

P.E.R.C. NO. 87-122

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and-

Docket No. CO-86-332-209 and
CO-86-338-120

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO against the Salem County Board of Chosen Freeholders. The charge alleged the County violated the New Jersey Employer-Employee Relations Act when it discharged Oscar Abernathy, CWA's local president. The Commission, however, in agreement with a Hearing Examiner, finds that Abernathy was discharged for assaulting his supervisor. The Commission further finds, however, that the County violated the Act when it refused to meet with CWA's negotiating team.

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COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Daniel A. Zehner, Esq.

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

On June 2, 1986, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Salem County Board of Chosen Freeholders ("County"). The charge alleges that the County violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when on May 30, 1986 it discharged Oscar Abernathy,

^{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; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

president of CWA Local 1041, from his position of assistant road foreman.

On June 11, 1986, CWA filed a second charge. This one alleges that the County violated subsections 5.4(a)(1) and (5)^{2/} when, on June 5, 1986, it refused to negotiate with a CWA negotiations team including Abernathy.^{3/}

On June 24, 1986, the charges were consolidated and a Complaint and Notice of Hearing issued. The County filed an Answer. It admits discharging Abernathy and refusing to meet with the CWA negotiations team, but states it did so because Abernathy had assaulted his supervisor, Francis Hogate. It further states that its compliance with the interim relief order moots the second charge.

On August 11, 12, 13 and 19, 1986, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They waived post-hearing briefs.

^{2/} This subsection prohibits public employers, their representatives or agents from: "(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."

^{3/} CWA requested interim relief on this charge. On June 16, 1986, after a hearing, Commission designee Edmund G. Gerber issued an interim order restraining the County from refusing to negotiate with the team. I.R. No. 86-23, NJPER (¶ 1986).

On August 29, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-16, 12 NJPER 693 (¶17263 1986) (copy attached). He found that the County discharged Abernathy because he punched Hogate; he thus recommended dismissal of the first charge. He found that the County had refused to meet with CWA's negotiations team; he thus recommended finding a violation on the second charge. He did not order a notice since negotiations after the interim relief order had produced an agreement.

On December 18, 1986, after receiving an extension of time, CWA filed exceptions. It asserts that the Hearing Examiner erred in: (1) finding that Abernathy struck Hogate after he had been fired; (2) finding that Hogate sustained certain injuries; (3) crediting Hogate's testimony while inconsistently finding that Abernathy demanded a copy of the clothing policy; (4) finding that the County had a clear policy about wearing long sleeve shirts; (5) finding that Abernathy did not file countercharges of assault against Hogate out of anger and at a trooper's suggestion; (6) finding that inconsistencies in Hogate's testimony were inconsequential; (7) finding that Hogate did not harbor ill will toward Abernathy; (8) making certain findings concerning four employees' written statements; and (9) not crediting union witnesses.

On January 16, 1987, the County filed a response to these exceptions. It did not file cross-exceptions.

CWA also moved to supplement the record with a transcript of a municipal court proceeding in which Abernathy was accused of assaulting Hogate.^{4/} On January 27, 1987, the Chairman granted the motion.

The central issue is whether Abernathy's discharge violated subsections 5.4(a)(1) and (3).^{5/} That legal issue turns on a factual issue: did Abernathy punch Hogate? If he did, the discharge was lawful. See generally Bridgewater Tp., 95 N.J. 235 (1984).

The Hearing Examiner found that Abernathy punched Hogate. He found that Hogate's testimony about the confrontation was more credible than Abernathy's and that the testimony of County witnesses about Hogate's injuries was more credible than the testimony of CWA witnesses. The exceptions ask us to overturn these credibility determinations and other findings of fact. CWA acknowledges that it has a heavy burden: absent compelling evidence in the record to the contrary, we will not disturb a Hearing Examiner's credibility judgments based on his observation of the witnesses. Clark Tp., P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980).

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-33) are detailed and generally accurate. We adopt them, with these additions, modifications and observations.

^{4/} Abernathy was convicted; an appeal is pending.

^{5/} In the absence of exceptions, we accept the Hearing Examiner's findings concerning the other aspect of the charge and his recommended remedy.

CWA first asserts that the Hearing Examiner erroneously found that Abernathy struck Hogate after he had been fired. The Hearing Examiner accurately recounts Abernathy and Hogate's versions of their confrontation (pp. 20-21). Hogate testified that he told Abernathy to put on a shirt and Abernathy told him to "Go fuck yourself" four times. Hogate continued: "At that time I told him that -- shut her down, and that was it. I didn't even get a chance to get anything else out of my mouth and he struck me, punched me." (TC 78) Hogate then told Abernathy "he was done." (TC 78) The Hearing Examiner credited this testimony rather than Abernathy's testimony that he told Hogate to "get the fuck out of my face" and Hogate then told him he was fired and left without being punched.

In making his credibility determination, the Hearing Examiner noted, as one of many factors, that, according to his own story, Abernathy must have been angry since Hogate shouted at him and told him he was fired and that the volatile situation may have led Abernathy to punch Hogate (p. 29 and n. 21). We believe the Hearing Examiner was saying that Abernathy was angry and that the situation was volatile; he was not necessarily crediting Abernathy's version of what was said.

In his analysis, the Hearing Examiner cites, as a factor in why Abernathy punched Hogate, that Hogate had told Abernathy he was fired (p. 39). Hogate, however, testified he had only told Abernathy to "shut down the tractor" and the Hearing Examiner credited Hogate's testimony generally. This variance between being

told he was fired and being told to shut down the tractor does not strike us as critical since Abernathy could well have thought that Hogate's order meant certain discipline and possible discharge.

CWA questions the testimony of Hogate and other witnesses about the injuries Hogate suffered. While there were some inconsistencies about the extent of these injuries, we find Hogate did suffer some injuries. This finding is based on the Hearing Examiner's credibility determinations.

Immediately after the incident Hogate drove to the house of the chairman of the Road and Bridge Committee, Charles Finlaw. Finlaw testified that he saw a welt on Hogate's upper right cheek.

Hogate had an employee call a State trooper, Steven Saiia, and met him at Abernathy's work site. The trooper testified that Hogate's face was reddish on the right cheek, perhaps from heat or a blow.

Another employee, Thomas Minch, saw Hogate while the trooper was arresting Abernathy. From three feet away, he saw that Hogate's bent glasses and a red mark on his upper right cheekbone.

When Hogate returned to the shop, James Scull, the assistant road supervisor, saw him from three feet away. Scull testified that Hogate's right cheek was raised and red and the bridge of his nose was slightly cut.

