

P.E.R.C. NO. 87-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT
OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CI-85-91-44

JOSEPH S. SEAMAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Department of Human Services) violated the New Jersey Employer-Employee Relations Act when it did not promote Joseph S. Seaman to sergeant. The Commission, in agreement with the Hearing Examiner, finds that Seaman was not promoted in retaliation for filing a grievance.

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JOSEPH S. SEAMAN,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Barbara A. Pryor, Deputy Attorney General)

For the Charging Party, Arthur Goldzweig, Esquire
(Steven J. Abelson, of counsel)

DECISION AND ORDER

On February 5, 1985, Joseph S. Seaman ("Charging Party")
filed an unfair practice charge against the State of New Jersey,
Department of Human Services ("Respondent"). The charge alleges
that the respondent violated the New Jersey Employer-Employee
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections
5.4(a)(1), (3) and (4),^{1/} by failing to promote the charging party

^{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; (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;

to the rank of sergeant in retaliation against him for filing a grievance.

On September 5, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing.^{2/}

On October 9, 1985, the respondent filed an Answer generally denying the Complaint's allegations. It asserts, as separate defenses, that the Commission lacks subject matter jurisdiction; the charging party has failed to state a claim upon which relief may be granted and has failed to establish a nexus between the facts as alleged and the alleged violations of the Act; and the respondent has complied with the Act.

On January 15 and February 24, 1986, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits.

On September 19, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-21, 12 NJPER 725 (¶17271 1986)(copy attached). He found that the respondent violated

1/ Footnote Continued From Previous Page

and (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."

2/ The Director also consolidated this matter with another, CI-85-90-43, which concerned another employee who also alleged that the respondent unlawfully failed to promote him. At the first day of hearing, that charge was withdrawn because that employee left the respondent's employ.

subsections 5.4(a)(1) and (3) when it threatened that the charging party's promotion would be jeopardized if he did not withdraw a grievance and when it refused, temporarily and then permanently, to promote him because he processed the grievance.

On November 3, 1986, the respondent filed exceptions. It asserts the Hearing Examiner erred in his factual findings and particularly his credibility determinations.^{3/} The respondent

3/ Specifically, the respondent asserts the Hearing Examiner erred: (1) when he found that respondent's counsel failed to contest the authenticity of Chief Ferrara's signature on a Civil Service form; (2) by rejecting Capt. Kosco's assertion that it was not Ferrara's signature; (3) by finding Kosco to be an unresponsive and generally uncooperative witness; (4) by failing to find Sgt. Hannah to be an unresponsive, uncooperative and evasive witness; (5) by finding that Capt. Fish intended Det. Aquila talk to the charging party about withdrawing his grievance; (6) by stating that Aquila placed herself and her promotional opportunities at risk by testifying against Capt. Fish and that she had nothing to gain by testifying at the hearing; (7) by finding Fish's testimony to be inconsistent; (8) by finding that Kosco failed to deny telling Sgt. Davis that the charging party was a troublemaker and wavemaker who would never learn and therefore never make sergeant; (9) by finding that Fish threatened the charging party by telling him he was "making waves"; (10) by relying on Hannah's testimony because Hannah had no first-hand knowledge; (11) by emphasizing Fish's response to the question of whether he "directly" suggested to the charging party that he withdraw the grievance or jeopardize his promotion; (12) by failing to consider fully all of Fish and Kosco's testimony; (13) by not finding that Hannah's early return to work motivated the decision not to fill the temporary "Y" position; (14) by not finding that "centralization" motivated the decision to deny the charging party a permanent promotion; (15) by ignoring the fact that since June 1984 there have been no promotions to sergeant in respondent's police force; (16) by crediting Davis' testimony that Kosco told Fattori he would not be promoted to sergeant until after the instant charge was resolved; and (17) by concluding that Kosco tried to persuade Davis to tailor his testimony regarding centralization.

also asserts that the charging party failed to establish a prima facie case because he never offered evidence that respondent was hostile toward protected activity. Specifically, it claims that Fish had no intention of influencing the charging party to withdraw his grievance and Hannah had no firsthand knowledge that management was unhappy because the charging party filed his grievance. It also asserts that even if the charging party established a prima facie case, it met its burden of proving that the decision not to promote would have taken place absent the charging party's protected activity. Specifically, it claims the "Y" position was not filled because Hannah returned earlier than expected and the charging party was not permanently promoted because it was centralizing its police force, not because he filed a grievance. Finally, the respondent contends the Commission lacks power to fashion a remedy requiring respondent to promote the charging party.

On November 25, 1986, the charging party filed its reply. It asserts that the Hearing Examiner's credibility determinations must be accepted and that the respondent failed to show that the charging party would not have been promoted absent his protected activity.^{4/}

^{4/} Specifically, the charging party contends: (1) the Hearing Examiner properly concluded that respondent's counsel did not object to the authenticity of Ferrara's signature, although the central point is not that, but that the Hearing Examiner found Kosco to be an incredible witness; (2) ample evidence supports the findings that Fish tried subtly to force Seaman to withdraw his grievance and that Kosco stated Seaman would

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-21) are accurate. We adopt and incorporate them with the following modifications.

We modify finding no. 6 to state that when asked whether whatever is on CP-6 occurred, respondent's counsel responded, "No, no." Her concern was that there should have been additional signatures on CP-6 that are not there. Since CEO Sorenson would not have signed CP-6 without Ferrara's approval, we find that Ferrara authorized the charging party's "Y" promotion, whether or not he signed CP-6. We add that the discussion regarding the "marking" near the center on the right side of CP-6 was not referring to Capt. Ferrara's purported signature which is higher up and in the center.

We modify finding no. 7 to state that Fish denied, when asked a second time, that he told Davis that the charging party would not be promoted as long as he was captain.

We add to finding no. 7 that Kosco testified there had been no promotions to sergeant since May 1984.

We otherwise reject the respondent's exceptions regarding the Hearing Examiner's credibility determinations. Those determinations were based on his evaluations of witness demeanor, cooperativeness and evasiveness, consistency and motivation to fabricate. We will

4/ Footnote Continued From Previous Page

never make sergeant, and (3) the Hearing Examiner logically concluded the "Y" and permanent promotions were nullified because the charging party filed his grievance.

not disturb them. Ocean Cty. Sheriff, P.E.R.C. No. 86-107, 12 NJPER 341 (¶17130 1986).

In re Bridgewater Tp., 95 N.J. 235 (1984) establishes the analysis we must apply when considering allegations of discriminatory conduct. 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 rights. Id. at 246. If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis.

Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

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Conflicting proofs concerning the employer's motives are for us to resolve.^{5/}

We first consider whether the charging party has proved that protected activity was a substantial or motivating factor in the respondent's decision not to promote him. Filing a grievance is a fundamental example of protected activity. Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER ____ (¶ ____ 1986); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1985); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984). The charging party filed his grievance on September 13, 1984 and the respondent knew about it. This case turns on whether the respondent was hostile toward the charging party because of his grievance. The Hearing Examiner found that it was. We agree.

Timing is an important factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985); see also, Jim Causley Pontiac v. NLRB, 620 F.2d 122, 104 LRRM 2190, 2193 (6th Cir. 1980); The Developing Labor Law at 193. A chronology of important events follows.

^{5/} Besides Bridgewater, see NLRB v. Transportation Management Corp. U.S. ___, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983); Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980); In re Ocean Cty. College, 204 N.J. Super. 24 (App. Div. 1985); East Orange Pub. Library v. Taliaferro, 180 N.J. Super. 155 (1981); Morris, The Developing Labor Law (2d ed. 1983) at 191-92; and Bartosic and Hartley, Labor Relations Law in the Private Sector (2d ed. 1986) at 115-16.

On July 3, 1984, Chief Ferrara, Captain Fish and Captain Kosco interviewed the charging party for a sergeant's position. On July 23, Fish formally recommended to Ferrara that the charging party be promoted. That same day, Ferrara recommended to the personnel director that the promotion be "right away." On August 24, Fish formally requested the personnel director place the charging party in a temporary sergeant's position. The appropriate paperwork was processed.

Then, on September 13, the charging party filed his grievance contesting a change in his days off. The grievance was denied by the immediate supervisor and a first-step hearing was scheduled for September 28 with Fish. Before that hearing, Fish, wanting the grievance withdrawn, asked a department detective to speak to the charging party regarding his grievance.

On September 28, the same day Fish denied the grievance, Fish told the charging party he was making waves by submitting the grievance. The charging party interpreted Fish's remarks to mean that he had to withdraw the grievance to become a sergeant. In addition, Kosco told Sergeant Davis that the charging party was a "troublemaker and a wavemaker" and "would never make sergeant."

On October 16, 1984, the charging party appealed his grievance and requested a second-step hearing. That same day, his temporary promotion was rescinded. No reasons were immediately given. On December 14, Ferrara informed the charging party for the first time that there would no longer be "in-house" but only statewide promotions.

On January 28, 1985, respondent denied the grievance at the third step. On January 30, Ferrara prepared a memorandum intending to transfer the charging party effective February 9. On February 5, the unfair practice charge was filed. Ferrara resigned that same month.

The chronology is striking. The promotion decisions were made. The grievance was then filed and pursued. Suddenly, the decisions were rescinded. The timing of the decisions not to promote, coupled with Fish's attempts to induce the charging party to withdraw the grievance and Kosco's remarks, convinced the Hearing Examiner that the grievance motivated the respondent's actions. We are equally convinced.

Because we have found that protected conduct motivated the respondent's action, we must determine whether the respondent proved, by a preponderance of the evidence, that the charging party would not have been promoted absent his protected conduct. The Hearing Examiner found that the respondent did not. We agree.

The respondent argues that department centralization prompted its decision. However, Fish and Kosco knew about the centralization months before they recommended the charging party's promotion in July 1984. The Hearing Examiner found Fish and Kosco to be unreliable witnesses and he specifically rejected their explanations as implausible. We find no basis to set aside those findings. Accordingly, we find that the respondent violated subsections 5.4(a)(3) and, derivatively, (a)(1) by failing temporarily and then permanently to promote the charging party to sergeant.

The Hearing Examiner also found that Fish's intimidation and threats, first through Detective Aquila and then directly, to get the charging party to withdraw his grievance independently violated subsection 5.4(a)(1). We agree. Fish's actions tended to interfere with the charging party's exercise of protected rights. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1882), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).^{6/}

In its exceptions, the respondent questions this agency's power to fashion a remedy requiring the charging party's promotion. We have such power and in this case exercise our discretion to use it.

N.J.A.C. 19:14-7.1 provides, in part:

[T]he hearing examiner shall prepare a recommended report and decision which shall contain findings of fact, conclusions of law, and recommendations as to what disposition of the case should be made, including, where appropriate, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act.

The Hearing Examiner issued such a report and recommended decision. He suggested a make-whole remedy whereby the charging party would be promoted to a sergeant's position, as he would have been absent his protected activity, and awarded backpay plus interest. We adopt those recommendations as we have done in similar cases. See, e.g., Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186

^{6/} We agree with the Hearing Examiner's recommendation to dismiss the subsection 5.4(a)(4) allegation.

(¶11089 1980), aff'd App. Div. Dkt. No. A-3230-79 (1/23/81);
Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123
1978), aff'd App. Div. Dkt. No. A-4824-77 (1/9/80); see also
Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational
Secretaries, 78 N.J. 1 (1978)(authority to award backpay).^{7/}

ORDER

The State of New Jersey (Department of Human Services) is
ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees
in the exercise of the rights guaranteed to them by the Act,
particularly by threatening Joseph Seaman that his filing and
processing a grievance might jeopardize his promotional
opportunities.

2. Discriminating in regard to the tenure of
employment to discourage employees in the exercise of the rights
guaranteed to them by the Act, particularly by failing and refusing
to promote Joseph Seaman to the rank of sergeant at Marlboro
Psychiatric Hospital effective December 8, 1984 because he filed a
grievance.

^{7/} We deny the charging party's request for attorney's fees and
costs.

B. Take the following affirmative action:

1. Pay Joseph Seaman the monetary difference between what he received and what he would have received had he been placed in a temporary sergeant position (the "Y" position) effective September 1, 1984 through November 5, 1984, plus interest on the monetary difference to date in accordance with R.4:42-11.

2. Promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital retroactive to an effective date of December 8, 1984, and adjust his records to reflect seniority in that position and at that location consistent with the effective date.

3. Pay Joseph Seaman the monetary difference between what he received from December 8, 1984 to date, and what he would have received for that time period had he been promoted to sergeant on December 8, 1984, plus interest on the monetary difference to date in accordance with R.4:42-11.

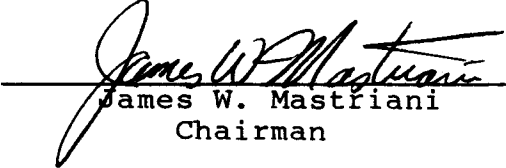
4. Provide Joseph Seaman with any other benefits he would have received (such as additional sick, vacation or personal leave) had he been in the unit which included Human Services sergeants effective December 8, 1984.

5. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

6. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 16, 1987

ISSUED: January 16, 1987

NOTICE TO ALL EMPLOYEES**PURSUANT TO**

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Joseph Seaman that his filing and processing a grievance might jeopardize his promotional opportunities.

WE WILL cease and desist from discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing and refusing to promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital effective December 8, 1984 because he filed a grievance.

WE WILL pay Joseph Seaman the monetary difference between what he received and what he would have received had he been placed in a temporary sergeant position (the "Y" position) effective September 1, 1984 through November 5, 1984, plus interest on the monetary difference to date in accordance with R. 4:42-11.

WE WILL promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital retroactive to an effective date of December 8, 1984, and adjust his records to reflect seniority in that position and at that location consistent with the effective date.

WE WILL pay Joseph Seaman the monetary difference between what he received from December 8, 1984 to date, and what he would have received for that time period had he been promoted to sergeant on December 8, 1984, plus interest on the monetary difference to date in accordance with R. 4:42-11.

WE WILL provide Joseph Seaman with any other benefits he would have received (such as additional sick, vacation or personal leave) had he been in the unit which included Human Service sergeants effective December 8, 1984.

Docket No. CI-85-91-44

STATE OF NEW JERSEY (DEPARTMENT OF
HUMAN SERVICES
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-21

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CI-85-91-44

JOSEPH S. SEAMAN,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public employment Relations Commission recommends that the Commission find that the State of New Jersey, Department of Human Services, violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it threatened employee Joseph Seaman that his promotional opportunities would be jeopardized if he continued to process a grievance he filed, when it refused to place Seaman into a temporary sergeant position because he processed the grievance, and when it refused to permanently promote Seaman to sergeant at Marlboro Psychiatric Hospital because he processed the grievance.

The Hearing Examiner, however, recommended that the allegation of a violation of subsection 5.4(a)(4) of the Act be dismissed. There was no showing that the State took any action against Seaman because he filed the Charge.

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. 87-21

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

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Appearances:

For the Respondent
W. Cary Edwards, Attorney General
(Barbara A. Pryor, D.A.G., of Counsel)

For the Charging Party
Arthur Goldzweig, Esq.
(Steven J. Abelson, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 5, 1985 by Joseph S. Seaman ("Charging Party") alleging that the State of New Jersey, Department of Human Services ("State") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party alleged that the State violated §§5.4(a)(1), (3) and (4) of the Act when it refused to promote him to the rank of

sergeant as punishment for his having filed a grievance pursuant to his collective agreement.^{1/}

The Director of Unfair Practices issued a Complaint and Notice of Hearing on September 5, 1985.^{2/} The State filed an Answer on October 9, 1985 denying any violation and asserting certain general defenses.

Hearings were held in this matter on January 15 and February 24, 1986 in Trenton, New Jersey, at which the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing this matter is appropriately before

^{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; (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; and (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."

^{2/} When the Complaint issued in September 1985 the Director consolidated the instant matter with the charge in CI-85-90-43 which concerned employee, Anthony Gonzalez, who also alleged that the Department of Human Services unlawfully failed to promote him to sergeant. At hearing on January 15, 1986, the charge in CI-85-90-43 was withdrawn (Transcript "T" 1 p. 6). Consequently, the decision here only concerns Seaman's case, CI-85-91-44.

the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The State of New Jersey, Department of Human Services is a public employer within the meaning of the Act.

2. Joseph Seaman is a public employee within the meaning of the Act.

3. Seaman, a civil service employee, has been employed by the State for approximately eight years as a patrol officer in the Department of Human Services ("Department") at the Marlboro Psychiatric Hospital. He took a civil service promotional examination for sergeant in December 1982 and placed third on the list for a position at Marlboro, but he moved to first on that list by April 1983 (Transcript "T" 1 pp. 70-73). That list expires sometime in 1986.

Seaman has been active in his union, PBA Local 113, since May 1983. He was secretary of Local 113 during the time that gave rise to this Charge, and he is currently vice-president (T 1 p. 73).

4. In August 1983 the State began to reorganize the police force for the Department of Human Services (T 1 pp. 181, 188). Captain Andrew Kosco, the Regional Police Commander for the southern half of the State for the Department of Human Services Police Force, was also the assistant to Angelo Ferrara, the Chief of the Human Services Police. Kosco testified that he and Ferrara were

hired to reorganize the Department's police force which led to the passage of Administrative Order No. 1:50 (Exhibit R-2) on December 28, 1983. Administrative Order No. 1:50 was effective January 1, 1984 and made the Chief the Civil Service appointing authority for the Department's police force (T 1 p. 161), and authorized him to reorganize and centralize police operations. Kosco explained that prior to R-2, each Human Services institution, such as Marlboro Psychiatric, would fill vacancies in its own police staff. There was no central hiring or promotional authority (T 1 p. 162). Kosco indicated that one purpose of the reorganization was to centralize the hiring and promotional opportunities for Human Services Police on a Department-wide rather than an institutional basis (T 1 p. 163).

5. In a meeting with Department police officers in January 1984 the Chief advised the employees of the goals of the police force reorganization, but he apparently failed to explain his position regarding future departmental promotions (T 1 pp. 213-214). On April 5, 1984 the Chief issued a notice to Department police officers (Exhibit R-4) scheduling a meeting for April 19, 1984 to once again explain the objectives of the reorganization.

On May 1, 1984 the Chief requested the promotion of Department detective George Vitoritt to sergeant (Exhibit R-3), and that promotion became effective by May or early June 1984.

6. In March 1984 Sgt. David Hannah was transferred from Trenton Psychiatric Hospital to Marlboro Psychiatric Hospital as

Officer in Charge ("OIC") of the police force (T 1 p. 18). Hannah testified that by June 1984 two sergeant positions had become vacant at Marlboro, and Seaman was the first on the list to fill one of those positions (T 1 pp. 20-22). In June 1984 Hannah spoke to Captain Fish, the Regional Commander for the Northern District of Human Services Police which included Marlboro, and informed him that he would be taking an extended sick leave in the Fall, and he recommended Seaman as his temporary replacement in a "Y" position. (T 1 pp. 24-25).^{3/} Fish agreed with that recommendation (T 1 p. 25).

