P.E.R.C. NO. 96-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN COUNTY,

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses the subsection 5.4(a)(2) allegation of a Complaint based on an unfair practice charge filed by PBA Local 302 against Warren County. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act by terminating Correction Officer Deborah Ellison in retaliation for her exercising rights protected by the Act. The Commission remands the remaining issue to the Hearing Examiner for clarification and a supplemental report reapplying the standards set forth In re Bridgewater Tp., 95 N.J. 235 (1984).

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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PBA LOCAL 302,

Charging Party.

Appearances:

For the Respondent, David A. Wallace, attorney

For the Charging Party, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys (Jacqueline Jassner, of counsel)

DECISION AND ORDER

On March 17, 1994, PBA Local 302 filed an unfair practice charge against Warren County. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (3),[1/] by terminating correction officer Deborah Ellison in retaliation for her exercising rights protected by the Act.

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

On April 25, 1994, a Complaint and Notice of Hearing issued. On May 26, the employer filed its Answer generally denying the allegations.

On October 13, December 9 and December 16, 1994, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On June 20, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-26, 21 NJPER 255 (¶26164 1995). He recommended dismissing the subsection 5.4(a)(2) allegation because he found no evidence to support it. He recommended dismissing the subsection 5.4(a)(1) and (3) allegations based on his application of the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

On July 17, 1995, PBA filed exceptions. On August 7, the employer filed cross-exceptions and an answering brief.

We adopt the Hearing Examiner's recommendation to dismiss the subsection 5.4(a)(2) allegation. Nothing in the record suggests that the County has dominated or interfered with the formation, existence or administration of any employee organization.

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee

engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected 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 has proven, 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 proven, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

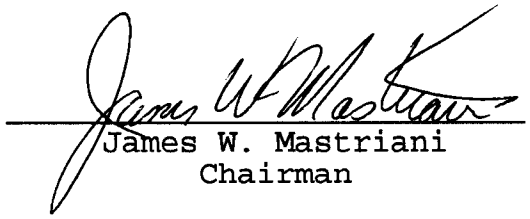
We are unable to render a final administrative decision on this record for the following reasons. Although the Hearing Examiner appears to have found that the employer was hostile toward Ellison's protected activity, he did not specifically articulate whether or not her protected activity was a substantial or motivating factor in her termination. In addition, rather than specifically decide whether or not the employer would have terminated Ellison even absent her protected activity, the Hearing Examiner found that insubordination was the substantial or motivating factor in her termination and not her protected

activity. Finally, the Hearing Examiner did not fully consider the union's claim that the employer's second reason for the termination was pretextual. Accordingly, we remand this matter for clarification and a supplemental report reapplying the Bridgewater analysis.

ORDER

The subsection 5.4(a)(2) allegation is dismissed. This matter is remanded to the Hearing Examiner for a supplemental report consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. Commissioner Klagholz was not present.

DATED: November 27, 1995
Trenton, New Jersey
ISSUED: November 28, 1995

H.E. NO. 95-26

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

In the Matter of

WARREN COUNTY

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that Warren County did not terminate Deborah Ellison in retaliation for her having exercised rights protected by the New Jersey Employer-Employee Relations Act. The Hearing Examiner found that the reason for Ellison's termination was her refusal to submit to pepper mace exposure, a requisite component of her correction officer retraining.

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. 95-26

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

In the Matter of

WARREN COUNTY

Respondent,

-and- Docket No. CO-H-94-280

PBA LOCAL 302

Charging Party.

Appearances:

For the Respondent, David A. Wallace, attorney

For the Charging Party, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, attorneys (Jacqueline Jassner, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 17, 1994, PBA Local 302 (PBA or Charging Party) filed an Unfair Practice Charge (C-3)[1/] with the Public Employment Relations Commission (Commission) against the County of Warren (County or Respondent). The PBA alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

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1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "J" refer to Exhibits submitted jointly by the parties, exhibits marked "CP" refer to Charging Party exhibits and those marked "R" refer to Respondent exhibits. Transcript citations 1T1 refers to the transcript developed on October 13, 1994 at page 1, 2T and 3T refer to the transcripts developed on December 9 and December 16, 1994, respectively.

seq. (Act), specifically Sections 5.4(a)(1), (2) and (3),[2/] by terminating correction officer Deborah Ellison in retaliation for exercising rights protected by the Act.

On April 25, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On May 26, 1994, the County filed its Answer (C-2) generally denying the allegations contained in the Charge. Hearings were conducted on October 13, December 9 and December 16, 1994, at the Commission's Offices in Newark, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by April 17, 1995.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the County is a public employer, the PBA is a public employee representative and that

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

Deborah Ellison was a public employee within the meaning of the Act (1T9-1T10) at all times relevant to this charge.