Four employees -- Paul Voeckler, Robert Pangburn, David Layman and Eugene Sorrell -- testified that they saw Hogate at his office that afternoon. Voeckler did not see Hogate's face. The

other three witnesses saw nothing unusual about his face. The Hearing Examiner found that the observations of these witnesses were imprecise and instead credited the testimony of Finlaw, Saia, Minch and Scull because they all had a better chance to see Hogate's face. We accept these credibility determinations.^{6/}

Hogate testified that Abernathy's left-handed punch resulted in a bruise on the right side of his face, a cut on his nose, and two black eyes, making him look like a raccoon. The black eyes appeared Saturday morning and disappeared by Monday morning. At first he testified that he was sure he looked in the mirror Saturday night and saw these injuries; later he admitted he wasn't sure he had. Scull saw Hogate up close Saturday morning and testified he had light black and blue eyes.^{7/} Hogate, like Minch, testified that his glasses were bent. He produced a receipt for their repair. The Hearing Examiner credited Hogate, Minch and Scull's testimony. We accept those credibility determinations.

CWA asserts that the Hearing Examiner erred in crediting Hogate's testimony, yet stating that Abernathy made an unfounded demand to see the clothing policy (p. 29). Abernathy testified he demanded to see the policy. Hogate did not so testify. It does appear inconsistent to credit Hogate's testimony generally, but

^{6/} We correct one finding: Layman did indicate the distance (five feet) from which he saw Hogate that afternoon.

^{7/} Scull mentioned a bruised right eye, but not black eyes, in a sworn statement the next Monday.

still find Abernathy made this demand and it would have been preferable if the Hearing Examiner had explained whether he was crediting Abernathy's testimony on this statement and, if so, why. Nevertheless, a Hearing Examiner may credit some portions of a witness's testimony while discrediting other portions and need not specify the basis for every credibility determination. Carrier Corp. v. NLRB, 768 F.2d 778, 119 LRRM 3603 (6th Cir. 1985); NLRB v. Norbar, Inc., 752 F.2d 235, 118 LRRM 2588 (6th Cir. 1985); Eastern Engineering & Elevator Co., Inc. v. NLRB, 637 F.2d 191, 106 LRRM 2097 (3d Cir. 1980); Don Moe Motors, Inc., 237 NLRB No. 170, 99 LRRM 1381 (1978). We also note that whether Abernathy made this demand is a minor issue since it is undisputed that Abernathy swore at Hogate, thus demonstrating a willingness to confront and perhaps provoke his supervisor.

CWA asserts that the Hearing Examiner erred in finding that Abernathy must have known about the policy on long sleeve shirts when the assistant road supervisor was unclear about this policy. Employees operating mowers are supposed to wear long sleeve shirts so they do not get poison ivy. This rule had been posted for two years. Assistant road supervisor Scull testified, however, that if mowers did not wear long sleeve shirts and got poison ivy, that was their choice. In any event, a rule required all employees to wear some kind of shirt and that rule was published, known and

inflexible. A week or two before the incident, Abernathy complied with an order, from either Hogate or Scull, to put on a shirt.^{8/}

CWA argues that the Hearing Examiner erred in discrediting Abernathy's testimony because Abernathy filed countercharges of assault against Hogate which he later withdrew and admitted were false. The Hearing Examiner rejected Abernathy's testimony that he filed the countercharges out of anger and at a trooper's suggestion. First, the Hearing Examiner credited Saiia's testimony that Abernathy was calm the entire time, including at police headquarters.^{9/} Second, the Hearing Examiner did not believe that a trooper would suggest a countercharge without knowing anything about the case (p. 40). CWA asserts that the Hearing Examiner improperly cut off questioning which would have shown that the trooper knew that Hogate had crossed out something on his first charge form and asked for another form which was not given.^{10/} The Hearing Examiner, while cutting this questioning off as hearsay, invited the charging party to call the trooper as a fact witness. The invitation was not accepted. While the Hearing Examiner should not have assumed the trooper knew nothing about the case, we do not

^{8/} Abernathy did not testify that he did not know the policy on vests. The Hearing Examiner erred on this point (p. 38).

^{9/} The transcript supports this finding; CWA's quotation omits two critical lines which indicate that Hogate and Abernathy were both calm at the station. Saiia, however, did leave Abernathy to go to lunch.

^{10/} The trooper signed the charge Abernathy filed against Hogate.

believe that the proffered testimony would have changed his assessment of the issue. The important fact is that Abernathy filed a false countercharge. This fact hurt Abernathy's credibility.

CWA asserts that the Hearing Examiner should not have dismissed five inconsistencies in Hogate's testimony as inconsequential. We have already discussed the first inconsistency (whether Hogate observed his injuries in the mirror Saturday evening).

Hogate testified he didn't see the punch coming (TC36), but then testified, when asked how he knew it was a left-handed punch, he had seen that coming (TC83). Hogate also testified he could not say whether the punch came from a 10 or 90 degree angle or whether it was a wide swing or an overhand (TC83), but he saw himself get hit (TC 84). We believe these discrepancies are insignificant.

Hogate first testified that he recommended to Finlaw that Abernathy be fired (TC 91); later denied that he had made that recommendation and instead testified that Finlaw initiated that decision (TC 94), and then reversed that testimony once more (TC 149). Hogate's confusion on this collateral point is a mark against his credibility.

CWA asserts that Hogate's testimony about the settlement of a previous unfair practice charge was inconsistent with his own testimony and that of the Freeholders' Clerk, Lee Munyon. That charge alleged that Abernathy was denied a promotion to assistant

road supervisor because of his grievances.^{11/} The parties settled this charge by an agreement which stated, in part, that the standard operating procedure was for the road supervisor (Hogate) to convey orders and assignments to the assistant road supervisor (Scull) who would tell the other employees. The purpose of this settlement, in part, was to reduce interaction between Hogate and Abernathy because of their past troubles. According to the Freeholders' Clerk, he read the settlement to Hogate and checked weekly to make sure he was complying. Hogate testified that he was aware of some kind of settlement but could not recall whether he learned of it from the Clerk or a meeting. He also testified that the settlement did not change the standard operating procedure of Scull's supervising employees in the field, subject to Hogate changing their assignments.^{12/} For two months after the settlement, Scull gave out Abernathy's morning assignments, but Hogate then resumed making these assignments. Before and after the settlement, Scull

^{11/} Abernathy testified that he filed this charge because Finlaw told him that the Freeholders had labelled him as a troublemaker because of the grievances and his harassment of Hogate. The Answer to the previous charge denied this statement. In this proceeding, Finlaw testified that he talked with Abernathy, informed him he didn't get the promotion, and pointed out his deficiencies. Finlaw, however, did not specify these deficiencies or deny Abernathy's testimony.

^{12/} In municipal court, Hogate testified that he was not aware, offhand, of a settlement arising out of Abernathy's suspension in December 1985. Hogate later testified that he was aware of some settlement but not its fine print since he had not seen it.

supervised the employees in the field, subject to Hogate's changing their assignments.

