P.E.R.C. NO. 90-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-89-152

FRATERNAL ORDER OF POLICE,
LODGE NO. 74,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Fraternal Order of Police, Lodge No. 74 against the University of Medicine and Dentistry of New Jersey. The charge alleged that UMDNJ violated the New Jersey Employer-Employee Relations Act by entering into a settlement agreement with a police officer to offer her the next promotion to a sergeant position; by offering a supervisory training course to that employee only, and by changing detectives' job assignments allegedly in retaliation for their filing grievances regarding the settlement agreement and the training course. In the absence of exceptions, the Commission agrees with the Hearing Examiner that UMDNJ did not violate the Act.

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Charging Party.

Appearances:

For the Respondent, Peter N. Perretti, Jr., Attorney General (Barbara A. Harned, Deputy Attorney General)

For the Charging Party, Markowitz & Richman, Esqs. (Stephen C. Richman, of counsel)

DECISION AND ORDER

On December 6, 1988 and March 15, 1989, the Fraternal Order of Police, Lodge No. 74 ("FOP") filed an unfair practice charge and amended charge against the University of Medicine and Dentistry of New Jersey ("UMDNJ"). The charge, as amended, alleges that UMNDJ violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (4) and (5),[1/] by entering into a settlement agreement with a police

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

Footnote Continued on Next Page

officer to offer her the next promotion to a sergeant position; by offering a supervisory training course to that employee only, and by changing detectives' job assignments allegedly in retaliation for their filing grievances regarding the settlement agreement and the training course.

On February 10, 1989, a Complaint and Notice of Hearing issued. On March 8 and May 15, 1989, UMDNJ filed an Answer and amended Answer denying it had violated the Act and asserting that it had promoted the most qualified candidate.

On May 16 and June 9, 1989, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs and replies by September 5, 1989.

On October 6, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-13, 15 NJPER ___ (¶_____ 1989). He found that UMDNJ did not violate the Act by temporarily rotating detectives into patrol assignments and by making other

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1/ Footnote Continued From Previous Page

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. (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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

changes affecting their employment, or by promoting the patrol officer to sergeant.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due October 20, 1989. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-21) are accurate. We incorporate them here. In the absence of exceptions, we agree that UMDNJ did not violate the Act when it promoted the patrol officer to sergeant or when it sent that officer to a training course. We further agree that it did not retaliate against detectives who filed a grievance regarding the promotion and the training course. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Reid, Bertolino, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioner Johnson abstained from consideration of this decision.

DATED: Trenton, New Jersey
November 20, 1989
ISSUED: November 21, 1989

H.E. NO. 90-13

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

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-89-152

FRATERNAL ORDER OF POLICE, LODGE NO. 74,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the University of Medicine and Dentistry of New Jersey did not violate the New Jersey Employer-Employee Relations Act by temporarily rotating detectives into patrol assignments, or by making other changes affecting their employment, or by the selection of - or by the manner in which it selected - a particular officer for promotion to sergeant.

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. 90-13

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

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-89-152

FRATERNAL ORDER OF POLICE, LODGE NO. 74,

Charging Party.

Appearances:

For the Respondent, Hon. Peter N. Perritti, Jr., Attorney General of New Jersey (Barbara A. Harned, Deputy Attorney General, of counsel)

For the Charging Party, Markowitz & Richman, Esqs. (Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed the the Public Employment Relations Commission ("Commission") on December 6, 1988 and amended on March 15, 1989 by Fraternal Order of Police, Lodge No. 74 (FOP), alleging that the University of Medicine and Dentistry of New Jersey (University) violated subsections 5.4(a)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq. (Act).[1/] In the original Charge the FOP alleged as Count I that on or about September 28, 1987 the University, without advising or including the FOP, entered into a settlement agreement with employee Lucille Holland to offer her the next promotion to a sergeant position; and that the terms of the settlement were in contradiction to the job bidding and promotion policy procedures affecting unit members. The FOP sought a finding that the University violated the Act by entering into the settlement agreement; that the University be enjoined from enforcing the terms of the settlement agreement; and that the University be required to follow the job bidding and promotional policy criteria and procedures. In the Amended Charge the FOP alleged two additional counts. As Count II, it alleged that after posting a promotional position for sergeant the University enrolled Officer Holland in a supervisory training course, but did not offer the training course to other promotional candidates, and by such conduct the University

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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. (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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

violated promotional procedures constituting a unilateral change. As Count III the FOP argued that after it filed grievances on November 10 and 18, 1988 regarding Holland's settlement agreement and enrollment in the training course the University altered the detectives' job assignments allegedly in retaliation for filing the grievances.

A Complaint and Notice of Hearing (C-1) was issued on February 10, 1989. The University filed an Answer and Amended Answer on March 8 and May 15, 1989, respectively. The University admitted certain facts but denied violating the Act, and asserted that it promoted the most qualified candidate.