On June 22, 1984 Hannah sent Seaman a memorandum (Exhibit CP-1) advising him that a meeting had been scheduled for him on July 3, 1984 for an interview with Chief Ferrara and Capt. Fish for a sergeant position. That interview was held on July 3 and included Ferrara, Fish, and Capt. Kosco. Seaman was told that in order to be considered for a sergeant position he needed to submit a letter that he was aware that if he was promoted, he could be transferred to other facilities (T 1 p. 78). By letter dated July 3, 1984 (Exhibit CP-3) Seaman informed Fish that he was interested in becoming a sergeant, and he acknowledged that if promoted he could be transferred.

^{3/} A "Y" position is one where the employee serves in a title on a temporary or acting basis and receives the salary for that title, but is not permanently placed in that title or salary (T 1 p. 25).

Having received CP-3, Fish, on July 23, 1984 formally recommended to Ferrara (Exhibit CP-4) that Seaman be promoted to one of the vacant sergeant positions at Marlboro. That same day, July 23, 1984, Chief Ferrara recommended (Exhibit CP-5) to Personnel Director, Joseph Leo, that Seaman be promoted "right away" to a vacant sergeant position at Marlboro.

Hannah testified that it was his expectation that Seaman would be promoted to a sergeant position (T 1 pp. 25-27). In fact, Seaman testified that it was his expectation that he would be in a sergeant position by December 1984 (T 1 pp. 84, 148). Although Hannah had not received official notification from the Vacancy Review Board that the two Marlboro sergeant positions were available to be filled (T 1 pp. 36-37), he testified that based upon the December 1983 Board of Inquiry decision that recommended that the police department at Marlboro be upgraded and which created two sergeant positions (T 1 pp. 19-20, 48), and based upon information he received from personnel, he believed that the vacancies were available to be filled (T 1 pp. 27, 48). In fact, Fish testified that when he issued CP-4 he expected the Vacancy Review Board to approve the openings "momentarily" (T 2 p. 41).

On August 24, 1984 Fish, in Exhibit CP-2, formally requested Personnel Director Leo to place Seaman into a "Y" position effective August 31, 1984 to cover Sergeant Hannah's position. As a result of CP-2, the Department processed Exhibit CP-6, a Civil Service Personnel Action form (known as a CS-21), on September 11,

1984. That form requested Seaman's temporary appointment to Sergeant Hannah's position effective 9/1/84 through 12/7/84. CP-6 was signed by Personnel Officer Craig Stevens, Personnel Director Joseph Leo, Mr. Sorensen, who was the chief executive officer and appointing authority for payroll purposes (T 2 p. 16), and by Seaman and Chief Ferrara. CP-6 did not contain the signatures of the President of the Civil Service Commission, or the Director of the Division of Budget and Accounting.

The State objected to the introduction of CP-6 because in its estimation the document was not complete because it did not contain the Civil Service and Budget and Accounting signatures (T 1 pp. 87-88). When asked whether the State contested what was purported to be Chief Ferrara's signature on CP-6, however, the State's counsel responded "No, no." (T 1 p. 88).

On cross-examination, however, Capt. Kosco testified that that was not Ferrara's signature on CP-6 (T 2 pp. 16, 19). But after a probing cross-examination where Kosco was generally unresponsive to the questions and generally uncooperative, Kosco, nevertheless, finally admitted that the "Y" position could not be approved without the Chief's signature (T 2 pp. 18-19), that the Chief had the authority to decide who would be (temporarily and permanently) promoted (T 2 p. 17), that the Chief intended to promote Seaman (T 2 p. 19), and that the Personnel Office, particularly Stevens, Leo, and Sorensen, would not prepare and sign CP-6 without checking with and receiving the approval of the Chief

(T 2 pp. 21-22). Fish also testified that CP-6 was processed only after the Chief approved of the action contained therein (T 2 pp. 66-68).

I do not credit Kosco's assertion that that was not Ferrara's signature on CP-6. I found Kosco to be an excessively uncooperative witness. He deliberately attempted to evade answering specific questions that were intended to reveal pertinent facts in this case (T 2 pp. 16-22) from which I infer an intent to conceal the truth. Thus, I found Kosco to be a generally unreliable and untrustworthy witness. Having found that the State did not object to the authenticity of Ferrara's signature on CP-6, and having found that Kosco's reluctant admissions established that Sorensen would not have signed CP-6 without Ferrara's approval, I find that Ferrara did authorize and sign CP-6.

7. On September 13, 1984 Seaman filed a grievance (Exhibits CP-7 and R-1) pursuant to PBA Local 113's collective agreement (Exhibit J-1) over the Department's change of his scheduled days off. Apparently the PBA president, who had less seniority than Seaman, was given Seaman's days off, Friday and Saturday, in order to better conduct PBA business. Seaman filed the grievance to get Friday and Saturday reassigned to him (T 1 pp. 92-93). The grievance was denied by his immediate supervisor (a sergeant) on September 17, 1984, and a first-step hearing was scheduled for September 28, 1984 with Capt. Fish.

Prior to September 28, 1984 Human Services police detective LuAnn Aquila had a conversation with Capt. Fish. She testified that Fish asked her to speak to Seaman as a friend regarding his grievance, and he asked her why Seaman was "making waves" while they were making him a sergeant (T 1 pp. 57-58). Aquila testified that she was not ordered to speak to Seaman, and that Fish did not tell her that Seaman should drop the grievance, or that the grievance would jeopardize his promotional opportunities (T 1 p. 68). Although Aquila admitted that she had not been ordered to speak to Seaman, it was, nevertheless, her understanding that as a result of the conversation with Fish, she was supposed to talk to Seaman (T 1 p. 58).

Fish admitted that he did comment to Aquila that:

...here I am trying to get him [Seaman] promoted and he [Seaman] put a grievance in to have his days changed. When the promotion comes through, why, he probably wouldn't get the days that he's requesting anyway. (T 2 pp. 52-53).

Fish denied, however, that he told Aquila that she should tell Seaman what he said, and he (Fish) testified that it was not his intention that Aquila tell Seaman to withdraw the grievance (T 2 p. 54).

I credit Aquila's testimony that Fish told her to speak to Seaman regarding his grievance, and I find that Fish could only have intended that Seaman withdraw the grievance. Aquila was also on the promotional list for sergeant at Marlboro and she placed herself and her promotional opportunities at risk by testifying against Fish at

this hearing. Since she had nothing to gain by testifying at this hearing I cannot believe that she would have been mistaken about being told to relay Fish's comment to Seaman. In addition, Fish's testimony is inconsistent. He admitted that he could not understand why Seaman filed a grievance (T 2 p. 54), and he admitted that he made the above remark to Aquila, yet he testified that he did not intend to directly or indirectly influence Seaman to withdraw the grievance (T 2 p. 55). What then could he have intended? Having found that Fish did ask Aquila to speak to Seaman, Fish could only have intended that Seaman quietly withdraw or resolve his grievance or it might jeopardize his promotional opportunity.

