

H.E. NO. 2018-5

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

In the Matter of

SOUTH JERSEY TRANSPORTATION AUTHORITY,
Respondent,

-and-

Docket No. CO-2017-026

IFPTE LOCAL 196, CHAPTER 2,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that South Jersey Transportation Authority discriminated against unit employee and IFPTE Local 196, Chapter 2 vice president Thomas Gates in retaliation for conduct protected by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., specifically section 5.4a(3) and (1), when it suspended him one day on July 21, 2016. The Hearing Examiner recommends that Local 196 did not demonstrate a prima facie case that the Authority discriminated against Gates, pursuant to the standard set forth in In re Bridgewater Tp., 96 N.J. 235 (1984).

The Hearing Examiner also recommends that the facts do not show that the Authority independently violated 5.4a(1) of the Act. The facts show that Gates was disciplined for inappropriate behavior toward unit employees during work hours at the Authority. The recommendation is that the Complaint be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Brown & Connery, LLP
(Benjamin S. Teris, of counsel)

For the Charging Party
Mets Schiro McGovern & Paris, LLP
(Leonard C. Schiro, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 4, 2016 and November 4, 2016, IFPTE Local 196, Chapter 2 (Local 196) filed an unfair practice charge and amended charge against South Jersey Transportation Authority (Authority). The charge, as amended, alleges that on July 21, 2016, the Authority unlawfully suspended for one day unit employee and Local 196 vice president and shop steward Thomas Gates for engaging in ". . . strictly union business," violating section

5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). The charge more specifically alleges that on February 9, 2016, Gates engaged three fellow unit members in discussion of a grievance regarding weekend work. On February 22, 2016, the Authority issued charges against Gates based on that discussion. On or about July 21, 2016, following a hearing on the charges, the Authority issued discipline, the one-day suspension, against Gates. Local 196 contends that ". . . the conversation and content of the conversation were strictly union business."

On November 30, 2016, a Complaint and Notice of Hearing issued. On January 3, 2017, the Authority filed an Answer, admitting some facts and denying others. It denies having violated the Act. It contends that the discipline, ". . . [was] based on the way Gates acted in the workplace during the February 9, 2016 incident, not because he had a 'union' discussion with co-workers." The Authority contends that Gates spoke "profanity" and referred to a female fellow unit member as a "bitch."

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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 January 12, 2017, this case was reassigned to me for Hearing, following the assigned Hearing Examiner's departure from the Commission. On June 19, 2017, I conducted a Hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs and replies were filed by September 15, 2017.

Upon the record, I make the following:

FINDINGS OF FACT

1. Thomas Gates is employed as a "maintenance person, #1" by the Authority, where he has worked steadily since 1998 (T11). Among his duties are operating heavy equipment, including snow plows and mowers. Gates has also been vice-president of Local 196 for about six years. Local 196 represents a collective negotiations unit of mechanics, sign fabricators, maintenance employees, auto body repair persons, HVAC journeymen, communications employees, clerks and others (J-1). He assists unit employees with grievances, mediates issues with Authority representatives and negotiates collective negotiations agreements (T12).

2. The parties' most recent collective negotiations agreement extended from August 1, 2007 through July 31, 2011 (J-1). Article VI (Union Representation) provides paid release time for Local 196 executive board members and upon request, unpaid release time for union representatives. Section 6

protects Local 196 representatives against discrimination by the Authority, ". . . because of any union activity."

Article X (Disciplinary Action) provides for written notice to employees and Local 196 of unit employee offenses, specifying the date(s), time(s), place(s) and names of witnesses. The provision also prescribes a hearing before a designated "Hearing Officer," (" . . . not from the same division or department as the accused employee") who will consider testimony and issue a written decision within a specified time period. Adverse decision(s) to the aggrieved are appealable to the Authority Executive Director and then to binding arbitration.

Article XII (Working Conditions) provides at Section 6(b): "Weekend duty in the Maintenance Department will commence Memorial Day Weekend through Labor Day Weekend and will be rotated, by seniority, among maintenance persons at the Level #4 classification."

3. Nicole Beck, Meisha Jasper and Charisse McLaurin are employed by the Authority as maintenance persons #4 assigned to its east maintenance yard. They are included in the collective negotiations unit with Gates (T13, 14, 23). Gates does not have supervisory authority over the three women (T26).