Hearings were conducted on May 16 and June 9, 1989.[2/] Both parties filed post-hearing briefs, the last of which was received on August 25, 1989. The FOP filed a reply brief on September 5, 1989.

Based upon the entire record, I make the following:

Findings of Fact

1. For many years the University has maintained a job bidding and promotion policy (C-1A) to encourage in-house promotions. Qualifications, ability and seniority are the essential factors for selection. All qualified bidders must be interviewed. A successful bidder must serve at least a 90-day trial period.

2/ The transcripts from the hearings will be referred to as 1T and 2T respectively.

2. On September 28, 1987 the University and police officer Lucille Holland agreed to a Stipulation of Settlement (C-1C) regarding a civil action Holland had filed against the University in Superior Court. The Settlement provided in pertinent part 1) that Holland would be offered a promotion to sergeant as soon as an opening became available, 2) that Holland's promotion to a sergeant position "shall" be treated as a normal promotion in accordance with the standard business procedure followed by the University in making promotions, and 3) that if Holland is promoted, the University, for a two-year period, cannot terminate Holland except upon good cause as determined after an administrative law hearing.

Ottoviano Cilenti, the University's Director of Public Safety, and Frederick Saxe, Vice President of Operations and Cilenti's immediate supervisor, interpreted the above item 2) of C-1C to mean that the University would follow the normal promotional policies and procedure, including promoting the most qualified candidate, regardless of the language in item 1) of C-1C. (1T82, 1T141, 1T147).

3. One of the major responsibilities of the University police force is to protect against automobile theft from University controlled parking lots. The University keeps records of vehicles stolen out of its parking lots and from nearby streets. Exhibit CP-4 covers August 1987 through March 1988 at the Newark campus and shows the following results:

	Vehicles Stolen From Lots	Vehicles Stolen From Streets
Aug 1987	1	1
Sep 1987	0	3
Oct 1987	7	1
Nov 1987	3	2
Dec 1987	3	1
Jan 1988	3	5
Feb 1988	2	4
Mar 1988	1	0

In November 1988 the University had its highest vehicle theft from the lots and streets combined. Exhibit R-3 shows the following results from August 1988 through November 1988.

	Vehicles Stolen From Lots	Vehicles Stolen From Streets
Aug 1988	0	5
Sep 1988	1	3
Oct 1988	4	3
Nov 1988	7	10

Sometime between late October and mid-November 1988 University President Byrne held a meeting with Cilenti and Saxe regarding the lack of security and safety in University parking lots including auto theft and personal safety. The president asked Saxe and Cilenti to initiate a program to correct the problem (1T84-1T85, 1T123-1T125, 1T137-1T138).

The program they developed was intended to increase directed patrols with high visibility in the lots (1T124). Cilenti directed his staff to cover all parking lots 24 hours a day when manpower permitted. The program was implemented in December 1988. One police officer with a patrol car was assigned to as many lots as possible (2T36). The officer was required to leave the overhead flashing lights of the car on while he patrolled the lot (1T92). This program continued at least through March 1989 (1T39-1T40).

After the implementation of that program there was a decrease in the number of auto thefts from the lots (2T16). Exhibit R-3 shows the following results.

	Vehicles Stolen From Lots	Vehicles Stolen From Streets
Dec 1988	1	5
Jan 1989	2	10
Feb 1988	1	4

In order to implement the parking lot program Cilenti needed additional manpower. Everyone in the patrol division was assigned a shift in the parking lots (1T92), then Cilenti moved men from the crime prevention unit into patrol, and finally he alternated two detectives at a time into patrol to perform the parking lot duty (1T126-1T127, 2T12-2T13, 2T55).

In order to assign detectives to the parking lot patrol duty the University decreased the number of investigations normally assigned to detectives by instituting a solvability factor to each complaint that was filed (1T90-1T91, 1T44, 2T17-2T19, R-4). The solvability factor is really a system whereby a supervisor reviews the facts of complaints filed with the police and makes a preliminary determination as to the likelihood of solving the particular case and whether the manpower expended on the particular investigation would be fruitful and cost effective. If the chances of solving a particular case are minimal and not cost effective, then it is not assigned to the detectives for investigation (1T91). Prior to the implementation of the solvability factor in late December 1988,the detectives handled approximately ten or more

investigations each a month. After its implementation, detectives were assigned approximately four or fewer cases a month each, and spent most of their time logging cases into a book (1T45-1T46).

The record shows the following information regarding cases filed and investigations assigned and cases with no solvability factors (2T20-2T21).

	Cases Filed	Investigations Assigned	Cases Not Solvable	Arrests Without Investigations
Jan 1989	72	9	47	16
Feb 1989	80	6	46	28
Mar 1989	88	5	62	21
Apr 1989	84	13	50	21
May 1989	64	11	34	23

By April 1, 1989 the detectives were removed from parking lot duty and reassigned to the detective bureau because new police officers were hired who could perform the parking lot duties (1T55, 1T90). The University, however, continues to use the solvability factor and, therefore, the number of complaints investigated by the detectives have decreased (1T91).