Aquila did relay Fish's message to Seaman (T 1 pp. 58, 95). Seaman testified that Aquila told him that Fish said he (Seaman) was making waves by submitting the grievance while they were trying to make him a sergeant, and with his making waves they (Fish, Ferrara and Kosco) don't know what could happen (T 1 p. 95). Seaman interpreted that remark to mean that if he withdrew the grievance he would become a sergeant (T 1 p. 97).

During that same time period, mid-September 1984, Capt. Kosco made a remark to Sergeant Trent Davis that:

as long as he [Kosco] was the Captain, Joseph Seaman
would never make sergeant in the Department. (T 2 p.
106)

Davis testified that Kosco was disturbed that Seaman had filed a grievance, and he testified that Kosco said that "Seaman would never learn," and that Seaman was a "troublemaker and a wave maker" at

Marlboro (T 2 pp. 106, 123). Davis also testified that Fish agreed with Kosco's remarks (T 2 p. 106). Kosco did not specifically deny making that remark, he testified only that he could not recall that statement (T 2 p. 141). I credit Davis that Kosco did make the remark.^{4/}

On September 28, 1984 the first step grievance hearing was held on Seaman's grievance before Capt. Fish and the grievance was denied (R-1). Fish and Seaman spoke to one another on September 28 and Fish told Seaman that he (Seaman) was making waves by submitting the grievance (T 1 p. 96). Seaman testified that he told Fish that the grievance concerned his patrolman's position and would not apply if he became a sergeant. Fish responded that he (Seaman) was still making waves, and Seaman responded that if he had to withdraw his grievance to become a sergeant, he guessed he would never be a sergeant (T 1 pp. 96-97). Seaman interpreted Fish's remarks to be that he had to withdraw the grievance in order to become a sergeant (T 1 p. 97).

Fish did not clearly deny that he made those remarks to Seaman. When asked if he discussed the filing of the grievance with Seaman prior to the September 28 hearing, Fish responded:

^{4/} On cross-examination the State attempted to impeach Davis' testimony by showing that Davis had a motive to testify adverse to Kosco. Kosco had apparently disciplined Davis in December 1985, and Davis has since filed a discrimination action and several grievances against Kosco (T 2 pp. 129-131). Despite these facts, I credit Davis for the reasons discussed infra.

Not with Mr. Seaman, no. Not that I can recall anyway. (T 2 p. 52).

Since Seaman clearly remembered that conversation with Fish, and Fish did not, and since I previously credited Aquila's testimony that Fish told her to relay a message to Seaman, I credit Seaman's testimony that Fish did tell him that he (Seaman) was making waves by processing the grievance, I find that Fish's remarks constituted a threat to Seaman.

Perhaps the most telling evidence that Fish intended Seaman to withdraw the grievance, however, was that Fish did not initially deny that he indirectly suggested to Seaman that his having filed the grievance would jeopardize his promotion. On direct examination Fish was asked if he ever directly suggested to Seaman that his having filed the grievance would jeopardize his promotional opportunities, and Fish responded: "No, not directly. (T 2 p. 52)."

I infer from that answer, in conjunction with Seaman's and Aquila's testimony, that Fish intended to suggest to Seaman, albeit indirectly through Aquila, that Seaman's processing the grievance would jeopardize his promotional opportunities. Fish's subsequent denial that he attempted to directly or indirectly influence Seaman to withdraw the grievance was a simple "No" to a more leading question, and I do not credit that response. Indeed, there is no other reasonable explanation for Fish's request to Aquila that she talk to Seaman other than to influence Seaman's processing of the grievance. Since I have found that Fish intended to convey a subtle threat to Seaman to withdraw his grievance, I cannot credit Fish's

attempt to deny that he made the above remarks directly to Seaman on September 28, 1984. That finding is consistent with Sgt. Hannah's testimony that the relationship between Seaman and Fish deteriorated after Seaman filed his grievance (T 1 p. 30).

8. On October 16, 1984 Seaman appealed his grievance and requested a step-two hearing (CP-7, R-1). That same day a personnel form (Exhibit CP-8) known as a "return slip" was signed and placed on CP-6, the CS-21 form requesting Seaman's "Y" position. CP-8 stopped the processing of CP-6 and listed the reason as:

The Chief has decided not to do anything on this CS-21 regarding Joseph Seaman.

No reasons were immediately given for CP-8, nor was Seaman immediately notified of the action.

On November 6, 1984 Hannah returned to active duty at Marlboro. On November 19, 1984 Seaman had his second-step grievance hearing before a Department hearing officer and his grievance was again denied (R-1). On November 29, 1984 Seaman (and Officers Gonzalez and Aquila) sent a letter (Exhibit CP-9) to the Civil Service Commission requesting an investigation into events that had transpired regarding the promotional opportunities for sergeant at Marlboro. On December 12, 1984 Seaman (and Gonzalez) sent a letter (Exhibit CP-10) to Chief Ferrara inquiring into the status of his promotion to sergeant. On December 14, 1984 (Exhibit CP-11) Ferrara responded to CP-10 and for the first time informed Seaman that there would no longer be "in-house" promotions and that he was attempting to have a statewide examination for sergeant for the Human Services Police.

After November 19, 1984 Seaman appealed his grievance to a third-step hearing and that hearing was held on January 28, 1985 before another Department hearing officer who denied the grievance (R-1). That same day, Hannah reported back to Trenton Psychiatric Hospital (T 1 p. 32). On January 30, 1985 Chief Ferrara prepared a memorandum (Exhibit CP-13) intending to temporarily transfer Seaman to Menlo Park effective February 9, 1985. The Charge was filed on February 5, 1985. Chief Ferrara resigned in February 1985, and was replaced by Chief Brennan (T 1 p. 39).

On March 21, 1985 Seaman appealed the results of his third-step grievance hearing, and by letter of July 24, 1985 (R-1) the Civil Service Commission President denied Seaman's request to review the matter.

9. Both Kosco and Fish testified that the reason Seaman did not receive the "Y" position was because Hannah returned from sick leave a month earlier than expected and therefore they did not need Seaman in that position (T 1 pp. 177, 184, 196, T 2 pp. 24, 49). They also testified that the reason Seaman did not receive a promotion to sergeant was allegedly because Civil Service was going to approve their request for centralization of promotions on a statewide basis (T 1 p. 178, T 2 p. 55). I do not credit either Kosco or Fish as to why Seaman did not receive his "Y" position, and particularly as to why Seaman did not receive his promotion.