4. Sometime in the early morning of Tuesday, February 9, 2016, all four employees returned separately to the east maintenance yard from having completed a "snow [removal]

overtime" shift, overnight (T14, 21). Their regular shift, 7:30 a.m.-3:30 p.m., would soon begin (T14).

Gates walked inside the east maintenance yard office and was discussing a "weekend duty" issue with two foremen -- most likely, Craig Collins and Phil Pelura (T21, 27). "Weekend duty" is an opportunity for maintenance persons #4 to work overtime, (cleaning the service areas, etc.) on a seniority rotation, on selected weekends year-round, despite the contract provision limiting that work to the summer months (T15, 77-80, J-1, finding no. 2). A coincidentally-related work rule requires all staff to work "snow overtime." A then-recent and significant weekend snowfall resulted in the Authority's cancellation of "weekend duty." When the Authority posted the list of eligible maintenance persons #4 for weekend duty following the snowfall, another maintenance #4 unit employee whose name [Gorman] was omitted from that list, complained to Gates that he had been unjustly bypassed. Gates concurred, phoned the office of "the department head" and complained to a secretary there. The secretary balked at immediately alerting that supervisor, anticipating an angry response in light of all the overtime recently worked (T16-18). Later that day, the secretary told Gates that she had informed Authority Director of Operations James Sullivan of the matter (T38). An unspecified short time later, and before February 9th, weekend duty was discontinued (at

least, unofficially, according to Gates) (T16-20, 22). The discontinuation caused consternation (at Local 196's expense) among unit maintenance #4 employees, including Beck, Jasper and McLaurin (T18).

5. Gates testified that during his conversation with two foremen about "weekend duty," McLaurin, ". . . walked in and she heard me talking about it [and] made a couple of comments and walked out." Pressed in direct examination, Gates testified McLaurin said: "I don't need to hear this shit" and "On that note, I'm leaving" and left the room (T21-22).

On February 13, 2015, McLaurin wrote a narrative of events regarding the morning of February 9th, pursuant to Authority senior lead foreman William Rickert's advice (T51, R-1, R-2, finding no. 9). McLaurin wrote in a pertinent part:

Tom Gates was already talking about something. When I sat down, he said to the men [supervisors]: 'Oh yeah, and all the 4's are mad at East because of the Gorman [the named employee purportedly 'bypassed' for weekend duty] syndrome.' When he said that, I got up from my seat and said: 'On that note, I'm leaving.' [R-1]

Only McLaurin's version provides a sensible context for Gates's account of her remarks; his testimony conveniently omits any remark of his that would have provoked McLaurin, i.e., ". . . all the 4's are mad at East because of the Gorman syndrome." I find that McLaurin said, "I don't need this shit" in response to his

characterization and implied criticism of her (inferred) state of mind.

6. Gates felt too warm and walked out of the building, ". . . to get some air" (T22). Outside in the front parking lot, he observed McLaurin speaking with Jasper and Beck near the opened driver's side door of a nearby Authority pick-up truck, with Beck seated behind the steering wheel (T22). He heard his name mentioned among them ". . . and they said something about weekend duty and Tom Gates and I went over to talk to them" (T23).

A moderately elevated security camera focused downward on the lot captured Gates walking (into the bottom of the camera-framed video and away from the camera) around the front end of the pick-up truck to stand near the far exterior end of its opened driver's side door with his left arm raised and left hand resting atop the opened door. Standing and facing Gates near the far interior end of the opened door is McLaurin, with Jasper standing between her and Beck, who is seated behind the steering wheel (R-8, T87-91).^{2/} In the video, Gates appears obviously

2/ R-8 is a video disc (without audio) proffered by the Authority and marked in evidence without Local 196's objection (T91-92). The top and bottom extreme edges of the framed video recorded the evolving clock-time of day by hours, minutes and seconds on the morning of February 9, 2016. The videoed group conversation/altercation started around 8:10 a.m. and ended at about 8:21 a.m. Director Sullivan narrated the video on direct examination.

taller than the standing women. Gates, McLaurin and Jasper also appear to be engaged in animated discussion. Later, in another relevant portion of the video, Gates steps to the inside of the open driver's side door so that all four employees are situated (i.e., standing, except for Beck) in direct, close proximity to each other (R-8). In the latter portion of the recording, Gates gesticulates with both arms upraised. McLaurin similarly and responsively gestures with one arm as the standing participants step back from each other. Finally, Gates turns and walks away, literally waiving off the apparent verbal altercation with one arm (R-8).