4. The University employs four or five rank and file detectives including Frank DeMarzo and Mike Riscinti. On August 1, 1988, Anthony Consolo, Captain of the Detective Bureau, filed a request for position evaluation (CP-3) seeking an upgrade of the detectives salary range.

5. By letter of September 14, 1988 (CP-1) the FOP's attorney wrote to Saxe regarding an anticipated vacancy for a sergeant position. The FOP represents rank and file police officers

and detectives, but not sergeants (J-1). In CP-1 the FOP expressed concern that the anticipated sergeant position had already been promised to a police officer in the unit (Lucille Holland) as a result of C-1C, and that, therefore, other unit officers would not be given consideration for the promotion. The FOP asked for confirmation whether the position would be available and whether all applicants would be given fair consideration.

By letter of September 28, 1988 (C-1B), Saxe responded to CP-1 as follows:

> In response to your letter of September 14, 1988, we do anticipate a Sergeant's position becoming available in the near future. Such a position will be posted and filled in accordance with the University's normal practice for filling vacancies.

Also on September 28, 1988 Captain Kenneth Lockhart prepared a memorandum for Cilenti (R-1) regarding a discussion Cilenti had had with him over a plan to reduce overtime. In R-1 Lockhart set forth an overtime reduction plan which included the reassignment of officers from the crime prevention unit and the traffic enforcement unit to regular shifts. Lockhart also recommended as a "Future Option":

> To rotate detectives in uniform.

He also indicated to Cilenti that:

> One (1) detective has already been assigned to the Uniformed Patrol Unit, 8x4 shift.

On or about October 21, 1988 the University posted a vacancy for a sergeants position in accordance with its normal procedure (1T79, 1T103). There were seven applicants that met the

minimum standards: detectives DeMarzo, Riscinti, Henderson and Fitzpatrick, and police officers Berry, Cervath and Lucille Holland (1T79-1T80). Interviews were held on or about November 18, 1988 after which Holland was selected for promotion.

6. In the fall of 1988 the University was considering purchasing a supervisory training course for use on a University-wide basis and enrolled a few employees in the course to determine its value to the University (1T28, 1T49). The University's personnel department notified Saxe of the course and Saxe notified Cilenti and requested that he select one officer for the course. Cilenti first selected police officer Donald Finer, but Finer told Cilenti he was unavailable. Cilenti then selected police officer Harmon, but Harmon also told Cilenti he was unavailable. Finally, Cilenti selected police officer Lucille Holland, and Holland attended the course on November 7 and 8, 1988. (1T98, 1T104-1T105, C-2, C-4). The training course was not required as a qualification for the sergeants position, nor did Holland's course attendance have any bearing on her qualification for promotion to that position (1T99).[3/]

3/ Riscinti and DeMarzo testified that after they learned of Holland's selection to attend the supervisory training course they spoke to Paul Barznicker, the man responsible for University-wide training programs, who allegedly told them that anyone taking the training course would have an advantage over other employees competing for a promotion (1T27-1T29, 1T65). I do not credit Riscinti's or DeMarzo's hearsay

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7. By letter of November 10, 1988 (CP-2), FOP President Sam Roberts filed a grievance with Cilenti regarding Holland's selection to attend the training course while awaiting an interview for promotion. In CP-2 the FOP alleged that Holland had gained an advantage for selection to the sergeant position and it requested that all candidates for the position be sent to the same training course. Cilenti denied the grievance at step one and the grievance proceeded to step two (1T15, 1T17).

After CP-2 was prepared, Riscinti, DeMarzo, Henderson and Fitzpatrick, on November 10, met with Cilenti and asked him about Holland's selection for the supervisory training course. Cilenti told them that he would not discuss police officer assignments with them. They also asked Cilenti whether he would make the decision on the promotion to sergeant, and he responded that he was discussing that issue with the vice president (Saxe), but no decision had been

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testimony to prove what, if anything, Barznicker said, or to prove that Holland had an advantage in the promotion process because she completed the training course. Barznicker was not involved in selecting Holland to attend the training course nor for her promotion to sergeant, and he did not testify at this hearing (1T49). Cilenti was not familiar with the training course or what was taught, and he testified that it had no bearing on Holland's qualifications for the sergeant promotion (1T99). There is no contrary reliable evidence, thus, I credit Cilenti's testimony.

reached. When the detectives persisted, Cilenti asked them to leave his office (1T100-1T101).[4/]

8. Prior to November 18, 1988 the four detectives (Riscinti, DeMarzo, Fitzpatrick and Henderson) worked in plain clothes on a regular day shift 8:00 a.m. to 4:00 p.m., Monday through Friday, with some evening and weekend overtime work for which they received monetary or compensatory compensation (1T24, 1T62-1T63); they were assigned approximately ten investigations to do each month, well over 100 per year (1T45, 1T71); and they had access to an unmarked car, a computer, and keys to the detectives office.