Hogate's testimony about the settlement was imprecise but not incredible. Munyon knew more about the settlement's details, but Hogate was sure of one key point with which Abernathy and Scull agreed: nothing changed with respect to Hogate's authority to give assignments and orders in the field.

The last alleged inconsistency concerns Hogate's testimony about how he arrived where Abernathy was operating the tractor on May 30, 1986. Hogate testified that he visited Finlaw at his home and then drove past Abernathy's work location on the way back to the shop; he later testified that his route back to the shop was not the shortest or fastest. The record does not show how much longer his route was. Without that information we are unwilling to assume Hogate was "looking" for Abernathy. Hogate was also confused about whether he stopped off at another project on Aldine Road after leaving Finlaw's house; at the departmental hearing, he testified he did, but at this hearing he testified he visited the other project before going to see Finlaw. We note this inconsistency.^{13/}

^{13/} CWA also asserts that Hogate testified evasively about how he knew Finlaw would be at home on a Friday morning. We see no evasion. Finlaw was on vacation that day and Hogate gave him an update on operations. The record is silent on how that meeting was arranged because that question wasn't asked. Nor was Hogate evasive about Finlaw's regular work hours: he knew Finlaw worked Monday through Friday but wasn't sure of the exact hours.

In sum, there were some inconsistencies in Hogate's testimony which bring into question his memory of details, but not necessarily his veracity on whether Abernathy punched him. We also note that Abernathy's testimony was not free from inconsistency either. For example, in municipal court he denied swearing at Hogate. Also, on cross-examination in this proceeding he denied ever having been ordered to wear a shirt but later admitted he had been a few weeks before the confrontation.

CWA contends the Hearing Examiner erred in discounting evidence of Hogate's hostility towards Abernathy. It points to six areas of testimony.

The first area concerns Abernathy's assertion that his work assignments changed after he helped an employee appeal his discharge. We agree with the Hearing Examiner (p. 8) that the record is unclear about the nature, extent and effect of any changes. We note that when an employee is operating a mower, he is not considered to have a district and that there is confusion about what roads lie within Abernathy's district.

The second area concerns a petition Abernathy circulated objecting to a new assistant road supervisor position and the appointment of a friend of Hogate to that position. A grievance was denied, but the Freeholders abolished the position anyway. CWA asserts that these developments must have upset Hogate.

The third and fourth areas concern a series of grievances between January and June 1985. These grievances challenged Hogate's exercise of authority.

The fifth area is the filing of the August 1985 unfair practice charge (later settled) and the work assignments and disciplinary actions which followed in September and led to an amended charge alleging harassment. These developments are described in the Hearing Examiner's report (pp. 10, 12-13 and 14-16).

The sixth area concerns a dispute over road patching material, two grievances filed in January 1986 and three grievances filed on May 20, 1986. The Hearing Examiner's report describes the dispute and grievances (pp. 10-11).

CWA concludes from these six areas of testimony that Hogate must have been upset by those challenges and that the Hearing Examiner should not have concluded that Hogate was an essentially truthful witness who harbored no ill will or hostility toward Abernathy (p. 30, n. 13). While Munyon and Finlaw thought that there were "differences," "trouble" and "animosity" between Hogate and Abernathy and that the settlement agreement was designed to reduce that tension, that tension was mutual. The Hearing Examiner observed Hogate's demeanor and concluded he was truthful in saying that a punch rather than hostility motivated Abernathy's discharge. We accept that demeanor evaluation, which is not inconsistent with the existence of mutual hostility.

CWA asserts that the Hearing Examiner erred in his findings (p. 26, n. 17, p. 27, n. 19 and p. 28) concerning the written statements of David Layman, Tom Minch, William Davis and James Scull. We correct two of the findings concerning Layman's

statement. First, Layman did not testify that he tore up his first statement; he testified that they did. This testimony is consistent with the testimony of Hogate's secretary, Connie Keaton, that she tore it up. Second, Keaton probably prepared Layman's first statement based on what Layman (or perhaps Davis) told her about a phone conversation in which Abernathy asked Layman if Hogate had any red marks on his face. We make no corrections in the findings concerning the Davis and Scull statements. Concerning the Minch statement, we add that at the municipal court hearing two weeks before his unfair practice testimony, Minch testified that he signed his statement at the road department, not at the courthouse.^{14/}

CWA lastly challenges the Hearing Examiner's credibility findings concerning the union witnesses. We have already considered the testimony of Pangburn, Voekler, Sorrell and Layman concerning Hogate's condition and explained why their testimony was less reliable than the testimony of the County's witnesses. CWA asserts that these points support Abernathy's credibility: (1) Saiia corroborated Abernathy's testimony about what he told Saiia; (2) Abernathy would not have called the garage asking about Hogate's injuries if he had punched Hogate; (3) Abernathy's testimony that personnel director John Davis told him to leave a conviction off his

^{14/} All the statements are signed by a notary public, but are undated and do not state that they were sworn to before the notary public.

employment application was not improbable.^{15/} We agree that Saiia's testimony about his conversation with Abernathy is consistent with Abernathy's testimony. We do not agree that if Abernathy had punched Hogate, he definitely would not have called the garage to check on Hogate's injuries. Finally, we agree with the Hearing Examiner that Abernathy's testimony concerning Davis's alleged advice was improbable.

Having reviewed the exceptions, we return to where we started: the central question is whether we should reverse the Hearing Examiner's finding that Abernathy punched Hogate. Under all the circumstances of this case, our answer is no. The Hearing Examiner's finding rests on his credibility determination that Hogate was more believable than Abernathy. This finding, in turn, largely rests on his evaluation of the witnesses' demeanors; Abernathy's dishonesty in filing a false countercharge; and the reliable testimony of County witnesses about Hogate's facial injuries. There were some inconsistencies in Hogate's testimony and some imperfections in the Hearing Examiner's findings and analysis. The inconsistencies might or might not have led a different Hearing Examiner to make different credibility determinations, but they do not rise to the level of justifying us in displacing this Hearing

^{15/} The Hearing Examiner admitted evidence of the nature of the prior conviction, but stated he did not consider it. The better approach would have been to accept evidence that a conviction was omitted from the application, but to exclude evidence concerning the nature of the conviction.

Examiner's credibility determinations. We thus dismiss this aspect of the consolidated Complaint.