2. Warren County correction officers are subject to the Civil Service Law, N.J.S.A. 11A:1-1 et seq. and the Administrative Rules, N.J.A.C. 4A:1-1 et seq., administered by the Department of Personnel (DOP). In the latter part of 1988, Ellison was hired by Middlesex County to work as a juvenile detention officer (1T15; 1T32). She held that position for approximately a year and a half (1T15). Juvenile detention officer is a DOP title, and, consequently, is subject to DOP Rules and Regulations (1T33). While serving as a juvenile detention officer, Ellison took a DOP administered examination for correction officer for Middlesex County. After passing the examination, Middlesex County provided Ellison with correction officer training by sending her to the Correction Officer Training Academy (COTA) and, subsequently, giving her additional "agency" training at the Middlesex County Adult Correctional Center. "Agency" training includes training in the state mandated sixty-five performance objectives as well as policies, procedures, and orientation information which are unique to the particular correctional facility (1T127-1T132). Ellison received a total of 10 weeks of COTA and agency training as a Middlesex County correction officer (1T116). Having first taken and passed the DOP examination, Ellison obtained permanent status in her Middlesex County correction officer position upon completion of her COTA training (3T70). Ellison worked as a Middlesex County

Correction Officer for approximately six months (1T15; 1T32-1T33; 2T17). On November 18, 1991, approximately one year after she left the Middlesex County correction officer position, Ellison was hired in Warren County as a correction officer (1T16; 2T154). Ellison's civil service status in the Warren County position was as a "provisional" employee, subject to taking and passing a DOP administered examination in order to achieve permanent status in the job (1T26).

3. In June, 1992, Ellison was assigned to the 4:00 p.m. to midnight shift at the Warren County Correctional Facility. On June 29, 1992, Ellison wrote a letter to Deputy Warden Sacco requesting that she be reassigned to the day shift (8:00 a.m. to 4:00 p.m.). Ellison's shift change request was denied and a less senior correction officer was assigned to the day shift.

4. Ellison testified that Sacco directed her to speak to Warden Leonard McGhee concerning the denial of her request to move to the day shift (1T111). Ellison spoke to McGhee, who confirmed that her request to move to the day shift was denied because there were sufficient women already serving on the day shift and not enough women to serve during her current shift (1T111). Ellison stated that McGhee told her that if she did not agree with his decision, she could file a grievance. However, McGhee told Ellison to remember that she was only a provisional employee and, thus, had no permanent rights to the position (1T111). Ellison considered McGhee's statement regarding her provisional status as a veiled

threat that she could be fired if she filed too many grievances (1T111). McGhee testified that he did not recall saying that Ellison had better remember that she was only a provisional employee (2T153). I find that McGhee made such a statement. McGhee did not deny making the statement, he merely indicated that he did not recall making the statement. I note that the arbitrator (see Finding of Fact No. 5) also found in his award that McGhee reminded Ellison that she was a provisional employee (J-2, p. 6). I also find that such statement does convey a veiled threat to a non-permanent employee filing grievances. The grievance was unrelated to Ellison's employment status as a provisional. There was no reason for McGhee to remind Ellison that she held only a provisional appointment, thus it was reasonable for Ellison to infer that the statement threatened her right to file a grievance.

5. On or about July 27, 1992, the PBA filed a grievance on Ellison's behalf contesting the County's refusal to transfer her to the day shift (J-3). That grievance was processed through the various steps of the grievance procedure included in the parties' collective agreement (J-1) and, concluded in binding arbitration (J-2).

6. On September 14, 1992, during the pendency of the grievance, Ellison resigned (1T16).[3/] On June 14, 1993, the arbitrator found that the County violated the collective agreement by failing to reassign Ellison to the day shift and ordered that she be reinstated on the day shift without back pay, but with her seniority intact (J-2).

7. As the result of the arbitrator's award, on or about July 7, 1993, McGhee wrote Ellison a letter advising her to report for duty on July 16, 1993 (1T36). On July 13, 1993, Ellison's attorney wrote McGhee a letter indicating that she had been injured in an automobile accident and was temporarily unable to perform her correction officer duties. The letter requested that Ellison be placed on an approved medical leave of absence until such time as her doctor certified that she was medically fit to return to duty (R-1). On July 15, 1993, Ellison reported to McGhee's office, told him that she had injured her leg in the automobile accident and would be visiting her doctor the next day (1T45). On July 16, Ellison returned with a doctor's note indicating the nature of her injury and that she would be unable to return to work for one month (R-2; 1T46). On July 16, McGhee sent a memorandum to the County

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3/ During the hearing, Charging Party repeatedly referred to Ellison's September 14, 1992 departure from employment as a "constructive discharge." Charging Party's characterization is not supported by the evidence. The arbitrator specifically stated that "...there is no evidence before the arbitrator to make a determination that the grievance's resignation constitutes constructive discharge..." (J-2 at p. 12). Thus, I find that on September 14, 1992, Ellison resigned.

Personnel Director, which essentially indicated that Ellison had asked to be placed on an unpaid medical leave of absence. McGhee suggested the leave be granted (R-3). The collective agreement (J-1) at Article 11, Section 9, Leaves Without Pay, provides in relevant part the following:

> The grant or denial of a request for leave without pay is discretionary with the County. The request must be made in advance and must be recommended by the employee's department head, with the appointing authority retaining the ultimate decision-making power.