Gates testified that McLaurin and Jasper ". . . said they were told that the reason [weekend duty] was cancelled was because of the union, because the union had made an issue of the bypass of [] Gorman" (T23). He testified that he tried to explain that Gorman had a "legitimate gripe;" that he should not have been [bypassed] and that, ". . . it was his turn the following weekend" (T24). He testified that McLaurin and Jasper disagreed, noting that Jasper "yelled and screamed at him," saying that he didn't belong on the union board (T26). He testified that McLaurin said that she had been bypassed for weekend duty and Local 196, ". . . didn't do anything for me." He replied: "No one brought it to my attention" (T24). I credit Gates's testimony.

Gates denied speaking profanity and to referring to another female Authority employee as a "bitch" (T25). He admitted being upset as he walked back to the building (T26). Minutes later, east maintenance yard foreperson Steve Hackett asked Gates to discuss the "incident" in his office, together with McLaurin and Beck (T27). Gates admitted that he ". . . talks loud[ly]" and often, ". . . moves [his] hands." He denied yelling during the argument with the maintenance #4 employees (T37-38). I do not credit Gates's denials (finding no. 7).

7. McLaurin wrote in her report (also signed by Jasper and Beck) that at about 8:15 a.m., as Gates approached them, he said: "I know that you are out here fucking talking shit about me" and as he came "up to our face[s]," said: "Now that you want to talk about me, well, say it to my face" (R-1). She wrote that they (all three women) felt "disrespected and threaten[ed]." McLaurin wrote that Gates,

. . . [said] he wanted to explain what happen[ed] with the weekend duty being taken away from the 4's. We listened to what he said; while telling us what happened, he began to call Coleen Cardis 'bitch[]' and saying she messed it up and if it wasn't for her, this would not have happened. Also stating it was [Director of Operations] Sullivan's fault and that we should be mad at them. [R-1]

McLaurin wrote that when Gates finished, she, Jasper and Beck disagreed that it was [the Authority's] fault because ". . . it should not [have gone] that far." She wrote that Gates "stormed

off," telling them not to call him to represent them because he will not do it (R-1). She also wrote that after the altercation in the lot, ". . . Hackett came to all of us to ask the three of us do we want to come and just talk it out with Tom Gates to make it a little peaceful for the work environment . . . so we went in to make peace" (R-1).

I credit McLaurin's writing that Gates's approach to them in the front lot included the specified, epithet-laced admonishment and challenge that set an angry, sometimes loud, confrontational context for the entire exchange. I infer that Gates was embarrassed and/or angered by McLaurin's dismissive remarks in and abrupt departure from the east maintenance yard office where the Local 196 vice president was informally discussing the merits of the pending "weekend duty" issue with two non-unit supervisors. I do not credit Gates's denial that he spoke profanity; I infer that profanity is often spoken in many workplaces, like the Authority, on occasions of perceived personal affront or intense disagreement among peer employees, including blue collar employees, like Gates, McLaurin, Jasper and Beck. I have credited Gates's testimony that McLaurin spoke profanity minutes earlier that day (finding no. 5). For the same or similar reasons, I find that Gates referred to another employee as a "bitch" in his remarks to McLaurin, Jasper and Beck. In drawing these inferences about the Authority, I

extrapolate from supervisor Rickert's un rebutted testimony that he was unaware of any employee who had been disciplined for saying "fuck" or "bitch" during work hours (finding no. 9).

8. Lead foreperson Steve Hackett soon invited Gates, McLaurin, Jasper and Beck into his office (T27, R-1, R-7). Jasper declined to attend (T27, R-7). Hackett had learned of an "incident/argument" among the employees in the east maintenance yard (R-7). He wrote that he was told, ". . . it was over a union issue" and that he, ". . . subsequently brought Beck, Gates and McLaurin into the office to try to rectify the situation" (emphasis added, R-7). Supervisors Collins and Pelura also were present in the office (T27, R-1, R-7).