With regard to the "Y" position, Fish testified that he could not remember when he told the Chief to do nothing about the

"Y" position (T 2 p. 71). But I have already found that Fish communicated a threat to Seaman through Aquila prior to September 28, 1984, then conveyed the threat directly on September 28 that if he did not withdraw the grievance he would jeopardize his promotion. It is only reasonable to conclude that that threat also was intended to affect the "Y" position. Obviously Hannah came back earlier than expected, but Fish did not know until October that Hannah was coming back earlier. Fish did know on September 28, however, that Seaman was not going to capitulate to his (Fish's) threat, and I believe that it was at that point, on September 28, that Fish decided to implement his threat and decided that he would recommend that the "Y" position not be filled. Although two additional signatures were needed on CP-6 to complete the document, those signatures were a mere formality because both the appointing authority for the promotion, Ferrara, and the appointing authority for payroll, Sorensen, had already signed the document. Thus, I find that had it not been for Seaman's refusal to withdraw his grievance he would have been placed in the "Y" position and received the higher salary.

With regard to the promotion, I do not believe either Kosco or Fish that the reason Seaman was not promoted was due to the Department's desire to centralize promotions.

First, as Kosco admitted, the move to reorganize and centralize the Human Services Police force began in late 1983. Although many changes had not been implemented by the Summer of

1984, Kosco, Fish and Ferrara certainly knew by July 1984 that they wanted to centralize promotions and eliminate "in-house" promotions. Yet, on July 23, 1984 both Fish and Ferrara recommended Seaman for an "in-house" promotion. Neither Fish nor Kosco told Seaman that his promotion could be jeopardized by their plan to centralize promotions (T 1 p. 189, T 2 p. 92), and the obvious reason they did not tell Seaman was because neither Fish nor Ferrara intended the centralization to affect Seaman's promotion. It was only after the grievance was filed, and after Seaman refused to withdraw the grievance, that Kosco and Fish used the excuse of the centralization as the reason to stop Seaman's promotion.

Second, even Kosco's and Fish's own testimony fails to support their assertion that Seaman's promotion was stopped because of the centralization and because of information from Civil Service. Kosco testified that the Chief made a decision to cut off "in-house" promotions" (T 1 p. 175), but he could not fix any particular time when that cutoff decision had been made. He admitted that there was no official cutoff date (T 1 p. 186), that there was nothing in writing from the Chief about a cutoff date (T 1 pp. 191-192), but only that the decision was made somewhere in the Fall of 1984 (T 1 p. 190). Since centralization of promotions appeared to be an important objective of the Chief and Administrative Order 1:50, I believe Kosco would have remember any cutoff date for "in-house" promotions if there had been one. I do not believe there was one, certainly not during the Fall of 1984.

The "in-house" Civil Service promotional list at Marlboro was valid in 1984 (and 1985) and the Chief had the authority to promote Seaman off of that list. Any assertion that the Chief changed the system was specious. In fact, Kosco apparently unintentionally admitted that he did not discuss the intent to cut off "in-house" promotions with the employees until January 1985, and then under cross-examination he quickly said the decision was made in late Summer 1984 (T 1 p. 192). I do not believe Kosco. Even if the decision was made in late Summer 1984, Seaman's promotion was made prior thereto, and it is not reasonable that that promotion would be stopped.

In addition, Kosco alleged that there had been three meetings with Civil Service prior to the Fall of 1984 but he could not remember when they were (T 1 pp. 180-181), and he had nothing in writing from his own Personnel Office whom he alleged told him not to make any promotions (T 1 p. 210). Once again, if those events really occurred, and really occurred when Kosco alleged that they occurred, there would be some documentation to support the testimony, or some Civil Service officials to corroborate the testimony. The State, however, offered neither documents nor Civil Service officials to support this position.

Similarly, Fish admitted that there was nothing in writing to prove when a decision to cut off promotions was made (T 2 p. 58), and he admitted that he never personally spoke to or communicated with anyone at Civil Service regarding promotions, and that Civil

Service never actually did anything with respect to centralization in the Fall of 1984 (T 2 pp. 62-63).

Both Fish and Kosco alleged it was "merely coincidence" that Seaman's promotion was stopped at the same time his grievance was filed and being pursued (T 1 p. 193, T 2 pp. 62, 73), but I believe it was intentional.

Third, Davis' testimony was offered by the Charging Party to rebut Kosco's testimony that Seaman's promotion was stopped because of the centralization of promotions. In late 1984 Davis was a sergeant in the Department's Police Operations Section in Trenton. In early January 1985 he recommended two patrolmen, Trahesky and Fattori, be promoted to sergeant. Davis testified that when he made the recommendation for Fattori, Kosco and the Chief told him that they could not promote Fattori because it would show some inconsistency with respect to the Department's position in the instant Charge (T 2 pp. 107-108). Davis further testified that Kosco promised Fattori that the promotion would be made after the Charge was resolved (T 2 p. 108). Davis indicated that Fattori's promotion would have been off of an "in-house" promotional list, and that the delay in promoting Trahesky and Fattori was because of the Charge (T 2 pp. 108, 111).

In addition, Davis indicated that in November 1985, in preparing for the instant hearing, Kosco asked him to gather information about the meetings the Chief had with the Human Services Commissioner about statewide promotional examinations. Davis

testified that Kosco wanted his (Davis') testimony to be that the decision for statewide Department promotions was made after his (Davis') and Vitoritt's promotions (T 2 pp. 110-111). Both Davis and Vitoritt were promoted in early Spring 1984. Davis testified that the testimony he was asked to give would not have been the truth (T 2 p. 111). After gathering the information Davis advised Kosco that the information could be detrimental to the testimony Kosco had asked him to give (T 2 pp. 110-111).

The State offered Kosco to rebut Davis' testimony. I find, however, that the State failed to overcome that testimony. Kosco testified that the instant Charge had nothing to do with the promotions for Trahesky and Fattori, but when asked if he ever made a statement to Davis that those officers would not be promoted while the Charge was pending he responded, "No, I don't recall making that" (T 2 p. 144), and when asked if he promised Trahesky and Fattori that they would be promoted when the Charge was disposed of Kosco responded, "No I don't recall that." (T 2 p. 144). Kosco's responses are not direct and emphatic denials. Having had the opportunity to observe the demeanor of both Davis and Kosco I find Davis to be the far more reliable witness. Davis was calm and clearly responsive to the questions even under cross-examination. Kosco, however, was more nervous, fidgety and generally uncomfortable looking while he testified and his answers were often unresponsive to the questions. I found Davis to be the more truthful witness and, therefore, I find that Kosco did make the statements attributed to him.