On August 12, 1993, Ellison wrote a letter to McGhee requesting an extension of her medical leave of absence until September 1, 1993 (R-5; 1T56). Ellison provided McGhee with a supporting doctor's note (R-4; 1T55).

8. Ellison returned to work on September 1, 1993 (R-6; 1T58). On that day, Ellison was required to undergo a physical examination conducted by the County's doctor (2T110). Ellison characterized the examination as "very thorough" (1T59). Ellison was given a medical form which inquired into her past medical history, industrial history and general physical characteristics (R-7). Ellison personally filled out only the top portion of the first page which dealt with the name of the employer, the job applied for, the employee's name, address, age, sex, and date (1T62). The balance of the form, including the past medical history and industrial history sections, were completed by the doctor (1T62-1T63; 1T121). Although Ellison signed the form attesting to

the accuracy of the medical and industrial history sections before they were completed, she testified that the information contained on the form was accurate (1T63-1T64). The general physical characteristics portion of R-7 indicates with respect to nose, throat and thyroid the presence of "normal mucosa." Although the examination focused on Ellison's knee, the doctor's remarks state: "Apparently normal exam. No restrictions, limitations, may do full duties" (R-7). Ellison did not advise the doctor during the course of the examination that she was suffering from a sinus or ear infection (1T61; 1T66-1T68). Although Ellison was aware that she had a medical problem with her ear and sinuses, she admitted that it was "...nothing that would keep me from doing my job" (1T60-1T61).

9. A drug test was administered on Ellison as a routine part of the examination. The prescription drugs which Ellison was taking were listed in the special instructions portion of the laboratory form (R-7, p. 3; 1T71).

10. In July, 1993, when Ellison was initially scheduled to return to active duty, McGhee met with Training Supervisor Robert Brothers and his assistant Training Officer Frank Eisley to discuss her training needs (2T20). They decided to train Ellison in the new policies and procedures adopted at the facility and retrain her in CPR, PR 24 (night stick), pepper mace, report writing, self defense and searches (2T21). While no formal policy exists regarding retraining of correction officers returning from leaves of absence, the practice has been for the warden and the training staff to meet

and review the training needs of the returning officer (2T43; 2T120). The warden and the training staff reviewed the returning officer's certifications to determine whether they were current or expired. The degree of retraining was based upon the status of the officer's certifications and the length of the leave of absence (2T120). Pursuant to the Police Training Commission's standards, the warden has the authority to retrain any officer returning from a leave of absence (2T120-2T121). Other officers who have returned to active duty after leaves of absence have gone through retraining based upon the status of their certifications, and the length of their leaves of absence (2T42). Since 1993, it was policy at the facility for employees returning from leaves of absence to be given agency training if their certifications had expired during the period of their leaves (1T194-1T145). Officers required to go through agency training received instruction in pepper mace, since they had not previously received such instruction and were not certified in that area (1T145).

11. Although on September 1, Ellison was classified as returning from an approved six week medical leave of absence, she was actually off the job since September 14, 1992, the date of her resignation (1T16). Since McGhee had become warden in August, 1991, no officer had been off the job for as long as Ellison (2T107; 2T120). Consequently, McGhee advised the training officers to administer the entire agency training program to Ellison (2T120).

12. The warden decided to include the use of pepper mace as a means to help control violent inmates before more aggressive means of restraint were employed. Thus, in January 1993, training in pepper mace was included as part of the agency training program administered to certain correction officers at the facility (1T141). Between January and March 1993, all supervisors and SERT (Special Emergency Response Team) members were trained in the use of pepper mace (1T142-1T143; 1T145). As of approximately March 1993, all new employees were required to undergo mace training (1T145; R-8). The training consisted of three quarters of a day of classroom instruction (1T142). Upon successfully completing classroom instruction, the officer was sprayed with mace in order to obtain actual experience and understanding concerning the effects of the substance (1T142).

13. On May 7, 1993, McGhee issued a memorandum to the training unit stating that since all SERT and supervisory employees had completed pepper mace training, the training unit should begin training the line staff. McGhee ordered all newly hired correction officers be given pepper mace training during the agency training program. McGhee stated "as soon as I can figure out a pleasant way to expose the older staff members, I will let you know" (R-8). Senior custody staff have not been certified in pepper mace because McGhee and the PBA could not agree on an acceptable training format (2T117).

14. Between January 1993 and September 1993, fifteen correction officers were certified in pepper mace, ten were either sergeants or SERT members (2T62). The remaining five correction officers receiving mace certifications were new hires (2T64).