Hackett told the assembled group that he, ". . . tries to make east maintenance a peaceful and harmonious workplace" and asked if the employees ". . . could resolve the issue and apologize to each other" (R-7, T28). Gates apologized first, stating: "If I offended you in any way, I'm sorry" (R-7, T28).

McLaurin wrote in her narrative:

I then proceeded to tell him that as women, we felt very disrespected and threatened [and] that as a union representative you will represent us if we need you to [represent us]. [R-1]

Gates testified that McLaurin said: "I accept your apology but I don't have to respect you," to which he replied: "You have to earn respect and I don't appreciate the way you were talking to

me out there" (T28). Hackett wrote in his report of the meeting that, "[McLaurin] got louder when the conversation moved on to 'respect'" and that he said: "Everyone has to keep calm" (R-7).

Gates testified that McLaurin, ". . . came at him in the office and [Hackett] jumped between us." He testified that she said: "I can't promise where this is going to go, this is probably going to go further" (T28-29). Hackett did not write of any physically aggressive conduct in the meeting, observing only that, "[McLaurin] and [Beck] walked out of the office first, followed by Tom. At this time, I thought the incident was resolved" (R-7). In the absence of any contrary testimony by any Authority representative or witness, I credit Gates's testimony. I also infer that McLaurin's uttered threat was a reasonably likely consequence of frustration derived (at least in part) from her thwarted physically aggressive act.

9. William Rickert is the Authority's lead foreman. He oversees firefighters, maintenance work, guardrail repair, purchasing, etc. (T49). At or around 11:15 a.m. on February 9, 2016, McLaurin and Jasper visited him at the central maintenance office. Rickert credibly testified that they told him,

. . . about what happened with Mr. Gates down at east maintenance and the altercation, as far as weekend duty . . . Both employees were very upset to the fact that Meisha Jasper was in tears, very upset and shaking. I tried to calm her down. And then McLaurin explained what had happened. [T50, 51]

Rickert told the women to write statements and give them to him, advising that he would forward them to Director Sullivan (T51). Rickert received their written statement on or about February 13, 2016, after which he authored his own "statement" (T59, R-2).

Also on February 9th, Rickert phoned supervisor Hackett and inquired of his version of events from earlier that day. On February 16, 2016, Rickert wrote that Hackett confirmed that an argument ensued among some employees and that, ". . . he [had taken] care of the problem" (T63, R-2). Rickert wrote that the complainants told him that Gates, ". . . [had used] very bad language and that they were threatened by him and felt disrespected" (R-2). On cross examination, Rickert did not recall if the complainants had said they were threatened (T62). I credit Rickert's near-contemporaneous writing over his memory of a statement in a conversation that occurred almost 18 months before his testimony. Rickert admitted that in his eight years as a senior lead foreman, he was unaware of any Authority employee who was disciplined for saying "fuck" or "bitch" during work hours (T64).

10. On or about February 16, 2016, Rickert reported the incident to Director Sullivan and provided him with McLaurin's written statement (also signed by Jasper and Beck), lead foreperson Steve Hackett's written narrative and his own written report (T52, 53, 82, R-1, R-2, R-7). Rickert wrote in part (see

also finding no. 9) that the complainants said: "Tom Gates got into an argument about weekend duty/Union problem with them," and that his apology, ". . . in their mind was not sincere." He also reported:

Tom was using very bad language and they were threatened by him and they felt disrespected. The [complainants] also stated that Tom stated he would never represent them in any union matter. [R-2]

11. Authority Director of Operations James Sullivan supervises all aspects of Atlantic City Expressway maintenance, facility maintenance, skilled labor, and unionized employees, including clerks and state police dispatchers (T66-67). On or about February 9, 2016, Rickert informed Sullivan that three women assigned to the east maintenance yard, ". . . had an argument or an aggressive behavior type of argument with Mr. Gates in the east yard" (T81). Sullivan directed Rickert to gather and convey to him written statements from the participants and from Steve Hackett, their immediate supervisor (T81). Rickert also provided Sullivan with his written account (R-2, T59).

