employee of the Weehawken Parking Authority. (U-1)

Mendez was suspended without pay, but did not grieve or otherwise challenge this discipline (1T61). Sosa spread out the unpaid days over time to lessen the financial burden of the suspension (1T62).

Discipline March 4, 2011

On February 25, 2011, at 1:00 p.m., Mendez called the personal cell phone of Vingenza Scarvigno, the Parking Authority's clerk, to report that he would be out sick that day (1T136-1T137, 2T30, 2T121). Scarvigno testified that she was surprised because Mendez had never called her on her cell phone to report his absences, and usually he called the office or one of the supervisors (2T30-2T33). She suggested that he call either Gohde or Sosa and he responded that he did not need to because he was reporting his absence to her (1T67-1T68, 2T31). She believed that Sosa and Gohde wanted the employees to either call them directly or leave messages on the office phone (2T33-2T34). She informed Gohde and Sosa of the conversation and Gohde asked her why Mendez had not called him directly (2T34-2T35, 2T121).

Around February 25, 2011, Sosa sought legal advice regarding the incident but did not receive a response for several days (2T227-2T228). On March 4, 2011, Sosa suspended Mendez for five (5) days for insubordination (2T121-2T122; U-2).

April 10, 2011 Incident and Termination

Lieutenant Mitchell Chasmar is an officer in the Weehawken police department (1T185). Chasmar was on duty on April 9, 2011, when two incidents involving Mendez arose (1T186). On the evening of April 8, 2011, the police desk officer directed

Chasmar to locate and check Mendez's physical condition because a resident, with whom Mendez had an altercation, reported that Mendez appeared to be under the influence of alcohol (R-6). Chasmar located and spoke to Mendez, whom he did not find to be under the influence of alcohol; Chasmar reported back to the desk and wrote a report of his findings (R-6).

However, later on April 9, 2011, Mendez summoned Chasmar to an area of a parking lot adjacent to the municipal building where Mendez was issuing parking tickets to Chasmar's co-workers (1T187-1T188). Mendez provoked Chasmar by calling him names, challenging him to a fight, threatening him and using loud, profane language (1T131-1T132). Mendez does not deny the substance of the allegations.

Chasmar found Mendez issuing parking tickets to on-duty police officers' personal vehicles in a municipal lot (1T191, 1T196-197, 1T221-1T222). Chasmar noted that the officers were permitted to park in the lot, that the issue of their right to park there while on duty had been previously decided by a municipal judge and these new tickets would most likely be dismissed, as were the earlier ones (1T212). Chasmar stated that no other PEO except Mendez had written tickets to police officers' personal cars in the lot adjacent to the municipal building after 5:00 p.m., when the lot is used by employees of the Township who work evenings, including police officers, and

some residents (1T212-1T213). Some police cars have an identifying police shield in their window (1T213).

Mendez became disorderly and loud, screaming and swearing at Chasmar (1T187-1T188, 1T223). Chasmar gave Mendez a few chances to calm down, but when Mendez would not calm down or lower his voice, Chasmar ordered Mendez handcuffed and arrested (1T192). Chasmar characterized Mendez's behavior as a tirade (1T191). Mendez cooperated in the arrest, was placed in a holding cell, pretended not to understand English, and was read his rights in English and Spanish (1T193). Thereafter, he became unruly, fought with various police officers and called Chasmar names (1T194, 2T9-2T12; R-18). He was charged with assault and aggravated assault for his conduct (2T12).

On April 11, 2011, Mendez was terminated for cause from his PEO position (2T124; R-6, R-7, R-18).

ANALYSIS

The issue here is whether the Weehawken Parking Authority disciplined Joseph Mendez on February 8 and March 4, 2011, in retaliation for his organizing activities on behalf of IBEW Local 1158 prior to a representation election. The IBEW argues that the Parking Authority was hostile towards Mendez's organizing and soliciting interest in the representation petition and for his complaints about not having a vehicle or partner on February 7, 2011. The Parking Authority denies that it was hostile to

Mendez's protected activity and argues that his repeated refusals to follow its call-out procedures and his inappropriate behavior in the Executive Director's office on February 7, 2011 resulted in his discipline. The Parking Authority urges dismissal of any alleged independent 5.4a(1) and any allegation that Mendez was objecting to working conditions at the time of the disciplines as not having been properly pled in the charge.

The Parking Authority's alleged discrimination against Mendez for his role in the representation petition was not proven. The Parking Authority disciplined Mendez for his conduct and failure or refusal to follow procedures and that conduct resulted in the discipline. Accordingly, I recommend the Commission dismiss the complaint.