On November 18, 1988 Riscinti, DeMarzo, Henderson, Fitzpatrick and Berry prepared and signed C-2A, a letter which they considered a grievance, addressed to University Vice-Presidents Saxe, Gazzerro and Lister, regarding the interviews scheduled for

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4/ Riscinti testified that during the November 10 discussion Cilenti told the detectives that he was not involved in the promotion decision, that it would be handled by the vice president (1T31). Cilenti denied saying that, and testified that he told them the matter was under discussion (1T101). I credit Cilenti. He had a better and more detailed recollection of that discussion.

In addition, in C-2A, a letter of November 18, 1988 prepared by the detectives, it was alleged in item 6 that during the November 10 discussion Cilenti said that there would be no interviews for the sergeant position; that the promotion selection would be made by the vice presidents; and that he (Cilenti) was the director and did what he wanted to do. I do not credit C-2A to prove that Cilenti made any of these remarks. Rather, I credit Cilenti's testimony regarding the November 10 discussion.

that day for the sergeant position. In C-2A the employees requested that the interviews be cancelled and the posting for the sergeant position be rescinded because of the settlement agreement with Holland, because Holland was sent to the supervisory training course, because of the November 10 grievance, and because of statements allegedly made by Cilenti.

On November 18, while C-2A was being delivered to the vice presidents, Anthony Consolo, captain of detectives, entered the detectives offices looking for Riscinti and DeMarzo. Fitzpatrick told him that they had written a letter of complaint concerning treatment they received as compared to Lucille Holland, and were delivering it to the vice president (2T47). Consolo was shocked that the chain of command was not followed and asked Fitzpatrick why they had not discussed the matter with him first, but Fitzpatrick did not know (2T4, 2T47-2T49). When Riscinti and DeMarzo returned to the office Riscinti waved a piece of paper (presumably C-2A) and said, "If this doesn't get him fired, nothing will." (2T4, 2T46, 2T49). Riscinti was referring to Cilenti, and Consolo asked Riscinti why they did not come to him first and why they couldn't work it out. Riscinti did not respond. Consolo was shocked because the detectives were trying to get Cilenti fired, and because they did not follow the chain of command (2T4-2T5, 2T46, 2T49-2T50). Consolo did not think the detectives did anything improper by writing the letter, but he felt that it should have been presented first to him, than Cilenti, before being sent to the vice-presidents

(2T6). During that encounter Consolo did not actually see or read C-2A and did not see that document until the hearing (2T3-2T4, 2T45-2T46)[5/]

Later that day, Consolo met with Cilenti regarding C-2A. Consolo explained that he neither read the letter nor gave the detectives' permission to distribute it. Cilenti did not criticize the detectives for writing the letter, but would have preferred them to follow the chain of command (2T6). Cilenti did not give Consolo any directions regarding C-2A, nor did he authorize or direct Consolo to take any action regarding it (1T101).

After leaving his meeting with Cilenti on November 18, Consolo did not further discuss C-2A with the detectives, and he did

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5/ Riscinti testified that when he and DeMarzo came back to the office that Fitzpatrick gave Consolo a copy of C-2A and that Consolo read it (1T32). Consolo testified that Fitzpatrick told him about the letter but that he never really saw or read the letter until the day before he testified at this hearing (2T4, 2T45-2T46). I credit Consolo's testimony and recollection of the events. Riscinti was not in the room when Consolo first arrived and could not have witnessed what Fitzpatrick did nor heard what Fitzpatrick told Consolo. Consolo testified that Fitzpatrick told him about the letter (2T4, 2T47), that he (Consolo) waited for Riscinti, and that Riscinti came into the room waiving a letter and making the remark about getting "him" (Cilenti) fired. Riscinti did not deny any of that testimony, and the FOP did not offer Fitzpatrick to prove whether he (Fitzpatrick) gave Consolo a copy of C-2A. Consolo's recollection of the facts is more plausible than Riscinti's and noting no direct rebuttal from Fitzpatrick, I credit Consolo's testimony.

not discuss any reassignments or changes with them on that day (2T7, 2T14, 2T57).[6/]

9. In late November and early December 1988 Consolo took part in discussions with Cilenti and other superior officers regarding the auto theft problem, manpower and plans to reduce thefts from the University lots. (2T33-2T35, 2T54-2T55). Cilenti indicated that something had to be done to decrease thefts from the lots, and he and the superior officers in general decided that a high visibility patrol in the lots was the best plan (1T126, 2T12, 2T55). The plan involved placing a marked vehicle and a patrol officer in uniform in as many lots as possible. In order to