Sullivan reviewed all three writings and the February 9th east maintenance yard video before recommending discipline of Gates (T83, 92). On direct examination and during his viewing of the video on the record, Sullivan was asked:

Q. What were your thoughts as you were reviewing this video while investigating?

He replied:

A. Honestly, I wish he had stayed in the building. That, it appeared to me that Mr. Gates continued this argument that, from Mr. Hackett and the other statements, occurred inside. And as I said, the totality of it was had he not continued this in the yard, the discipline probably would have been much different than what's going on currently. [T89]

Asked why one of the female employees [McLaurin] engaged in the parking lot discussion wasn't disciplined, Sullivan testified:

I believe that the aggressor is Mr. Gates. As I said, had he remained in the building this conversation and this activity would not have occurred. He had an opportunity to cease the activity and he became the aggressor by continuing. These women were leaving. [T89]

Sullivan agreed on cross-examination that the subject of "weekend overtime" is appropriately categorized as "union activity." He disagreed that "not providing union representation" is also union activity; he testified that it was "a threatening act," a form of "harassment," which appears in his written recommendation of Gates's discipline as ". . . 'unbecoming,' which would have been the language and the shouting and continuation of the argument" (T117-118, CP-1).

I find that Sullivan was mistaken and I don't credit his attested chronology.^{3/} I have found that McLaurin's and Hackett's written reports and Gates's testimony amply prove that Hackett's meeting with the employees occurred after--and not before--the verbal altercation in the east maintenance lot (finding nos. 6, 7 and 8). Sullivan admitted: "After viewing the video and the statements made by the employees, I was going to submit the request for discipline, regardless of what Mr. Gates had to say about it" (T98). Sullivan did not discuss the incident with Gates before requesting discipline. He believed that the female employees, ". . . were harassed in the workplace as set out by the policy" (T97).

12. On or about February 22, 2016, Sullivan submitted to the Authority Human Resources Office a completed Authority "Request for disciplinary Action Form" regarding Gates (T95). The specified infraction was: "Conduct unbecoming an employee in public service; violation of the Authority's harassment policy." Sullivan wrote:

^{3/} I do not credit Sullivan's testimony that Hackett told him in a phone conversation on an unspecified date that he had "handled" the altercation before the recorded east maintenance lot incident (T107-109). Sullivan did not testify about any such phone conversation in his direct examination and Hackett's written narrative of his actions and chronology of events (proffered and moved into evidence by the Authority) on the morning of February 9, 2016 supercedes Sullivan's hearsay testimony (R-7).

Mr. Gates was loud, argumentative, abusive and disorderly to three of his female co-workers. Those employees described, in the attached statements, behavior that left them feeling 'threatened,' creating a hostile work environment. [CP-1]

McLaurin, Jasper, Beck and Hackett were identified as "witnesses to the infraction" (CP-1, T96).

13. On or about July 21, 2016, David Zappariello, Authority Chief of Staff and designated "Hearing Officer," conducted a hearing on the "Request" Sullivan submitted, pursuant to Article X of the collective negotiations agreement. Counsel for both parties participated in the hearing. Gates, McLaurin and Jasper testified (T99, 100, R-10). Sullivan attended (R-10, T40). The Hearing Officer watched the disputed video and permitted Gates to belatedly "supplement" his testimony with a writing, "purportedly written" shortly after the February 9, 2016 incident (R-9,^{4/} R-10). Sullivan testified that in the hearing, Gates initially said that he had not walked out, ". . . on the [lot] sidewalk," (despite the contrary images in the video) and that the Authority had not disclosed the recording of events that took place in Hackett's office. He also claimed that the charges against him were "racially-based," despite the apparent absence of any proof

4/ Gates wrote a "statement" on or about February 19, 2016 setting forth his understanding of the "weekend duty" issue and his account of the February 9th verbal altercation and aftermath (T40). It is detailed and consistent with his testimony in the hearing on this complaint(R-9). His written account was not provided to Sullivan (T92, 98).

of such assertions (T101). In the absence of any rebuttal from Gates, I credit Sullivan's testimony.

On July 29, 2016, the Hearing Officer issued a "Disciplinary Action Report," sustaining the charge of "unbecoming conduct" with a penalty of a one-day suspension. He wrote that McLaurin's and Jasper's testimonies were "cogent and credible" and Gates's testimony was "defensive and erratic." The Hearing Officer determined that Gates had engaged the women,

in a heated verbal altercation in which he intimidated them, cursed and referred to a female co-worker as a 'bitch.' This type of conduct is not acceptable in the workplace and I find that it constitutes conduct unbecoming an Authority employee. [R-10]

In a footnote addressing Local 196 Counsel's argument that possible discipline of Gates should be dismissed because the subject of the "heated argument" concerned "union matters" protected under Article VI of the agreement, the Hearing Officer disagreed, writing that the Authority has "the right and duty" to address unbecoming conduct by its employees occurring on its premises during work hours. He wrote: "The topic of the disagreement--be it union-related, personal or otherwise--does not insulate Mr. Gates from the consequences of his behavior" (R-10).