ORDER

The Public Employment Relations Commission orders the Salem County Board of Chosen Freeholders to:

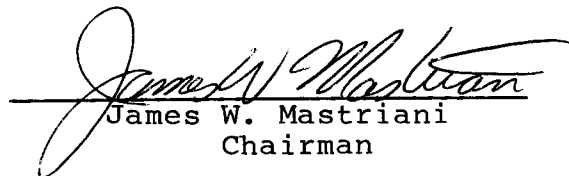
Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by the Act, particularly by refusing to negotiate with the CWA negotiations team because it included a suspended employee; and

B. Refusing to negotiate with the CWA negotiations team because it included a suspended employee.

The allegations involving the discharge of Oscar Abernathy are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987

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

In the Matter of

SALEM COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Respondent,

-and-

Docket No. CO-86-332-209 &
CO-86-338-210

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County violated §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused to negotiate with CWA on June 5, 1986, because of the presence of a suspended employee, Oscar Abernathy, the President of CWA Local 1041. No cease and desist posting was ordered since the County, subsequent to an interim relief proceeding, proceeded to negotiate with Abernathy present and reached agreement on four collective negotiations agreements. The Hearing Examiner further recommended that the Commission find that the Respondent County did not violate §§5.4(a)(1) and (3) of the Act when it terminated Abernathy on May 30, 1986, for insubordination and having struck his supervisor, Francis L. Hogate. This aspect of the case turned primarily on credibility resolutions which were resolved against the witnesses produced by CWA.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-16

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

In the Matter of

SALEM COUNTY BOARD OF CHOSEN
FREEHOLDERS,

Respondent,

-and-

Docket No. CO-86-332-209 &
CO-86-338-210

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Daniel A. Zehner, Esq.

For the Charging Party,
Steven P. Weissman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge (Docket No. CO-86-332-209) was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 2, 1986, by the Communications Workers of America, AFL-CIO (hereinafter the "Charging Party" or the "CWA") alleging that the Salem County Board of Chosen Freeholders (hereinafter the "Respondent" or the "County") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter

the "Act"), in that on May 30, 1986, the County by its supervisor, Francis Hogate, discharged Oscar Abernathy, the President of CWA Local 1041, who had filed three grievances on May 20, 1986, because of Abernathy's union activity; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

A second Unfair Practice Charge was filed with the Commission by CWA on June 11, 1986, Docket No. CO-86-338-210, alleging that the County has engaged in additional unfair practices within the meaning of the Act, in that Abernathy, as President of CWA Local 1041, was on June 5, 1986, denied the opportunity to negotiate on behalf of CWA in negotiations involving reopener clauses for four collective negotiations agreements because of Abernathy having been discharged by the County on May 30, 1986, the County taking the position that it would not negotiate as long as Abernathy was a member of the CWA negotiating team; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.^{2/}

^{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; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

^{2/} 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; and (5) Refusing to

It appearing that the allegations of the two Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing, and an Order Consolidating the two cases, was issued on June 24, 1986. Pursuant to the Complaint and Notice of Hearing, hearings were held on August 11-13 & 19, 1986 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally on August 19, 1986, and waived the filing of post-hearing briefs.

Two Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and after hearing, and after consideration of the

2/ Footnote Continued From Previous Page

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."

CWA applied for interim relief at the time that the second Unfair Practice Charge was filed on June 11, 1986. On June 16, 1986, after hearing, Commission Designee Edmund G. Gerber restrained the County from refusing to negotiate with CWA merely because Abernathy was currently on suspension from the County and because his appearance at negotiations was an affront to the County, concluding that the County's position had a chilling affect on negotiations: I.R. No. 86-23.

oral argument of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Salem County Board of Chosen Freeholders is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Oscar Abernathy is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

Findings as to the Refusal to Negotiate
(Docket No. CO-86-338-210)

4. It was stipulated that the affidavits of Richard Lewis, a CWA Staff Representative (J-6), and Lee M. Munyon, the Clerk/Personnel Officer of the County (J-7), would constitute the basis for determining whether or not the County violated the Act as alleged under the above docket number. The stipulated facts from the two affidavits are as follows:

a. Oscar Abernathy, the President of CWA Local 1041, was discharged from his position of Assistant Road Foreman on May 30, 1986, by his supervisor Francis L. Hogate, allegedly because of Abernathy's protected activity in the filing of grievances.

b. On June 5, 1986, Lewis arrived with a negotiations team, including Abernathy, for a first scheduled negotiations session on reopener clauses for four collective negotiations agreements.

c. The attorney for the County informed Lewis that the County would not negotiate with CWA if Abernathy was present at the table, stating that Abernathy's presence was an affront to management. The attorney for the County added that insofar as the County was concerned Abernathy was guilty of the charges brought against him, that he was no longer an employee of the County and that there would be no negotiations as long as Abernathy was a member of the CWA negotiations team.

d. The County, by way of defense, alleged that, in addition to Lewis and Abernathy, there were on the CWA negotiations team five other individuals who held various offices in Local 1041.

e. After the decision of the Commission's Designee on June 16, 1986, I.R. No. 86-23, the parties met and negotiated with Abernathy present and negotiations were concluded on the reopener clauses for the four collective negotiations agreements.

Findings as to the Termination of Abernathy
(Docket No. CO-86-332-209)

5. The County's Road Department is supervised by a Road Supervisor and an Assistant Road Supervisor. There are between 32 and 35 employees in the Road Department.

6. Abernathy was hired on November 17, 1975 as a laborer in the Road Department. Abernathy had completed an employment

application on October 6, 1975, and in answer to a question as to whether he had ever been arrested or involved in a criminal offense, he stated that in 1969 he had received an indeterminate sentence for breaking and entering and larceny (R-2). He omitted to state that on September 14, 1973, he had been given a six-month suspended sentence and a fine of \$150 as a result of having entered a plea of guilty to charges of rape and carnal abuse of a child (R-4). The Hearing Examiner discredits as improbable the testimony of Abernathy that when he filled out his employment application in October 1975 he was told by the Personnel Director, John Davis, that he should not "put on" the application the fact of his conviction for rape and carnal abuse of a child, supra.

7. After being hired as a laborer in the Road Department in November 1975, Abernathy also worked as a truck driver and in 1982 became Assistant Road Foreman.^{3/}] The Road Supervisor from November 1975 through February 1984 was J. Baker Diitrich. The Assistant Road Supervisor during most of this period was William Robinson.

Abernathy's' Protected Activity

8. CWA and its Local 1041 have represented five units of County employees for approximately five years. One of these units

^{3/} Abernathy filed a second employment application on April 27, 1983 for the position of Assistant Road Supervisor or Shop Foreman, in which he made the same omission as to the September 14, 1973 conviction (R-4), including, however, as previously, the 1969 conviction (R-2).

includes non-supervisory employees and among these employees are those in the Road Department. Abernathy is in this unit. Abernathy became a CWA Shop Steward in or around February 1984. In November 1984 he became the Executive Vice President of Local 1041 and in February 1986 became its President. Also, Abernathy became active in negotiations on behalf of CWA Local 1041 in April 1984 and has actively participated in negotiations through June or July 1986.