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6/ Riscinti and DeMarzo testified that after Consolo spoke to Cilenti on November 18, he (Consolo) told the detectives that Cilenti said that because they wrote C-2A there were going to be changes made in assignments, and that there would be no overtime, no vehicle, and the computer would be removed. (1T33-1T35, 1T67-1T68). Consolo denied those statements and testified that after leaving the meeting with Cilenti he had no further discussions with the detectives regarding C-2A (2T7, 2T14, 2T57). I credit Consolo's testimony. Consolo explained that he did not have any further discussions with the detectives that day or make any quick changes in their schedules because he and Cilenti wanted to avoid making any change that would appear retaliatory (2T7). As far back as September 28 in R-1, it was suggested that detectives be rotated into the patrol division. Given the high auto thefts in November and the shortage of manpower, the University had a legitimate reason, apart from C-2A, to implement the patrol policy. Consolo actually told the detectives about the new assignment in early December, and the patrol rotation and solvability factor were not implemented until late December, and the computer wasn't removed until April 1989 and even that was legitimately based. Given the fact that a legitimate basis existed for the patrol assignments -- one which existed prior to C-2A -- it is not likely that Consolo would have told the detectives that it was based upon C-2A. I found Consolo's testimony more plausible and credit it here.

effectuate the plan Cilenti needed all his patrol officers plus two detectives rotating in uniform (1T125-1T127). The detectives were to be in uniform performing the patrol duty on an every other week basis and rotated back into the detective office on the following week. The detectives' participation in this plan was to continue until the theft problem stabilized or more manpower was obtained (2T12-2T13, 2T56). Although Consolo objected to moving detectives into the patrol rotation, he acknowledged that the facts of the theft problem and manpower needs necessitated the change. (2T55-2T56). The plan, including the detectives rotation to patrol, was implemented in December (1T35). The detectives going out on patrol had their hours changed to patrol hours 7:30 a.m.-4:00 p.m. instead of their usual 8:00-4:00 (1T36, 1T89).

During those discussions it was further decided that in order to shift two detectives into patrol it was necessary to implement the solvability factor to reduce the number of investigations for the detective staff (1T90-1T92, 2T16-2T17, 2T54). The solvability factor was implemented in late December 1988 (2T17). By memorandum to Saxe dated February 13, 1989 (R-4), Consolo explained the nature and purpose of the solvability factor.

In early December, after the discussions with Cilenti, Consolo informed the detectives about rotating into patrol duty (2T13). The detectives reacted by perceiving the assignment as

punishment. Consolo told them to do the job and eventually they would return to full-time detective duty (2T13-2T14).[7/]

10. Sometime after the detectives were informed of their patrol assignments other changes occurred. A computer was removed from their office, the lock was changed on their office door, and the detectives' vehicle was not available as often as before. A computer had been placed in the detectives office apparently sometime during 1987 or 1988 to computerize crime statistics and other information needed by the crime prevention unit (1T93-1T94). By December 1988, but for a list of 65 weapons, the computer was not being used (1T94, 2T22, 2T24). Cilenti decided that the computer could be used for a new decal program, thus the detectives were informed that it would be removed from their office (1T93). Sometime in April 1989 the computer was moved to the fiscal department (2T23).

Sometime subsequent to early December 1988 a captain told Cilenti that a detective had told him (the captain) that he (the detective) listened to a tape of Cilenti speaking badly about an

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7/ Consolo testified that when he told the detectives about the patrol assignments Riscinti and DeMarzo "perceived" it as punishment (2T13). Riscinti testified that Consolo told them about the assignment and then allegedly said that "they [we] can 'perceive' this as punishment." (1T35). I credit Consolo's testimony. Obviously a discussion was held about the assignment and Consolo may have told them that they could perceive it as punishment. But I find that Consolo's remark was in response to Riscinti's comments that he thought it was punishment and Consolo's response was not intended to mean that the assignment was given as punishment. It was intended to mean that Riscinti could perceive it any way he wanted.

employee. Cilenti decided to restrict the access to the tape cabinet which was in the detectives office by changing the lock on the office door and only giving keys to the captains (1T97-1T98, 2T24).

A vehicle had, for some time, been assigned to the Detective Bureau for use by the detectives when doing investigations. After the implementation of the parking lot patrol plan and the solvability factor there was a reduction in the number of cases needing investigation. Although the car was still assigned to the Bureau, detectives were only allowed to use it for off campus investigations. In addition, when the captain's car was destroyed, the availability of the detectives' car was reduced because it served both the captain and the detectives (1T94, 2T24).

Despite the implementation of the parking lot patrol plan and solvability factor, Cilenti did not discontinue the overtime policy, but required captains to authorize it after Cilenti's own approval (1T95).