Additionally, despite admitting that he asked Davis about documents regarding this Charge, Kosco testified that he did not talk to Davis about his testimony (T 2 p. 135), and did not tell him how to testify (T 1 p. 137). However, after another vigorous cross-examination Kosco was asked:

You never told him [Davis] what you'd like the testimony at this hearing to come out as?

and Kosco responded:

Negative. I was only interested in supporting my view in that respect. (T 2 p. 151).

I find that response to be an admission that Kosco wanted Davis to testify in support of his (Kosco's) view of the Charge, and I, therefore, refuse to credit Kosco's testimony denying that he asked Davis to testify a certain way.

The State attempted to impeach Davis' testimony by showing that Kosco had reprimanded him in December 1985 to demonstrate a motive for Davis to fabricate his testimony. Kosco testified that Davis was reprimanded for insubordination in not obeying Kosco's order not to use overtime in certain circumstances (T 2 pp. 138-139). The State also showed that Davis has filed many grievances against Kosco as a result of the reprimand (T 2 pp. 140-141). The State further showed that when State's counsel informally discussed this Charge with Davis on October 30, 1985 (prior to hearing), Davis never told State's counsel that Kosco told him (Davis) that Seaman would never make sergeant, and that Kosco told him (Davis) that Trahesky and Fattori would not be promoted because of Seaman's case (T 2 pp. 125, 131-132).

Davis admitted that he did not tell State's counsel about Kosco's remarks (T 2 pp. 125, 132), and he testified that he did not tell her about the remark regarding Trahasky and Fattori because he was not asked about that (T 2 p. 132). He also freely admitted that Kosco had reprimanded him and that he filed grievances against Kosco.

Although I recognize that a motive existed for Davis to fabricate testimony against Kosco, I completely credit Davis based upon many of the above credibility findings. Kosco proved to be an unreliable witness not only vis-a-vis the circumstances regarding Davis, but vis-a-vis his testimony regarding the reasons for stopping Seaman's "Y" position and his promotion. Davis' testimony is actually consistent with the other credited testimony in this case. Having observed Kosco and found him to be untruthful, I believe that Kosco did make the remarks that were attributed to him by Davis.

10. Although there have been certain changes in the Department since 1984 regarding sergeant positions, the record shows that currently there are sergeant vacancies in the Department (T 2 p. 15), that the sergeant position at Marlboro was cleared by the Vacancy Review Board (T 1 p. 122, T 2 p. 4), and at least one sergeant position is still available at Marlboro (T 1 p. 123, T 2 p. 85).

Analysis

Based upon the numerous credibility determinations made above, I find that the State violated §§5.4(a)(3) and derivatively

5.4(a)(1) of the Act by not placing Seaman into a "Y" position and by not permanently promoting him to sergeant at Marlboro because he filed a grievance pursuant to J-1. Additionally, I find that the State independently violated §5.4(a)(1) of the Act when Fish threatened Seaman in hope that he would withdraw his grievance.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court adopted the private sector dual motive test in analyzing (a)(3) cases. Under that test the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the State's decision to stop his promotion. If the Charging Party meets that test, the State has the burden to show that the same action would have occurred - based upon legitimate business considerations - even in the absence of protected activity. 95 N.J. at 242. The Court in Bridgewater held that to make a prima facie case the existence of protected activity must be established, the employer's awareness of the protected activity must be established, and it must be shown that the employer was hostile toward the exercise of the protected activity. 95 N.J. at 246.

The Failure to Promote

In the instant case the existence of a protected activity, the filing of CP-7, has been clearly established. The Commission has often held that the filing of a grievance is protected activity. Lakewood Bd.Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461

(¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Pine Hill Bd.Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1986); and Hunterdon County Sheriff, P.E.R.C. No. 87-13, 12 NJPER ____ (¶____ 1986). In addition, the State was obviously aware of CP-7 as evidenced by the processing of the grievance in R-1.

The Charging Party established that the State, i.e., Kosco and Fish, was hostile towards him because he filed and processed the grievance as evidenced by testimony from Aquila, Seaman and Davis as credited above. Their collective testimony showed that Seaman was considered to be "making waves" because he filed a grievance at the time the Department was processing his promotion. That was evidence of hostility. Thus, the Charging Party met his burden of establishing the prima facie case.

The State, however, failed to meet its burden of proving that Seaman would not have been promoted even absent the filing of a grievance. Ferrara, Fish and Kosco knew in late 1983 and certainly in early 1984 that they wanted to centralize promotions on a statewide basis for Human Services Police, yet they recommended Seaman's promotion off an "in-house" promotional list in July 1984. Even though the centralization had not been fully implemented by that time, they knew what their goal was regarding departmental promotions, yet they still decided to promote Seaman because they did not intend the centralization to affect his promotion. Even if the centralization was to become effective in the Fall of 1984, the

effective recommendations for Seaman's promotion preceded the centralization.

There was no legitimate reason for the Chief to withdraw the recommendation. The State merely used the centralization as an excuse to cover up its unlawful actions. The State could not overcome obvious inferences to be drawn from the timing of the filing of the grievance and the decision not to promote. I found Fish and Kosco to be unreliable witnesses who did not advance a plausible explanation for the State's actions particularly regarding the failure to promote Seaman to a permanent sergeant position. Indeed, I found that the Department was refraining from making other "in-house" promotions pending the completion of this case for fear it might (and did) nullify the State's centralization defense.

The State's explanation for not placing Seaman in the "Y" position was equally unreliable. Certainly it was convenient for the State to stop Seaman's placement in the "Y" position because Hannah was returning early, but the grievance was the real catalyst for cancelling the "Y" position. It was not coincidence that the "Y" position was cancelled by CP-8 on the same day Seaman appealed his grievance. I am, therefore, not convinced that the "Y" position would have been cancelled even absent the protected activity.

Accordingly, I find that the State violated §5.4(a)(3) of the Act by failing to place Seaman in a "Y" position and by failing to promote him to a permanent sergeant position.