15. Other correction officers returned to active duty following their leaves of absence (2T65-2T67). Correction Officers House, Jacobs and Stark returned to active duty after concluding their leaves of absence. Although Correction Officer Monoco was out of work, the record does not establish whether or not he had taken a leave of absence (2T66). Nor does the record establish whether House, Jacobs or Stark took leaves of absence during calendar year 1993 (2T65-2T66). If their leaves of absence occurred prior to 1993, there was no mandate to train these officers in pepper mace. McGhee testified that other correction officers' longest leaves of absence lasted approximately six months (2T119). Ellison contends that House had a ten month break in service, Jacobs was out for 8 or 9 months, and Correction Officer Kowalski may have been out for 7 or 8 months (1T115). However, I find Ellison's testimony to be somewhat prone to unsupported assertions and inaccuracies. For example, one of Ellison's claims in this case is that the County's contention that it discharged her for failing to file for and take the October 31, 1992 DOP examination for county correction officer is pretextual. In support, she raises the employment circumstance of Correction Officer Rouse. Ellison testified that Rouse was hired a few months after her as a provisional employee, he, like her,

failed to take the DOP examination to obtain permanent employment status, and, yet, he was not terminated by the County (1T30-1T31). However, the record establishes that Rouse did take and pass the DOP examination and was appointed to a permanent position (2T151-2T152; R-11). Also, Ellison asserted that Warden McGhee allowed other employees at the correctional facility to take the October 31, 1992, DOP corrections officer examination on a "walk-in" basis, but did not allow her to do so (1T108). In fact, Ellison sat for the October 31, 1992 examination as a "walk-in" (3T92-3T95). Further, I take administrative notice of the fact that entrance to sit for the examination is controlled by DOP rules and regulations, not by McGhee. Thus, I find Ellison's testimony, in general, to be less authoritative and credit McGhee's testimony that other correction officers' leaves of absence lasted about six months. Moreover, I find that McGhee was in a better position to know the duration of other officers' leaves. Ellison was the only correction officer returning to active duty from a leave of absence[4/] who underwent pepper mace training.

16. On September 1, 1993, during a conversation with Eisley, Ellison contends that in addition to asking him why she was

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4/ While, technically, Ellison's return to active duty was preceded by a "leave of absence" of less than six months, viewing her break in service in that manner is misleading. The more accurate description is that Ellison was out of work for approximately one year. This distinguishes her situation from that of the other correction officers returning from leaves of absence.

being required to go through complete agency training unlike other returning officers, she also told Eisley that she could not be sprayed with mace, because she was having sinus and ear problems (1T18). Ellison testified that she told Eisley and Brothers that she could not be sprayed with mace because of her medical problems on several occasions. In addition to the September 1 conversation with Eisley, which she said Brothers overheard, Ellison testified that she told Eisley on September 4th or 5th that she was having problems with her ear and sinuses and advised Brothers on September 7th or 8th of her medical problems (3T12-3T13).

17. On September 1, 1993, Eisley told Ellison that included in the then current agency training program, she would be certified in pepper mace which, as a final step, included actual exposure (1T18; 2T83). Eisley testified that Ellison raised no complaint concerning her training generally or regarding pepper mace specifically. Eisley stated that Ellison's only request was that she be given one day's notice before being sprayed, so that she would not wear her contact lenses (2T84). Eisley testified that he had no conversations with Ellison between September 1 and September 16 regarding her pepper mace training (2T85; 3T119). In the afternoon of September 15, 1993, Ellison was assigned to "center control" (2T26; 2T85). Eisley advised Ellison that she would be sprayed with pepper mace on the following day as the final step in her training. Ellison told Eisley that she would not submit to the exposure (2T85-2T86; R-10). Eisley stated that on September 15, he

was unaware of any claim by Ellison that she was encountering medical problems that would prevent her from completing her training (3T118-3T120). Ellison told Eisley that she was unwilling to be sprayed because none of the other senior officers had been sprayed (2T92; R-10). Eisley told Ellison that since pepper mace was added to the agency training program, all officers that went through the two week agency training program were sprayed and videotaped (R-10). After Eisley's conversation with Ellison, he immediately told Brothers (2T86).

18. Upon learning of Eisley's conversation with Ellison, Brothers directed Eisley to prepare an incident report (R-10).[5/] Brothers went to center control (2T30). Ellison told Brothers that she would not submit to being sprayed with pepper mace (1T20; 2T30-2T31). They engaged in a brief argument wherein Ellison told Brothers that if she were maced she would file a grievance and assault charges (1T20; 2T31). Brothers told Ellison that she would do as she was told (2T31). Brothers then left center control and within ten minutes reported his conversation with Ellison to McGhee (2T33). McGhee told Brothers to proceed with the training program "as is" (2T75). Brothers testified that Ellison never raised her

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5/ Eisley's incident report indicates that the conversation took place on Thursday, September 16, 1993. I have found that the incident took place on Wednesday, September 15, 1993. In testimony Eisley maintains that the incident occurred on a Thursday, which would date it on September 16th (2T95-2T98). I conclude that Eisley was and continues to be confused as to the date that the incident actually occurred.

medical condition as a reason for refusing to be exposed to the pepper mace (2T32). On September 16, 1993, Brothers wrote an incident report memorializing his conversation with Ellison at central control the previous day (R-9). Although the incident report should reflect that the incident took place on September 15, it is dated September 16. Incident reports should be completed on the day the incident occurred, however, Brothers was unable to complete the report on September 15, because he was also serving as shift supervisor (2T76).