9. Francis L. Hogate became the County's Road Supervisor in February 1984, at which time he met Abernathy, who was an Assistant Road Foreman. As noted above, Abernathy had become CWA Local 1041's Shop Steward at about that time.

10. The following is a history of the grievances filed by Abernathy, either on behalf of himself or others, since Hogate became the Road Supervisor in February 1984:^{4/}

a. On August 9, 1984, Abernathy filed a grievance on his own-behalf regarding a dust problem (CP-2A). On August 13, 1984, Hogate answered the grievance, advising Abernathy that the dust problem would not be tolerated and that he and other employees should wear the appropriate equipment (CP-2B).

b. In July 1984, Hogate discharged David Herscher, whose discharge was the subject of a grievance and a departmental

^{4/} CWA indicated at the hearing that for "background" purposes, it intended to adduce evidence beginning with the hiring of Hogate in February 1984.

hearing in August 1984. Thereafter, Abernathy worked on preparations for a hearing before the Office of Administrative Law in November 1984. However, the case was settled at or before the OAL hearing on November 30, 1984, wherein Herscher received backpay in consideration for his resignation (CP-1). Abernathy testified that the day following the scheduled hearing on November 30, 1984, he was taken out of his District by Hogate and that since then he has worked in his "old District" only about one-third of the time. On the other hand, Hogate testified that his review of the daily work sheets indicated that Abernathy had worked in his "old District" 80% of the time in 1984 through 1986. Alan Kaufman, a CWA Representative, testified that his examination of the daily work sheets indicated that Abernathy worked in his "old District" 41% of the time between August 1984 and May 1986. The discrepancy lies in the definition of "District" and how many roads are within it. The Hearing Examiner is unable to conclude on the basis of the testimony exactly how many roads lie within Abernathy's "old District" and thus concludes only that Abernathy has been assigned to work in his "old District" less frequently than before the Herscher episode.

c. On December 12, 1984, Abernathy filed a grievance, protesting the implementation of work rules without notice to the union, particularly involving hard hats and safety vests. This grievance was denied by Hogate on December 12, 1984 (CP-3A). The grievance was processed through the third step and resulted in a denial (CP-3B to CP-3E).

d. Also on December 12, 1984, Abernathy filed a grievance regarding the failure of the County to comply with seniority in overtime assignments, which was processed through the third step of the grievance procedure and denied (CP-4A to CP-4F).

e. On December 12, 1984, Abernathy filed a third grievance, protesting the failure of the County to post a vacancy for Assistant Road Supervisor, which was processed through the third step and denied (CP-5A to CP-5G). This grievance originated from the fact that previously there had been one Assistant Road Supervisor position and now the County had created a second position.

f. On December 18, 1984, Abernathy filed a grievance, again protesting work rules over hard hats (CP-6A), and this grievance was denied at the first step by Hogate on December 21, 1984 (CP-6B).

g. On January 3, 1985, Abernathy filed a grievance concerning the posting of vacation schedules (CP-7A), which was processed through Step 2 and denied (CP-7B & 7C).

h. On March 18, 1985, Abernathy filed a grievance, regarding the assignment of work (CP-11A), which was processed through the third step and denied on April 15, 1985 (CP-11B to 11F).

i. On March 25, 1985, Abernathy filed a grievance on behalf of James Redden, who had been docked one day's pay for March 22, 1985 (CP-10A), which grievance was denied at Step 3 on April 17, 1985, on the ground that Redden had not followed the proper procedure for taking vacation or sick time (CP-10B to 10F).

j. On March 29, 1985, Abernathy filed a grievance, regarding his having been given a written warning for safety violations (CP-12A), which grievance was processed through Step 2 and denied (CP-12B to 12D). However, Abernathy was relieved of the requirement to wear a hard hat for six weeks for medical reasons.

k. On April 4, 1985, Abernathy filed a grievance for the expense of a doctor's visit in connection with being relieved of wearing a hard hat (CP-13A), which grievance was processed through Step 3 of the grievance and denied on April 24, 1985 (CP-13B to 13F).

l. On September 11, 1985, Abernathy filed a grievance regarding a verbal reprimand for wearing leather sneakers (CP-26A), which grievance was denied at Step 3 on October 3, 1985 (CP-26B to 26F)^{5/}

m. On January 1, 1986, Abernathy filed a grievance on behalf of Charles Oliver, protesting discrimination by Hogate against Oliver by assigning him to unfavorable jobs and work sites (CP-27A), which grievance was denied at Step 2 on January 21, 1986 (CP-27B, 27C).

n. Also, on January 1, 1986, Abernathy filed another grievance on behalf of Charles Oliver, protesting work assignments by Hogate (CP-28A), which grievance was denied at the second step on January 21, 1986 (CP-28B, 28C).

^{5/} In or around the time of the filing of this grievance by Abernathy on September 11, 1985, supra, there was a flurry of disciplinary activity which will be delineated hereinafter (see CP-16 to CP-25, infra).

o. Sometime at the end of March 1986, or the beginning of April 1986, Abernathy brought to the attention of Hogate a problem involving the material used for patching potholes. Hogate said that the patch was "good" and to use it, after which Abernathy brought the matter to the attention of Munyon, who affirmed Hogate on the issue.

p. On May 20, 1986, Abernathy filed a grievance, complaining about trash on the railroad tracks as not being within the jurisdiction of the Road Department (CP-29A), which grievance was processed to Step 3 and denied on June 20, 1986 (CP-29B to 29D).

q. Also, on May 20, 1986, Abernathy filed a second grievance, complaining that four employees were forced to dig and load garbage and trash into a dump truck with pitch forks when the proper method would have been to use a back hoe (CP-30A), which grievance was processed to Step 3 and denied on June 20, 1986 (CP-30B to 30D).

r. Finally, on March 20, 1986, Abernathy filed a third grievance, complaining that employees were forced to work in the rain (CP-31A), which grievance was processed to Step 3 and denied on June 20, 1986 (CP-31B to 31D).

Disciplinary History Prior to Termination

11. On December 1, 1980, Dietrich, the then Road Supervisor, initiated a personnel action against Abernathy for refusing to drive posts into the ground with a hand hammer, for which Abernathy was suspended three days and two hours (R-6 to R-8). Abernathy filed a grievance on December 1, 1980, over the

incident which was apparently denied (R-9 & R-11).

12. On January 21, 1985, Hogate gave Abernathy a verbal warning because of a belligerent attitude and swearing on January 17, 1985 (CP-9).^{6/}

13. On April 2, 1985, Hogate issued a written warning to Abernathy for not wearing his safety equipment (R-13).^{7/}

14. On September 9, 1985, Hogate gave Abernathy a written warning for failure to complete a job assignment and on September 10, 1985, a Notice of Minor Disciplinary Action was issued by Munyon, suspending Abernathy for one-half hour on September 9th and the entire day of September 10, 1985 (CP-16 to CP-22).^{8/}

15. On September 12, 1985, Hogate issued a written warning to Abernathy for failing to perform properly his mowing assignment on September 11, 1985 (CP-23 to CP-25).