The Threat

The State, i.e., Fish, committed an independent violation of §5.4(a)(1) of the Act by intimidating and threatening Seaman, first through Aquila, and then directly to Seaman, to withdraw his grievance. Although motive is not even needed to prove an independent violation of §5.4(a)(1) of the Act, N.J. College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1976), Fish certainly intended to intimidate Seaman by conveying that if he did not withdraw his grievance his promotion would be affected. At the very least, Fish's remarks reasonably tended to interfere with Seaman's exercise of protected activity. Commercial Tp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982) aff'd App. Div. Docket No. A-1642-82T2 (12/8/83); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79).

The 5.4(a)(4) Allegation

The Charging Party did not establish that he was discriminated against for filing the Charge or for testifying at this hearing. Thus, the 5.4(a)(4) allegation should be dismissed.

Remedy

Seaman is entitled to receive the monetary difference between what he received and what he would have received had he been placed in the "Y" position effective September 1, 1984, the date set forth in CP-6, through November 5, 1984, the day prior to Hannah's return, plus interest on the monetary difference to date. The

Commission has the authority to award interest as provided by law. See Collingswood Bd.Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985). Pursuant to New Jersey Civil Practice Court Rules, R.4:42-11, Seaman should receive the annual rate of 12% interest on the monetary difference for the period from November 5, 1984 through January 1, 1986 and the annual rate of 9.5% interest on the monetary difference from January 2, 1986 to the present.

Seaman is also entitled to be promoted to the rank of sergeant at Marlboro Psychiatric Hospital retroactive to December 8, 1984.^{5/} He should receive the monetary difference between what he earned from December 8, 1984 to the present and what he would have earned for that period if he had been promoted to sergeant effective December 8, 1984, plus interest from December 8, 1984 to the present. Pursuant to R.4:42-11, Seaman should receive the annual rate of 12% interest on the monetary difference for the period from December 8, 1984 through January 1, 1986, and the annual rate of 9.5% interest on the accumulated monetary difference from January 2, 1986 through the present. Included in that remedy are any negotiated increases Seaman would have received during that period pursuant to the collective negotiations agreement negotiated with

^{5/} The record shows that Seaman expected to be promoted no later than Hannah's expected return from extended sick leave. Since CP-6 placed Hannah's expected return for December 7, 1984, I have selected December 8 as the day Seaman's promotion would have become effective even though Hannah returned on November 6, 1984.

the majority representative representing Human Services sergeants, as well as any other additional benefits he would have received as a member of that unit.

In addition, the remedy is specifically intended to require the State to assign Sgt. Seaman to Marlboro Psychiatric Hospital. Although Seaman signed CP-3 on July 3, 1984 recognizing he could be transferred to another location, that was before the State committed the instant unlawful act. The record shows that as of the close of hearing at least one sergeant position was still available at Marlboro. Even if that position has subsequently been filled, the State cannot now benefit from its previous unlawful act. Thus, the State cannot now argue that no sergeant positions exist at Marlboro as a defense to implementing this remedy. In addition, any attempt to involuntarily transfer Seaman from Marlboro to another location absent legitimate business reasons could result in another violation.

Finally, the remedy is intended to give Seaman all Civil Service and other seniority in a sergeant's position at Marlboro. Thus, his employment records should reflect a starting date in a sergeant's position at Marlboro effective December 8, 1984.

Attorney's Fees and Costs of Suit

The Charging Party asked for attorney's fees and cost of suit in this matter. Although I believe that attorney's fees might be appropriate here due to the egregious nature of the State's conduct toward Seaman, the Commission may lack the authority to issue such a remedy. See, Commercial Tp. Bd.Ed. v. Commercial Tp.

Supportive Staff Assoc., et al., App. Div. Dkt. No. A-1642-82T2, 10 NJPER 78 (¶15043 12/8/83). Therefore, that request is denied.

Based upon the entire record I make the following:

Conclusion of Law

1. The State violated §§5.4(a)(3) and derivatively 5.4(a)(1) of the Act, and independently violated §5.4(a)(1) of the Act, first by failing to place the Charging Party in a temporary sergeant position, and by threatening and failing to promote the Charging Party to a permanent sergeant position because he filed a grievance.
2. The State did not violate §5.4(a)(4) of the Act by any of its actions.

Recommended Order

I recommend that the Commission Order:

A. That the State cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by threatening Joseph Seaman that his filing and processing a grievance might jeopardize his promotional opportunities.
2. Discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act particularly by failing and refusing to promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital effective December 8, 1984 because he filed a grievance.

B. That the State take the following affirmative action:

1. Pay Joseph Seaman the monetary difference between what he received and what he would have received had he been placed in a temporary sergeant position (the "Y" position) effective September 1, 1984 through November 5, 1984, plus interest on the monetary difference to date in accordance with R.4:42-11, supra.

2. Promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital retroactive to an effective date of December 8, 1984, and adjust his records to reflect seniority in that position and at that location consistent with the effective date.

3. Pay Joseph Seaman the monetary difference between what he received from December 8, 1984 to date, and what he would have received for that time period had he been promoted to sergeant on December 8, 1984, plus interest on the monetary difference to date in accordance with R.4:42-11, supra.


4. Provide Joseph Seaman with any other benefits he would have received (such as additional sick, vacation or personal leave) had he been in the unit which included Human Services sergeants effective December 8, 1984.

5. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative,

shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

6. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. That the Complaint be dismissed regarding the §5.4(a)(4) allegation.


Arnold H. Zudick
Hearing Examiner

Dated: September 19, 1986
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act particularly by threatening Joseph Seaman that his filing and processing a grievance might jeopardize his promotional opportunities.

WE WILL cease and desist from discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act particularly by failing and refusing to promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital because he filed a grievance pursuant to his collective agreement.

WE WILL immediately pay Joseph Seaman the monetary difference between what he received and what he would have received had he been placed in a temporary sergeant position effective September 1, 1984 through November 5, 1984, plus interest on the monetary difference to date in accordance with court rules.

WE WILL immediately promote Joseph Seaman to the rank of sergeant at Marlboro Psychiatric Hospital retroactive to an effective date of December 8, 1984, and adjust his employment records to reflect seniority in that position and at that location consistent with the effective date.

WE WILL immediately pay Joseph Seaman the monetary difference between what he received from December 8, 1984 to date, and what he would have received for that time period had he been promoted to sergeant on December 8, 1984, plus interest on the monetary difference to date in accordance with court rules.

WE WILL immediately provide Joseph Seaman with any other benefits he would have received had he been in the unit which included Human Services sergeants effective December 8, 1984.

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES

(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, CN 429 495 W. State Street, Trenton, New Jersey 08625. Telephone (609) 292-9830