19. After the exchange between Brothers and Ellison, Ellison decided that she would also prepare an incident report (J-5; 1T20; 1T80; 1T119). J-5 states the following:

> On the above date and time, Officer Brothers came into center and told me to wear my uniform to work tomorrow but to bring sweats, he said he was going to mace me. I told him I was not new, a supervisor or a SERT member, so why was I being maced. He said it was part of training. I told him I've been trained and maced, that I [am] not a new hire and would not let him mace me. He said I would do what I was [expletive deleted] told. I told him if he wanted to write me up to go ahead but I would grieve it. I feel Officer Brothers is doing this out of spite because of my last grievance. Other officers have been out on leave and not have to be retrained. Officer Jacobs asked to be maced and was refused. I feel this is only be[ing] done in retaliation. Also I feel the way that people are being maced here is dangerous.

Ellison testified that J-5 did not contain all of the details of her encounter with Brothers at central control (1T82).

20. On September 16, 1993, Ellison was scheduled to complete her agency training. That morning, Brothers presented a pepper mace class to Ellison and, thereafter, gave her a written test which she completed (3T14; 3T112). Only Brothers is certified to administer the exposure portion of pepper mace training to staff (2T51). Ellison testified that after the written test she was not ordered to prepare herself for mace but was ordered to return to an assigned post (3T14). Brothers testified that after Ellison completed the written test, he told her to change into her sweat clothes in preparation to be exposed to the pepper mace (3T113). Ellison refused, and Brothers directed Eisley to order Ellison to return to her post (2T51-2T52; 3T113-3T114). Brothers then proceeded to McGhee's office and told him that Ellison refused to be exposed to mace (2T52; 3T115). It is unnecessary for me to resolve the issue of whether Brothers ordered Ellison to submit to pepper mace exposure or merely directed her to return to her post. It is clear that Ellison was not sprayed with pepper mace on September 16 or thereafter. It is also clear from the conversations between Ellison, Brothers and Eisley on September 15 that Ellison refused to submit to pepper mace exposure and clearly advised Brothers and Eisley of that fact. From Ellison's conversation with Eisley on September 1, she was on notice that completion of agency training required submission to pepper mace exposure. Consequently, I find that Ellison was under order, as part of her agency training, to submit to pepper mace exposure and her refusal to submit, which

clearly took place on September 15 and may have again taken place on September 16, constitutes her non-compliance with a direct order from her supervisor. Ellison successfully completed all other aspects of her agency training program (3T115).

21. Ellison was under the care of a medical specialist for treatment of her ear and sinus conditions (3T24). Between September 1 and September 15, 1993, Ellison visited her doctor at least twice (3T25). During her first visit to the doctor, on September 3 or 4, the doctor told Ellison that exposure to pepper mace would be contrary to her treatment and offered to write her a note for her employer (3T24; 3T25; 3T28-3T29). Ellison declined (3T29). Ellison testified that on those occasions when she told Brothers and Eisley that she could not be maced because of medical reasons, she also told them that she could submit medical verification of her condition upon request. Ellison stated that she was never requested to submit a doctor's note, so she never did (1T23; 1T91; 1T120-1T121; 3T16; 3T31).[6/]

22. Brothers, Eisley and McGhee testified that they had never requested Ellison to submit medical verification in support of her refusal to submit to pepper mace exposure, because Ellison had never informed them that her refusal was based on medical reasons (2T123; 2T126; 2T153; 3T89; 3T107; 3T109; 3T118). Brothers stated

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6/ Ellison never submitted medical verification to the County until the grievance which was filed contesting her termination reached the arbitration level sometime well after September, 1993 (3T37).

that Ellison never offered to submit a doctor's note concerning her medical problems (2T56). Eisley never asked Ellison to submit a doctor's note concerning her medical problem, because he was unaware that a medical problem existed (3T119-3T120).

23. On September 15, 1993, Ellison prepared her own incident report (J-5) because she believed that ultimately, she and Brothers would be called into the warden's office to explain their respective positions, and the matter would be resolved (1T25; 1T81). Ellison was never called into the warden's office to discuss her refusal to submit to pepper mace exposure and never discussed her incident report with the warden (1T25; 1T81; 3T16). McGhee did review Ellison's incident report along with Brothers' and Eisley's incident reports before taking action (2T176). Other than reviewing the three incident reports submitted and discussing the matter with Brothers, McGhee conducted no independent investigation into Ellison's refusal to submit to pepper mace exposure (2T176). On September 22, 1993, McGhee called Ellison into his office and handed her a termination letter (1T20; 2T135). Ellison testified that after she received the termination letter, she told McGhee that she could obtain medical verification of her physical condition, but McGhee's only reply was to direct Ellison to change out of her uniform into civilian clothes and leave the building (1T120-1T121). McGhee testified that after handing Ellison the termination letter, she read it, turned around and walked away without saying anything (2T135; 3T89; J-4). I find that Ellison did not say anything to