In January 1989, after the patrol rotation and the solvability factor were implemented, Riscinti had a discussion with Consolo regarding a complaint the detectives filed with the Equal Employment Opportunity Commission concerning Holland's selection for promotion. Riscinti alleged that prior to the EEOC discussion, Consolo, early in January 1989, told him that he was "wrong" for writing C-2A and that unless he rewrote or rescinded that letter or wrote a new letter indicating they (the detectives) misunderstood

what was going on, things would stay the same (1T40-1T41). Consolo denied ever asking Riscinti or DeMarzo to rewrite or rescind C-2A and I credit his testimony (2T14, 2T57-2T58).[8/] With regard to the EEOC complaint, Riscinti told Consolo that if Cilenti would remove the detectives from the patrol assignment and put them back in the Bureau and bring everything else back (i.e., the keys to the Bureau, the car, etc.) that they would drop the EEOC complaint. Consolo responded that Cilenti would not do that; that he had nothing to hide and would welcome the processing of the complaint. (2T15, 2T57-2T58).[9/]

8/ Riscinti testified that when Consolo first spoke to him about rewriting C-2A he (Riscinti) was on patrol duty in a University parking lot. Riscinti testified that Sergeant Riccardi and detective Fitzpatrick were also present for that discussion (1T40), yet the FOP did not present either Fitzpatrick or Riccardi to support Riscinti's claim. Consolo denied asking Riscinti to rewrite or rescind C-2A and testified that he had no authority to even suggest that the patrol rotation would be rescinded if C-2A was retracted (2T58). I credit Consolo's testimony. Given the fact that Cilenti recognized the need to reduce auto thefts by increasing patrols in the lots, it makes little sense that he or Consolo would want to discontinue using detectives to patrol after only one month before new recruits were available to patrol the lots.

9/ Riscinti testified that Consolo told him that the FOP would have to drop the EEOC complaint if Cilenti were to change everything back. Riscinti further testified that he then told Consolo that if everything was put back he wouldn't go through with the complaint, but that Consolo said that Cilenti wouldn't make the first move and Riscinti wouldn't drop the complaint (1T42). Consolo testified that it was Riscinti who made the offer to drop the complaint, but that he (Consolo) rejected it and indicated that Cilenti was willing to have the

Footnote Continued on Next Page

11. In the afternoon of November 18, 1988, Cilenti interviewed all the candidates for the sergeant position (1T80). The interviews lasted about one-half hour each and consisted of Cilenti (and occasionally Capt. Lockhart) asking questions regarding police work, scheduling of personnel, use of manpower, and knowledge of management concepts (1T50, 1T75, 1T109-1T111). The qualifying criteria Cilenti relied on to promote an officer to sergeant included review of their time as a police officer, years of service, their attendance record, their educational level and background, and their ability to articulate management concepts in an oral interview (1T82-1T83).

Prior to the interviews Cilenti was aware of Holland's settlement agreement (C-1C) with the University, but Saxe told him that his (Saxe's) interpretation of C-1C was to follow the normal bid process which meant he (Cilenti) should select the most qualified candidate no matter who that was (1T81-1T82). Cilenti was

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9/ Footnote Continued From Previous Page

complaint processed (2T15, 2T57-2T58). I credit Consolo's testimony. At the time the discussion occurred the patrol rotation and solvability factor had been in effect a month or less. Since the purpose of that rotation was to reduce auto thefts and the number of investigations, it is not logical that Cilenti or Consolo would -- so soon thereafter -- make an offer to Riscinti to discontinue those policies for the withdrawal of the EEOC complaint. It is far more likely that Riscinti, in an effort to eliminate the patrol rotation -- which the detectives didn't like -- before they had to spend much more time in it, offered to withdraw the EEOC complaint in the hope of getting a quick settlement to avoid doing more of the patrol work.

also aware that he chose Holland to attend the supervisory training course, but he had no knowledge of the course, and her attendance at that course was not considered by him as part her qualifications for promotion (1T99, 1T112).

After interviewing all the candidates Cilenti recommended to Saxe that Holland be promoted. He explained that during the interviews he prompted all the candidates, but that Holland was better able than the other candidates to grasp management principles (1T82-1T83). Holland was better able to answer the questions clearly, concisely and correctly (1T82). Cilenti also relied on Holland's educational background and good attendance record in selecting her for promotion (1T83, 1T118-1T119).

Saxe, independent of Cilenti, had also determined that Holland was the most qualified candidate for promotion, but he did not inform Cilenti until Cilenti had made his own recommendation (1T141). Saxe did not interview the candidates. Rather, he reviewed their resumes and based upon their experience, years at the University and their education, particularly in the field of criminal justice, he concluded that Holland was the most qualified candidate (1T138-1T140, 1T146).