^{6/} This was one of several disciplinary actions during 1985, which was expunged from Abernathy's personnel file as a result of the settlement of an Unfair Labor Practice Charge on December 5, 1985, infra (J-5, ¶1).

^{7/} On May 25, 1984, Hogate caused a memo to be posted on the bulletin board in his office to all employees "...who mow, work around guard rail and use weed eaters....," which advised the employees that they must wear a long sleeve shirt and keep it buttoned (R-14). The Hearing Examiner finds as a fact that such a memo was posted and displayed on the bulletin board and that all employees, including Abernathy, had adequate notice of its content.

^{8/} This disciplinary action was not expunged from Abernathy's file as a result of the settlement of an Unfair Labor Practice Charge, infra (J-5, ¶1).

16. On September 26, 1985, James E. Scull, the Assistant Road Supervisor, issued a written warning to Abernathy based on a citizen's complaint that he had caused stones to be swept on a lawn while operating his mower on September 24, 1985 (R-19 & R-20).

17. On February 27, 1986, Scull issued a written warning to Abernathy, regarding his failure to have completed a job assignment of road patching on that date (R-17). Abernathy was given a one-hour suspension on February 27th as indicated on a Notice of Minor Disciplinary Action (R-18).

Events Surrounding August 19, 1985 Unfair Practice Charge

18. In or around April 1983, Abernathy applied for the positions of Assistant Road Supervisor and Mechanic Foreman but his application was rejected by letter dated April 29, 1983 (R-12). One Samuel Hitchner was selected as Assistant Road Supervisor and Richard Cline was selected as Mechanic Foreman.

19. On June 12, 1985, Abernathy applied again for the position of Assistant Road Supervisor. He was among seven applicants but was not interviewed because he lacked supervisory background, according to the testimony of Charles H. Finlaw, a Freeholder who has been Chairman of the Road & Bridge Committee for one and one-half years. The Freeholders selected Scull for the position of Assistant Road Supervisor based on the high recommendation of the County Engineer and the fact that Scull had a good knowledge of County roads and was, according to Finlaw, a "self-starter."

20. Abernathy testified that in or around June 24, 1985, he met Finlaw on two occasions, the first being in the Road Department garage when Finlaw advised Abernathy apologetically that the position of Assistant Road Supervisor had been filled by Scull and shortly thereafter at Finlaw's truck when the following colloquy between Abernathy and Finlaw occurred:

Finlaw: Why did you have to be a troublemaker?

Abernathy: What do you mean troublemaker?

Finlaw: Writing all those grievances and, you know, harassing Hogate, doing this to Hogate, doing that to Hogate.

Abernathy: I was only doing my union business.

Finlaw: Well, when your name was brought up in the...Freeholder hearing--everybody got mad because you were a troublemaker. They labeled you as a troublemaker. (2 Tr 8).

Finlaw did not deny that this colloquy occurred.

21. CWA filed an Unfair Practice Charge with the Commission on behalf of Abernathy on August 19, 1985, Docket No. CO-86-45-37, in which it was alleged that Abernathy was denied the promotion to Assistant Road Supervisor because of his having engaged in the protected activity of filing many grievances and being labeled as a "troublemaker" by Finlaw on June 24, 1985, supra (J-1).

22. Sometime in August 1985, shortly after the filing of the above Unfair Practice Charge, Abernathy spoke to Finlaw by telephone and the following colloquy occurred:

Finlaw: I don't even think I'll talk to you.

Abernathy: What's the problem?

Finlaw: Everytime I talk to you, you sign charges against me, make charges against me.

Abernathy: How did I make a charge against you?

Finlaw: I'm sitting here looking at it right now, the Unfair Labor Practice Charge I just received in the mail.

Abernathy: Well, I didn't intend that to be a personal matter between you and me,...that's all union business. I was denied a job promotion through it. and... I had to file the unfair labor practice charge.

Finlaw: I still shouldn't talk to you if you're going to file charges against me like this....I thought that we were talking man-to-man and you pulled this on me. (2 Tr 9, 10).

Finlaw also did not deny that this colloquy occurred.

23. As indicated previously, the Unfair Practice Charge of August 19, 1985, was settled and withdrawn on December 5, 1985 after a Complaint and Notice of Hearing had issued on August 29, 1985 (J-5). The Stipulation of Settlement provided, inter alia, for the expunging of disciplinary notices and written warnings from Abernathy's personnel file and that, in any future promotional opportunities, Abernathy would be given "full and fair consideration" and, finally, in ¶5 that:

Standard operating procedure for the Salem County Road Department is that the Road Supervisor conveys orders and assignments to the Assistant Road Supervisor, who in turn conveys such orders and assignments to Road Department employees. Although there may on occasion be exception to this general practice, whenever possible it is adhered to.

24. There was considerable testimony from each party as to whether or not the "standard operating procedure" set forth in J-5, supra, was adhered to by Hogate after December 5, 1985. However, Abernathy on cross-examination testified that after the settlement of December 5, 1985 (J-5) Hogate ceased giving out the work assignments to Abernathy each morning and instead the assignments were given to Abernathy by Scull, who also oversaw the work of the Road Department employees. The Hearing Examiner finds as a fact that the settlement agreement was adhered to vis-a-vis the "standard operating procedures," supra, and that day-to-day contact between Hogate and Abernathy was diminished.

Background Events Prior To Termination

25. Hogate testified without contradiction that since he became Road Supervisor in February 1984 he has conducted weekly orientation meetings of Road Department employees on Monday mornings at 7:30-a.m., lasting about ten to fifteen minutes. This was corroborated by Scull. At these meetings Hogate has reviewed the health and safety rules and regulations of the County Road Department, which he learned from correspondence, involving prior Freeholders. These regulations involve the wearing of florescent safety vests, hard hats when needed, and the requirement that proper dress is required, including long sleeved shirts for mower men such as Abernathy and for men working around poison ivy. In a typical month, Hogate would touch upon the clothing requirements about 50% of the time and safety vests all of the time. Hogate and Scull

testified that Abernathy has attended these Monday meetings, and that he never raised any questions regarding the regulations. As previously found, the bulletin board memo of May 25, 1984 (R-14), regarding the necessity for wearing a long sleeve shirt, was continuously posted and Hogate was certain that all of the Road Department employees had seen it, including Abernathy.