McGhee about her medical condition or her offer to obtain a medical certification when she was terminated on September 22, 1993. During Ellison's rebuttal testimony, she stated that she was called into the warden's office, given a termination letter, told by the warden to change out of her uniform and leave the building. She stated that she turned around, called her attorney and left the building (3T15). Ellison's testimony comports with McGhee's testimony that no discussion took place concerning her medical condition.7/

24. On or about September 30, 1993, the PBA filed a grievance on Ellison's behalf contesting her termination (R-12). On October 8, 1993, McGhee sent a memo to James Cregar, President, PBA Local 302, stating that the grievance failed to specify the grievance complaint as required by the grievance procedure. McGhee gave Cregar one week to refile the grievance (R-13). On October 14, 1993, Cregar refiled the grievance contesting Ellison's termination (R-14). R-14 clarified and listed the reasons why the PBA objected to Ellison's termination. In response to Ellison's termination for refusing to submit to pepper mace exposure, the grievance stated the following:

> The second reason for discharge does not constitute insubordination in that Ms. Ellison has medical verification for her inability to be

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7/ During Ellison's rebuttal testimony she indicated that she was terminated on September 21 rather than September 22, 1993. J-4 is dated September 22, 1993. Her earlier testimony indicates that she was terminated on September 22. I find that Ellison merely misspoke when she stated that she was terminated on September 21 during her rebuttal testimony.

> sprayed with pepper mace. Due to medical verification, her actions do not constitute insubordination. [R-14].

On October 21, 1993, McGhee responded to the grievance (R-15). In his response, McGhee stated in part:

> Finally you refer to medical verification for Ms. Ellison's inability to be sprayed with pepper mace, as removing her refusal from the category of insubordination. Until your letter of grievance arrived, this contention was never made, and even now you offer no such verification. Ms. Ellison never made this contention when she was given advance notice of the impending spraying, and she never made this contention at the time she refused both verbal and in writing to obey the order. [R-15].

25. On September 21, 1993, the day Ellison was terminated, she visited her doctor and obtained a doctor's note concerning her medical condition, because she knew it was needed for her unemployment application (3T33; 3T58). Ellison never submitted written medical verification to the County until the grievance contesting her termination reached the arbitration step (3T37). McGhee was never furnished with a copy of Ellison's medical verification (3T58; 3T90).

26. I find that Ellison did not tell any County representative that her medical condition was the reason she refused to submit to pepper mace exposure. It is a very well established workplace principle that an employee must comply with the supervisors order and, later, file a grievance challenging that directive. It is equally well established that an exception to this

"obey now -- grieve later" doctrine exists where compliance with the order would subject the employee to an unusual or abnormal safety or health hazard.[8/] Ellison is clearly aware of this well known work principle, since the thrust of her testimony asserts that she should be excused from the pepper mace exposure portion of the training, because she repeatedly told Brothers and Eisley that such exposure would be detrimental to her health. She further argues that since exposure to mace would have been harmful to her, her refusal to submit does not constitute insubordination. Ellison's secondary argument was that she should not have been required to submit to pepper mace exposure, because other correction officers were not likewise required. However, Ellison failed to include the extremely important medical issue in her own incident report, J-5. Her claim of disparate treatment alone would not relieve her of the obligation to subject herself to pepper mace exposure under the "work now -- grieve later" rule. Only by raising her medical condition does Ellison succeed in invoking the "health and safety" exception of the rule to serve as a legitimate excuse for her to refuse to submit to pepper mace exposure. It is noteworthy that Ellison neither raises her medical condition on J-5 nor promptly delivers a doctor's note to Eisley or Brothers when merely a few weeks earlier Ellison was diligent in providing written medical verification of her need for a medical leave of absence and subsequent extension. Moreover, she

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8/ F. Elkouri and E. Elkouri, How Arbitration Works, 671 (3d Ed. 1979).

visited her doctor at least two times in September 1993, providing her with ample opportunity to obtain a doctor's note. The doctor offered to give her a note, but she declined. Almost immediately after her termination, Ellison took the initiative to obtain medical verification of her condition, because she knew it would be needed for her unemployment filing. In light of her recent experience of providing medical verification for her leave of absence, and considering how promptly she took steps to obtain medical verification for unemployment, Ellison's claim that she did not supply a doctor's note simply because she was not asked to produce one strains credulity.

I am also persuaded that Ellison did not raise her medical condition before refusing to submit to pepper mace exposure based on McGhee's response to the grievance challenging Ellison's termination (R-15). On October 21, 1993, McGhee stated that "until your letter of grievance arrived, this contention [Ellison's inability to be exposed to pepper mace due to medical reasons] was never made, and even now you offer no such verification (R-15). The record contains no evidence that either the PBA or Ellison ever disputed McGhee's statement contained in R-15. McGhee's October 21, 1993 grievance response comports precisely with Brothers' and Eisley's testimonies. I also note that Ellison did not mention her medical condition to the County's doctor during her September 1, 1993, physical examination, albeit she was under treatment by a medical specialist at that time. Thus, I credit the County's witnesses that

Ellison did not raise her medical condition as a reason for refusing to be exposed to pepper mace.