During his review process Saxe prepared a chart (R-2) listing the candidates, their total years in security and police work, their years in University public safety, their years as a University police officer, and their high school and any college education. Saxe then placed an asterisk on the chart for the two

leading candidates in each category and added them up at the end and Holland, with an asterisk in each category, had the most asterisks, thus was Saxe's selection (1T140, 1t142-1T143). Saxe was particularly impressed with both Holland's and DeMarzo's two years of college education in criminal justice (1T146). But DeMarzo had fewer years in service at the University. Riscinti, who had more years in service at the University than Holland, had no college education.10/

ANALYSIS

The University did not violate subsection 5.4(a)(5) or (a)(1) of the Act since it did not change, rather it properly applied and followed, the bidding and promotional criteria and procedures contained in C-1A, because its selection of Holland to attend the training course did not violate C-1A, and because it did not consider the training course in selecting Holland for promotion. The University did not violate subsection 5.4(a)(3) or

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10/ Riscinti testified that R-2 incorrectly listed his years in security work and years at the University (2T86). R-2 listed him as 12 years--7 months in all those categories. R-2 already shows Riscinti as having the most years at the University and as a University police officer for which he received two asterisks. Assuming his years in security work should be increased to 14 years, he would have received another asterisk which would have tied him with Holland for three asterisks going into a review of their educational background. But Holland had two years of criminal justice in college, Riscinti had no college credit. Thus, Holland received a fourth asterisk, and since both Cilenti and Saxe considered college to be a significant consideration for promotion, it was reasonable and logical that Saxe, through R-2, would select her for promotion.

(a)(1) of the Act because it did not implement the patrol rotation, the solvability factor, or any of the other changes in response to the exercise of protected activity. Rather, those changes would have occurred in any case based upon legitimate business considerations. Finally, the University did not violate subsection 5.4(a)(4) of the Act. The FOP failed to produce evidence that the University took any action against any employee based upon proceedings before this Commission.

Count I

Count I must be dismissed because it is out of time, because the settlement agreement did not cause a change in the job bidding and promotion policy, and because the University properly implemented the promotion policy in selecting Holland for promotion.

First, the Act at 34:13A-5.4(c) provides that a complaint shall not issue based upon any incident occurring more than six months prior to the filing of the charge unless the charging party was prevented from filing the charge within the proper time. In order to establish that it was prevented from filing a charge, a charging party has the burden to prove that it did not know and could not have known of the incident until sometime within six months from the filing of the charge. Here, the settlement agreement, C-1C, was reached on September 28, 1987. The Charge was not filed until December 6, 1988, more than a year later. Thus, on its face, the allegation that the FOP was not allowed to be a party to C-1C, or that the University was obligated to negotiate with the FOP before entering into C-1C, or that C-1C changed the promotional

policy (C-1A), is untimely. The FOP did not establish when it became aware of C-1C or that it was prevented from knowing about C-1C until sometime within six months of the Charge.

Second, even if the Charge on this count was timely, and assuming the University would have been obligated to negotiate with the FOP over any changes to C-1A, C-1C as a whole did not require or cause there to be a change in C-1A. Nothing in C-1C specifically mentions C-1A or that it should be changed, and although item one of C-1C required the University to offer Holland a promotion to sergeant as soon as an opening occurred, item two of C-1C conditioned any offer on following the University's normal promotional procedure.

The FOP also argued that since item three of C-1C provided that the University could not terminate or demote Holland for two years except after an Administrative Law Judge hearing, that it violated or was a change of section 5.1 of C-1A.

Section 5.1 provides in pertinent part:

> A successful bidder must serve a trial period of ninety days on the new job. A successful bidder who fails on the new job in [the] ninety day trial period may return to his/her former job if an opening exists. Such an employee may not bid on another job for a six month period.

The 90 days can be interpreted minimally as guaranteeing the employee at least 90 days to demonstrate his/her ability to perform the job, and to give the University an opportunity to evaluate the employee's ability to perform the job. But it can also be considered a maximum by requiring the University to make the

employee permanent or rejct the employee after 90 days. Nothing in item three of C-1C abridges the intent of 5.1. The two-year language merely protected Holland for two years from being unilaterally terminated or demoted. But that language did not alter or negate the 5.1 language. If after ninety days the University wanted to demote Holland it could have begun proceedings to do so. Proceedings before an Administrative Law Judge would not have contravened any language in 5.1. If, after ninety days Holland wanted to return to her prior position, she could have unless the position was filled. Item 3 of C-1C did not extend or shorten the ninety day trial period, it merely ensured Holland of an Administrative Law Judge hearing if she was demoted or terminated within two years. That protection was separate than the procedures provided for in C-1A.

Third, the University actually followed the procedures in C-1A in selecting Holland for promotion. By its letter of September 14, CP-1, the FOP sought assurance from the University that it would follow C-1A in selecting a candidate for promotion, and by letter of September 28, C-1B, Saxe gave the FOP the assurance it sought. In addition, I credited both Saxe and Cilenti that they interpreted item two of C-1C to mean that the University should follow its normal promotional procedures in filling the sergeants' position, and that Saxe directed Cilenti to promote the most qualified candidate regardless of the language in item one of C-1C.