26. Hogate also testified without contradiction that during his tenure all of the Road Department employees have worn shirts and that he observed Abernathy failing to wear a shirt and safety vest on only two occasions, once, a week or two prior to May 30, 1986 and on May 30, 1986. On the first occasion, a week or two prior to May 30, 1986, Hogate testified credibly that Scull came to him and asked him to look into the failure of Abernathy to wear a shirt and vest while operating the mower. Scull testified that on that occasion he had observed Abernathy naked from the waist up and told him to put on his shirt and vest. Abernathy refused, stating that Hogate had said that he did not have to wear a shirt and vest on the mower. Hogate testified that upon being informed of Abernathy's not wearing a shirt and vest he drove to the job site and directed Abernathy to put on the shirt and vest, which Abernathy did without raising any questions.

27. Finlaw testified that he was aware of the health and safety regulations in the County Road Department, including that of

safety vests, hard hats and clothing.^{9/}

28. Hogate testified that he became aware of the Stipulation of Settlement of the prior Unfair Practice Charge from Munyon. He was told of the "standard operating procedure" provision of J-5, supra, and that thereafter Scull was the one who gave out the work assignments to Abernathy. Munyon testified that he read the "Standard Operating Procedure" provision in J-5 to Hogate, and that he told Hogate that he would be contacting him once a week to see how Hogate and Abernathy were getting along. Munyon said that this procedure continued up to the week of May 30, 1986, and that Hogate stated that all was going well even though he had had some grievances from Abernathy.^{10/}

The Incident Of May 30, 1986 And Thereafter

29. Finlaw, as Chairman of the County's Road & Bridge Committee, testified that he regularly has contact with Hogate about five times per week, either by telephone or personal visits,

^{9/} Finlaw also testified that the grievances filed by Abernathy had caused him no problem and were just a "nuisance." He also stated that Abernathy's being the President of Local 1041 was no problem to him. However, as previously found, Finlaw did not deny the two colloquies between Abernathy and himself in June and August 1985 (see Findings of Fact Nos. 20 & 22, supra).

^{10/} Munyon testified credibly that as of May 29, 1986, when the three May 20, 1986 grievances were in the second step, there had been no discussion regarding the termination of Abernathy, and that the filing of grievances by Abernathy caused Munyon no problem.

notwithstanding that he is a full-time employee of New Jersey Bell. On Friday, May 30, 1986, Finlaw was at home on vacation and, sometime between 10:30 a.m. and 11:00 a.m., Hogate visited him at his home. Finlaw testified credibly that during the course of this visit he was at least four feet distant from Hogate and Hogate's face was "okay."

30. Hogate testified that during the morning of May 30, 1986, he was checking job assignments in Alloway and that at one point he stopped at Finlaw's home to discuss with him matters involving the Road Department. When Hogate left Finlaw he "headed back to the Shop" and, as he turned on Acton Station Road at about 11:10 a.m. or 11:15 a.m., he saw Abernathy sitting on his tractor mower without a safety vest or shirt.^{11/}

31. There can be no dispute but that Abernathy was naked from the waist up when Hogate encountered him on Acton Station Road on May 30th. Hogate so testified and he was corroborated by Thomas J. Minch, who works in the sign shop of the Road Department, and who arrived on the scene shortly after Hogate. Also, Abernathy testified that he was not wearing a shirt and did not deny that he was not wearing his safety vest.

^{11/} The Charging Party attempted to elicit from Hogate that he had not taken the most direct route back to the Shop, the clear implication being that Hogate was "looking" for Abernathy. The Hearing Examiner finds as a fact that the Charging Party's proofs failed to establish that Hogate was on anything other than business-related activity when he encountered Abernathy on Acton Station Road.

32. Abernathy's version of the incident of May 30, 1986 is as follows:

He saw Hogate at about 11:00 a.m. while he was mowing and Hogate approached him and told him to "shut the tractor down." Hogate next stated that he was sick and tired of telling him to wear a shirt, to which Abernathy replied that it was "hot." When Hogate replied that it was County policy, Abernathy asked Hogate to bring it to him "in writing."^{12/} According to Abernathy, Hogate then began yelling, stating that he was the boss, to which Abernathy, in an angry tone, replied, "get the fuck out of my face," and again requested something in writing. Hogate responded angrily that Abernathy was fired but Abernathy continued to operate the tractor mower.

33. Hogate's version of the above incident of May 30th is as follows:

^{12/} Abernathy testified on cross-examination that he had never been told to wear a shirt and that he was aware of no policy that Road Department employees were required to wear shirts. Under questioning by the Hearing Examiner, Abernathy acknowledged that several weeks prior to May 30th he had been told by Hogate to put on his safety vest and shirt and that he had done so without asking to see anything in writing. His only excuse for asking for something in writing on May 30, 1986, was because it was "hot." The Hearing Examiner discredits the testimony of Abernathy that on May 30th he was unaware of County policy requiring employees in the Road Department to wear shirts and safety vests and finds as a fact that Abernathy had full and complete knowledge of County policy in this regard.

When he encountered Abernathy without a shirt and safety vest sitting on the tractor mower, he approached the left-hand side of the tractor and stated, "You know you have to wear a shirt." Abernathy's response was to say, "Go fuck yourself" four successive times and then Hogate, who was about two to three feet away from Abernathy, told him to shut down the tractor. Hogate then stated that he felt a blow on his upper right cheekbone, which knocked off his glasses and hard hat. Abernathy then said, "You can't prove I hit you, you have no witnesses." Hogate told Abernathy to get down from the tractor but Abernathy continued to operate the mower.

34. When Abernathy continued to operate the mower, Hogate immediately returned to Finlaw's home and told him of the incident and that he was going to sign a complaint and get Abernathy off the tractor.^{13/} Hogate next called the Shop and asked that the State Police be summoned to the scene. When he returned to Acton Station Road a State Trooper was present. He told the Trooper that he had been struck and that he wanted to sign a complaint.

35. Minch arrived on the scene shortly after Hogate returned from Finlaw's house. He observed the arrival of the State

^{13/} Finlaw testified credibly that about 30 to 40 minutes after Hogate had left his home initially, Hogate returned and told him of the incident with Abernathy. Finlaw testified that he saw Hogate's face and that there was a red welt on the upper right cheek. Finlaw stated to Hogate that he was going to direct Munyon to terminate Abernathy for failing to follow safety regulations and striking a supervisor.

Trooper and heard Hogate state to him that he wanted Abernathy arrested for assault. He heard the Trooper state that Abernathy was under arrest and saw Abernathy and the State Trooper leave together. Minch testified that at one point he was about three feet from Hogate, face-to-face, and that Hogate had a red mark on his upper right cheek and that his glasses were bent.

36. Scull testified that on May 30th he was out in the field and received a message on his beeper to call the office and, when he did so, he was told to go to Acton Station Road. When he arrived Minch was there moving the tractor mower. No one else was present. Scull told Minch to bring Abernathy's truck back to the Shop. After Scull returned to the Shop, Hogate came in about noon and, at a distance of about three feet from Hogate's face, Scull could see that his right cheek was raised and red and there was a slight cut on the bridge of his nose.