27. As noted above, Ellison was hired by Warren County as a provisional employee (1T26). Ellison could become permanent only by taking and passing the exam for correction officer administered by DOP. A co-equal reason given by the County for Ellison's termination was that as a provisional employee, she was required but failed to file for and take the examination administered by DOP to achieve permanent status in her title (1T28; 2T166; J-4). Between the time that Ellison began working at the Warren County Correctional Facility and the time of her resignation in September 1992, no announcement was made for a Warren County correction officer examination (1T27). On October 31, 1992, DOP administered an examination for county correction officer (1T107; CP-4). The closing date for filing an application for that examination was January 21, 1991, well before Ellison began employment with the County in October 1991 (1T15; CP-4). Usually, examination announcements are issued three to six months prior to the conduct of the examination (2T147-2T148). The announcement for the October 31, 1992 examination was also made prior to the time Ellison was hired by the County (1T27).

28. The examination conducted by DOP on October 31, 1992, combined at least three previously announced examinations which were originally scheduled to be conducted at an earlier time (2T163-2T164). The previously scheduled examinations were not

conducted because of a federal lawsuit alleging civil rights violations in the examination process (2T136).

29. On October 22, 1992, McGhee issued a bulletin advising provisional employees who filed an application for the correction officer examination during 1990, that they should receive their DOP examination notification by October 26, 1992, or, failing that, they should contact DOP (2T150; 2T160; CP-3). McGhee routinely posts notices of DOP examinations as advisories to provisional employees. He does not send such notices to individual eligible provisional employees (2T185). Since Ellison discontinued active duty with the County in September, 1992, she never saw CP-3, nor did McGhee send her a copy of that or any other DOP examination notice (1T107; 2T185). DOP notified neither Ellison nor McGhee that Ellison had failed to file or sit for the county correction officer examination while she held provisional status in that title (1T31; 2T186).

30. The October 31, 1992 examination is the same for all law enforcement positions: municipal police officer, sheriff or correction officer (3T96).[9/] The applicant designates the law enforcement position to which the examination is to be applied by merely marking the box designating the law enforcement position sought (3T95). In light of the delays encountered by DOP in conducting a law enforcement examination due to the lawsuit, DOP designated the October 31, 1992 examination as a "walk in" test

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9/ The DOP administered law enforcement examination does not apply to state police officer (3T96).

(1T27-1T28; 2T165). Walk-in tests do not require any pre-filing in order to sit for the examination. Notwithstanding the fact that Ellison had not pre-filed with DOP to take the October 31 examination, she sat for the test as a "walk-in", designating that it be applied to only a state correction officer position (3T94-3T95). Ellison did not choose to have the October 31 examination also apply to a county correction officer position (3T94-3T104).

31. McGhee learned that Ellison's name was not included on the DOP eligibility/failure roster (R-11) in the latter part of July, 1993 (2T139-2T140; 2T172). On July 15, 1993, the date when Ellison was initially scheduled to report for duty, McGhee did not know that Ellison was not included on R-11 (2T172). By September 1, 1993, the date Ellison actually returned to active duty, McGhee was aware that Ellison was not included on R-11 (2T173). McGhee took no action concerning Ellison's failure to appear on R-11 but contacted the County Administrator, County Personnel Department and County Counsel for review and advice (2T140; 2T173). McGhee terminated Ellison on September 22, 1993.

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the New Jersey Supreme Court established the test used in determining whether an employer's actions violate

subsection (a)(3) of the Act; motive is a necessary element. Under Bridgewater, no violation will be found unless the charging party has proved a prima facie case by a preponderance of the evidence on the entire record, sufficient to support the inference 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 (1) that the employee engaged in protected activity, (2) the employer knew of this activity, and (3) the employer was hostile toward the exercise of the protected activity. Id. at 242, 246.

If a Charging Party satisfies those tests, the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. If the employer did not present any evidence of a motive not illegal under the Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. However, sometimes the record demonstrates that an employer's adverse personnel action taken against an employee was motivated by both lawful and unlawful reasons. 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. Conflicting proofs concerning the employer's motives are for the hearing examiner and/or the Commission to resolve.

The Commission has long found that filing grievances constitutes protected activity. See Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978), aff'd NJPER Supp. 2d 67 (¶48 App. Div. 1979); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987). In July, 1992, Ellison filed a grievance challenging the denial of her request to transfer to the day shift. That grievance ultimately went to binding arbitration culminating in an award in Ellison's favor. By filing the grievance, Ellison engaged in protected activity, and, clearly, the employer knew of such activity.