Count II

Count II must be dismissed because the University's selection of Holland to attend the supervisory training course did not contravene any part of C-1A, nor did it result in an alteration of the criteria for promotion, nor was her attendance at the course relied upon by either Cilenti or Saxe in their selection of her for promotion.

In its post-hearing brief the FOP alleged that by selecting Holland for the training course the University unilaterally changed the promotional procedure, altered the criteria for promotion by adding an additional qualification, and gave the appearance of favoring Holland for promotion. Those allegations are not supported by the record. Although one could obviously argue that selecting Holland to attend the course may have given the appearance of favoritism, that, standing alone, is not a violation of the Act and the evidence does not otherwise support a finding that the University gave Holland an advantage.

The essential parts of C-1A set forth the posting and bidding procedure for a job vacancy, provides that "qualifications, ability and seniority" are the essential factors for selection, then provides that all qualified bidders must be interviewed and be notified in writing of the results. The remaining part of C-1A concerns procedures for the successful bidder. Nothing in C-1A addressed or prevented the University from sending a promotional candidate to a training course. Thus, the University did not change any procedure in selecting Holland for that course. In fact, the

University implemented the notice, bidding and interviewing procedures for the sergeant position and selected Holland for that position based upon her seniority, her ability to best understand management concepts, and her educational qualifications. Her attendance at the training course was not a factor. It was merely coincidence that Holland was even selected for the training course and at a time she was a candidate for promotion. Cilenti offered the course to two other employees before asking Holland, and there was no showing that he knew in advance that they were unavailable for the course. Saxe only considered seniority, work experience and college education in selecting Holland, and Cilenti testified that he did not know what Holland learned in the training course and did not consider her attendance at that course in reviewing her qualifications for promotion. Thus, neither Saxe nor Cilenti altered the criteria for promotion. There was no evidence to rebut Cilenti and I credited his testimony.

The cases relied upon by the FOP to support its contentions were not applicable. In Bergen County Special Services School Dist., P.E.R.C. No. 88-83, 14 NJPER 241 (¶19088 1988) the employer violated the Act by applying altered criteria in order to hire a particular candidate. But that did not occur here. The evidence conclusively shows that there was no change in the established criteria for promotion, and the same criteria was applied to each candidate. Similarly, there was no change in the procedures set forth in C-1A, thus the holding in Tp. of Piscataway, P.E.R.C. No.

86-10, 11 NJPER 456 (¶16161 1985) providing for the negotiability of promotional procedures was not applicable.

Count III

The FOP alleged that the University discriminated against the detectives because they filed the November 10 and November 18 grievances.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984) (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 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 us to resolve.

I find that the University did not implement the patrol assignments or make the other changes affecting detectives because they filed the November grievances. The FOP satisfied the first two parts of the Bridgewater test; grievance filing is protected activity, Lakewood Bd.Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); State of N.J. (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987), and the University knew of that activity. But the FOP did not establish that the University was hostile toward the exercise of that activity. I credited Cilenti's recollection of the discussion with the detectives on November 10, and Cilenti said nothing demonstrating anti-union animus. I also credited Consolo's testimony that he had no discussions with the detectives regarding C-2A after he met with Cilenti on November 18, and that when he informed the detectives of the patrol assignments in early December he did not tell them it was punishment. Neither Consolo's encounter with Fitzpatrick and Ricinti early on November 18 when he first learned of C-2A, his informing the detectives of the patrol assignment in early December, nor his expressed concern that the detectives did not follow the chain of command in distributing C-2A demonstrate anti-union animus.

Since the FOP did not demonstrate that anti-union animus was a motivating or substantial reason for the University's actions, under Bridgewater it is unnecessary for me to consider the University's defenses. Nonetheless, to the extent that anyone might argue that anti-union animus existed, I find that the preponderance of the evidence shows that the University would have made the patrol assignments, instituted the solvability factor, changed the locks, moved the computer and limited use of the detectives car even absent the November 10 and 18 grievances.

Beginning with R-1 on September 28, 1988, the University was considering rotating detectives into uniform. Once the auto thefts increased, the University President asked Cilenti to initiate a program to deal with that problem, and Cilenti decided to increase patrols in the parking lots. Given the shortage of manpower, Cilenti had to rotate detectives into uniform and implement the solvability factor in order to initiate the parking lot program. All of that would have occurred even absent the grievances. Once additional manpower was available the detectives were taken out of patrol rotation.

In addition, the computer would have been moved, regardless of the grievances, because the detectives did not use it; the locks would have been changed because of a breach in security; and the detectives car would not have been as available anyway because the captain was sharing its use.

Accordingly, based upon the above findings of fact and analysis, I make the following:

Recommendation

I recommend that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: October 6, 1989
Trenton, New Jersey