The Alleged Independent 5.4a(1)

Whenever an employer violates 5.4a(3), it also violates 5.4a(1) - the duty to refrain from interfering with, coercing or restraining employees in their protected activity - derivatively. An independent 5.4a(1) violation occurs when an employer's conduct would have the tendency to restrain, interfere with or coerce employees in activities protected by the Act. NJ College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978). In its brief and during the hearing, IBEW argued that both Gohde's and Sosa's statements about the IBEW organizing effort demonstrated an independent 5.4a(1) violation. No

independent 5.4a(1) was pled in the amended charge and, apart from Mendez's disciplines, there were no references to the specific statements or conduct, nor the time and place of such occurrences, as required by N.J.A.C. 19:14-1.3(a). N.J.A.C. 19:14-1.3(a) requires

. . .3. A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the subsections of the Act alleged to have been violated, and the relief sought. (emphasis added)

Accordingly, I recommend that the alleged independent 5.4a(1), raised in the hearing and briefs, be dismissed. Even if the Commission were to consider the alleged independent 5.4a(1), I recommend that none was proven. In NJ College of Medicine and Dentistry, the Commission articulated the standard for finding an independent a(1) violation:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [4 NJPER 422-423]

Proof of actual interference, coercion or restraint is not necessary. ^{2/}

7/ Commercial Tp. Bd. of Ed. and Commercial Tp. Ed. Ass'n and
(continued...)

Under the Act, public employers are permitted to express their views about the merits of voting for a union and to disseminate information to employees, as long as their communications contain no threats of reprisal or promises of benefits to the employee(s). Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981). Applying this standard, Mr. Sosa's letter to employees urging them to vote against the Union and attaching salaries of IBEW officers and staff, Exhibit U-3, is protected speech. Further, I did not credit Mendez's testimony that Gohde said the Union was "never going to happen," and found Gohde's order to cease distributing authorization cards in the Parking Authority office reflected the Parking Authority's policy against all solicitation within that office, which doubled as Gohde's office.

The Alleged 5.4a(3)

In Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), the New Jersey Supreme Court established the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven 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

7/ (...continued)
Collingswood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), Aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

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 an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretext, there is sufficient basis for finding a violation without further analysis.

Sometimes however, the record demonstrates that both motives illegal 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 substantial or motivating reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether the Charging Party has proved hostility is based upon consideration of all the evidence, including that offered by the employer, as well as credibility determination and inferences drawn by the hearing examiner.

Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116, (¶18050 1987).

IBEW proved the first two elements of the test - that Mendez was involved in protected activity when he was distributing Union authorization cards to other PEOs and that both of his supervisors were aware of his activity - Gohde in January or February 2011, when Mendez collected the cards, and Sosa on or about February 8, 2011, when he received correspondence from a Commission election official.

An employer's discriminatory motives may be inferred from the timing of discipline imposed in relation to an employee's protected activity. However, I do not infer from the timing in this matter that protected activity motivated Director Sosa's discipline of Mendez on February 8, 2011. The discipline on February 8, 2011, was contemporaneous with the Parking Authority's receipt of the representation petition and correspondence from the Commission and with Mendez's inappropriately unruly conduct on February 7, 2011, which caused both Gohde and Sosa to discipline him. Mendez had been suspended for his behavior on several occasions prior to February 7, 2011, including complaints to the police about his on-duty behavior. Gohde learned of Mendez's union organizing in January 2011, well before PERC informed the Parking Authority that the Union had filed a representation petition, but no other evidence

demonstrates Gohde's hostility towards Mendez or his role in the Union organizing campaign.

For the first time at the hearing and again in its brief, Charging Party alleged, but did not prove, that the Parking Authority retaliated against Mendez by violating its own safety policy by "suddenly" denying Mendez the use of a vehicle and a partner while on duty.^{8/} No evidence shows how the Parking Authority supervisors singled out Mendez from other employees in their assignments or working conditions. His own testimony and that of Director Sosa reveals that parking enforcement officers do not have an expectation of having a car or partner on every shift and that sometimes there were not enough people or working vehicles. Even if these facts were properly pled and proven, I find that Mendez's conduct - banging on file cabinets, desks, cursing, becoming loud, and not calming down or leaving when ordered - together with his failing to call in his February 5 absence and assertion that he did not have to call in to the supervisors, that resulted in the February 8, 2011 discipline.

Approximately two weeks later, on February 25 and 26, 2011, Mendez again failed or refused to call in his absences to a supervisor, instead calling the office secretary on her personal cell phone. When she advised him to call the supervisors

^{8/} This allegation was asserted at the hearing; I admitted the evidence over the Parking Authority's objection that it had not been specifically pled in the amended charge.


directly, he declined, telling her he was not required to do so. Mendez had used paid leave previously, had signed leave forms which identified the proper procedure, and had previously followed the proper procedure. In addition, Mendez admitted that he was aware that he was obligated to notify the Parking Authority when he called out sick. Because this was a second instance of Mendez's refusal to follow the rules, he was suspended again. The Charging Party does not argue, nor does the evidence suggest, that the particular disciplines were excessive or disproportionate. Therefore, based on the entire record, the Parking Authority had a legitimate business reason for disciplining Mendez on both occasions.

CONCLUSIONS OF LAW

The Weehawken Parking Authority did not violate sections 5.4a(1) or (3) of the Act by disciplining former Parking Enforcement Officer Joseph Mendez on February 8, 2011 and March 4, 2011, or by any statements made to Mendez by his supervisors. The Weehawken Parking Authority, through Executive Director Robert Sosa, did not violate either 5.4a(1) or (3) of the Act by issuing a campaign letter on February 7, 2011, to employees prior to a Commission representation election.

RECOMMENDATION

Based on the above, I recommend the Commission dismiss the amended charge, Docket No. CO-2011-317.



Timothy Averell
Hearing Examiner

Dated: April 25, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by May 5, 2014.