The final element required for the charging party to establish a prima facie case is that the County was hostile toward Ellison's protected activity. I find that it was. There is direct evidence of hostility. Ellison complained to McGhee that her request to transfer to the day shift was improperly denied under the terms of the collective agreement. McGhee told Ellison to file a grievance if she wished to contest the denial of her transfer request, however, McGhee cautioned that Ellison should remember that she is only a provisional employee. McGhee's statement was designed to dissuade Ellison from exercising her right to file a grievance.

The Commission has held that timing is also an important factor in assessing motivation. See City of Margate, H.E. No.

87-46, 13 NJPER 147 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185 (¶19071 1988), recon. den. P.E.R.C. No. 88-112, 14 NJPER 345 (¶19132 1988); Downe Tp. Board of Education, P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). Ellison was terminated twenty-two days after she returned to active duty. The County's action, coming so closely after Ellison's reemployment at the direction of an arbitration award, supports an inference that the County was hostile toward Ellison's exercise of her rights protected by the Act. Thus, the timing of Ellison's termination taken together with McGhee's statement concerning a provisional employee filing a grievance constitutes sufficient evidence to infer that the County was hostile toward Ellison's protected activity.

Since the Charging Party has satisfied the tests required to establish a prima facie case, the burden now shifts to the County to prove that Ellison's termination would have occurred for lawful reasons even absent the protected conduct. Ellison had not worked as a correction officer for almost one year. During her absence, Ellison's certification in CPR, PR 24 and firearms had expired and McGhee, Brothers and Eisley determined that she also needed refresher courses in areas such as self defense and report writing. In light of Ellison's lengthy absence, McGhee decided to put Ellison through the complete agency training program. I find nothing improper in McGhee's decision.

In 1993, the facility added the use of pepper mace as a tool for inmate control. Training in the use of pepper mace was provided to all corrections supervisors, SERT members and employees going through the complete agency training program. Before Ellison, employees going through complete agency training were comprised of only newly hired employees. However, since Ellison was required to go through complete agency training, she was, likewise, required to complete the training in pepper mace use. Pepper mace training culminated in actual exposure. Ellison was advised upon her return that she would be trained in the use of pepper mace and such training included exposure. Ellison viewed herself as being an experienced officer rather than a new hire. Ellison objected to the fact that she was being required to undergo pepper mace exposure, while no other senior correction officer was similarly ordered. Based on this perceived disparate treatment, Ellison refused to submit to pepper mace exposure. The County treated Ellison's refusal as insubordination and terminated her. I find that the County's order requiring that Ellison undergo complete agency training, in light of her almost one year absence from the job, was reasonable and unrelated to the exercise of her protected rights. Consequently, I find that Ellison's insubordination was the substantial or motivating factor in her termination. While I take no issue with the fact that Ellison may have been suffering from medical problems involving her ear and sinuses, she did not express these medical reasons to her employer as the basis for her refusing

to submit to pepper mace exposure. Thus, without any information indicating that Ellison's refusal to submit to pepper mace exposure would jeopardize her health or safety, the County legitimately viewed Ellison's refusal as insubordination. Accordingly, I find that the County did not violate section 5.4(a)(3) or (1) when it terminated Ellison for refusing to fulfill all agency training requirements as ordered.

In addition to terminating Ellison for insubordination, the County advances another reason for her termination. The County is a Civil Service employer and is subject to DOP Rules and Regulations. The County advised Ellison that she was terminated because she failed to file for and take an examination which had been announced for her title. The County contends that DOP rules and regulations require the provisional employee to file and sit for announced examinations in order to achieve permanent status in his/her respective title. The County asserts that Ellison failed to comply with such DOP rules and regulations by failing to take the announced examination administered on October 31, 1992. The Charging Party contends that Ellison was not employed by the County when DOP announced an examination for her title, nor was she employed by the County on October 31, 1992, the date DOP administered the examination.

I find that for purposes of reaching a determination in this matter, I need not resolve the issue of whether Ellison's termination was in accord with relevant DOP rules and regulations.

The issue of whether Ellison was properly terminated pursuant to DOP rules and regulations should be appealed through the appropriate DOP dispute resolution mechanism and not before the Commission. Even assuming arguendo that the County was wrong in its interpretation and application of relevant DOP rules and regulations so as to result in a finding that the County erred in terminating Ellison for failing to file for and take the examination, the outcome of this decision would remain unchanged. I have found that the substantial or motivating factor in Ellison's termination was her insubordination for failing to comply with the order to submit to pepper mace exposure and not because of protected activity in that instance. Consequently, even if the County is wrong in its decision to terminate Ellison for failing to file and sit for an examination and that reason were found to be pretextual, Ellison's termination for insubordination, not in violation of the Act, would stand.

The PBA also alleged that the County violated section 5.4(a)(2) of the Act. The Charging Party has introduced no evidence showing that the County has dominated or interfered with the formation, existence or administration of the PBA. That allegation must also be dismissed.

Accordingly, on the basis of the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

Warren County did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) by terminating Deborah Ellison.

RECOMMENDATIONS

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

Stuart Reichman
Hearing Examiner

Dated: June 20, 1995
Trenton, New Jersey