Nothing in the record suggests that Local 196 appealed the "Disciplinary Action Report," pursuant to Article X of the agreement.

ANALYSIS

Local 196 contends that the Authority disciplined Gates in retaliation for his protected conduct, specifically, his discussion with fellow Local 196 members about weekend duty. It also argues that Gates's behavior falls ". . . well below conduct [the Commission] has previously recognized as threatening or harassing" (brief at 6-10). The Authority asserts that Gates was not engaged in protected activity and that if he was, it cannot excuse workplace misconduct of "verbal abuse and intimidation" (brief at 12).

The standard for evaluating a 5.4a(3) charge is well established and set forth in New Jersey in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of 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 that activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. Sometimes 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 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 motivated or substantial reason for the personnel action.

The record shows that on a workday in the Authority's east maintenance yard and within a security camera's recording eye, Local 196 representative and unit employee Gates attempted to explain and justify his support for a potential "weekend duty" grievance to fellow unit employees McLaurin, Jasper and Beck. Conduct related to enforcing a collective negotiations agreement or preserving working conditions in a recognized or certified unit is "protected" under the Act. State of New Jersey (Ofc. of Public Defender), P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005). In the absence of a legitimate and demonstrated business need to restrict the freedom of employees to discuss their employment conditions, such discussions are protected. Sussex Cty., P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994).^{5/} The record also demonstrates that Authority representatives Hackett, Rickert

^{5/} I disagree with the Authority's contention that in the absence of Gates's written advance request for leave to discuss union "business," his discussion with McLaurin, Jasper and Beck was not "protected" under the Act (brief at 10). Gates was not disciplined for failing to request leave for the ten minutes he engaged the three employees in discussion. No facts indicate an operational disruption or that the Authority was unaware of the employees' location.

and Sullivan were aware of the "weekend duty" subject of argument among the employees in the east maintenance yard before discipline was imposed.

I find that Local 196 has not proved by a preponderance of evidence on the record that the Authority was hostile to Gates's protected activity. Gates was both recommended for discipline and disciplined (following a hearing in which he was represented by Counsel) because he was found to have been "loud, argumentative, abusive and disorderly" towards female unit employees and to have engaged them in a "heated verbal altercation" in which he, ". . . intimidated them" and referred to another female co-worker as a "bitch." Evidence supportive of these characterizations of his behavior include contemporaneous writings by the aggrieved women and supervisors, testimony by Authority representatives and a video recording of the disputed incident.

No facts indicate that the determinations of Gates's behavior were pretextual, notwithstanding Sullivan's mistaken finding that Gates was admonished by foreperson Hackett before the altercation in the yard (see finding no. 11). Sullivan's admission that Gates's discipline, ". . . probably would have been much different than what's going on currently" if he had not ". . . continued the argument" is not an exculpation, though from

his perspective, discipline would have likely been lessened to a reprimand or warning.

In New Jersey Dept. of Ed., P.E.R.C. No. 85-85, 11 NJPER 130 (¶16068 1985), the Commission found that the State had lawfully reprimanded a union steward where the reprimand neither addressed nor concerned the steward's engaging in protected activity but rather, concerned alleged insulting and intimidating behavior. In a fortuitous parallel to the Hearing Officer's determination of Gates's infraction, the written admonishment in New Jersey Dept. of Ed. specifically advised the steward and employee that her behavior, ". . . is not becoming to a professional educator and employee of the New Jersey Job Corps Center." Id. at 11 NJPER 131. The Commission noted: "An employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative." Id. at 131.

Finally, I see nothing in the "Disciplinary Action Report," that establishes an impermissible connection between Gates's employment status and his role as employee representative that violates 5.4a(1) of the Act. See Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

RECOMMENDATION

I recommend that the Complaint be dismissed.

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: November 30, 2017
Trenton, New Jersey

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

Any exceptions are due by December 11, 2017.