37. State Trooper Steven Saia, a witness for the Respondent, testified that at about 11:45 a.m. on May 30, 1986, he was dispatched to Acton Station Road where he first spoke with Hogate, who stated that he had just been assaulted and that he wanted Abernathy removed and taken to the Road Department garage to get his belongings. At about a distance of three feet from Hogate, Saia observed that Hogate's face was reddish on the right cheek, venturing that it might have been from the heat or a blow. After motioning to Abernathy to approach him he told him that he was under

arrest for assault and battery and took him to the Road Department garage and then to the State Police Barracks in Woodstown, New Jersey.^{14/}

38. When Trooper Saiia and Abernathy arrived at the Woodstown State Police Barracks, Saiia took information from Abernathy for an Arrest Report. Saiia then left for a lunch break and returned at about 12:45 p.m. He next took information from Hogate for an Investigative Report. Hogate signed a complaint against Abernathy, which was served upon him at the Barracks. Saiia testified that he took no written statement from Hogate. Saiia testified that Abernathy signed a complaint against Hogate at about 1:15 p.m., which was served on Hogate later that afternoon. Abernathy's complaint was received in evidence as Exhibit R-1 and avers that Hogate attempted to cause bodily injury to Abernathy, specifically by striking him in the chest with his open hand.^{15/}

^{14/} Hogate returned to the Shop after the State Trooper left with Abernathy, arriving there between 11:30 a.m. and 11:45 a.m. He immediately went to his office and advised Munyon of the incident.

^{15/} Abernathy's complaint (R-1) was never processed since, as Abernathy testified, he called the State Police Barracks at 7:00 a.m. the following day, May 31st, and withdrew it because the allegations were not true. Abernathy added that he had signed it because he was "angry." Abernathy testified that the idea of his signing a complaint against Hogate originated with a Sergeant Andrew Mastella at the State Police Barracks, whom Abernathy testified, had suggested to him the filing of a countercharge. Abernathy's testimony regarding Mastella's alleged suggestion is discredited as totally improbable.

Saia testified that Abernathy left the Barracks at about 1:30 p.m. and that Hogate had left sometime before that. On cross-examination, Saia testified again that Hogate's face was reddish and flush, adding that Abernathy denied to him that he had hit Hogate. Finally, Saia testified credibly on cross-examination that, at the scene, Hogate was upset and agitated but calm at the Barracks while Abernathy was calm the entire time.

39. After leaving the State Police Barracks on May 30th, Hogate testified that he went to Munyon's office and, with the assistance of Munyon's secretary, Betty Slusser, he completed and signed a Request for Personnel Action, attaching to it a memo to Munyon setting forth the details of the incident with Abernathy that day (R-15). In the Request for Personnel Action, Hogate had recommended the termination of Abernathy. Under the "Disposition" portion of the form, Munyon wrote in longhand that he had received a call from Finlaw and had been instructed by him to terminate Abernathy immediately (R-15). Munyon also testified that he had received a telephone call from Finlaw at about 11:30 a.m. on May 30th, who told him that he wanted Abernathy fired.

40. Under date of May 30, 1986, Munyon issued a Preliminary Notice of Disciplinary Action to Abernathy, suspending him effective that date, on charges of insubordination and serious breach of discipline, disorderly conduct, willful violation of Civil

Service statutes, etc. relating to employment, and conduct unbecoming an employee in public service (J-7, Exhibit "A").^{16/}

41. CWA produced four employee witnesses whose testimony collectively was that they observed no marks of any kind on Hogate's face during the afternoon of May 30, 1986:

a. Robert Pangburn, a Road Department employee for nine years, testified that at about 3:50 p.m. on May 30th he was in Hogate's office where Hogate was seated at his desk. Pangburn was about six to seven feet away from Hogate and saw his face, noting nothing unusual. He stated that Hogate was wearing his glasses and that he saw "no marks."

b. Paul R. Voeckler, a Road Department employee for 14 years, testified that sometime during the afternoon of May 30, 1986, he saw Hogate walk into his office and noticed nothing unusual. He did not notice whether Hogate was wearing glasses.

c. David W. Layman, a Road Department employee for six or seven years, testified that on May 30th he saw Hogate at his desk at about 12:00 noon. Layman testified that he was in the doorway of Hogate's office, about 15 feet away, and saw him with his glasses off but noticed nothing else. Layman testified that Hogate said he was "not in the mood right now, Oscar struck me and he's

^{16/} Following a departmental hearing on June 17, 1986, before Munyon, the above charges were sustained and Abernathy was terminated, effective May 30, 1986 (J-8). The transcript of the departmental hearing was received in evidence as Exhibit J-9.

gone." Layman testified further that he saw Hogate at the end of the day with his glasses on and that he noticed nothing unusual. This was after Layman had received a call from Abernathy at about 3:55 p.m., who asked him if he knew what had happened and then asked, "Does he (Hogate) have a red mark?" In a statement, which Layman executed thereafter, he said that he told Abernathy that "...all I could see was that Speedy (Hogate) came in without his glasses..." (CP-8).^{17/}

d. Eugene Sorrell, a Road Department employee for ten years, testified that on May 30th at about 3:45 p.m. he saw Hogate at his desk and observed him at a distance of about eight feet. Hogate was wearing glasses and Sorrell noticed nothing unusual. He stated that Hogate's face did not appear to be red and was "the same as normal."

^{17/} Layman also testified that when he reported to work on Monday, June 2, 1986, he was called into the office and asked to sign a statement, which had been previously prepared for him, and which said that Hogate had bruises and red marks. Layman testified that he tore up the statement but later signed another statement, which had been typed by Connie Keaton, Hogate's secretary. The Hearing Examiner finds more credible the testimony of Keaton that Layman, who was called into Hogate's office on June 2nd, gave her an oral statement, which she wrote out in longhand, read it to him and he said that it was "not right." Keaton said that she tore up the statement and threw it away, adding that it said that Hogate had a "red mark" on his face. A second statement was prepared, which Keaton typed for Layman, who did not sign it in the office (see Exhibit CP-8, supra).

42. At the departmental hearing on June 17, 1986, and at the instant hearing, Hogate testified that when he got up the next day his two eyes were black and blue and he "...looked like a raccoon..." (J-9, pp. 31, 32). Hogate testified that he did not seek medical attention nor did he have any pictures taken of the condition. He testified that the "black eye" condition lasted until Sunday night, June 1, 1986. Hogate also testified that a bruise on his cheek lasted until Sunday night, June 1st.^{18/}

43. On May 31, 1986, the day after the incident, Hogate testified that he had breakfast with his wife at a diner and met Scull. Scull testified that he saw Hogate at the Jack Rabbit parking lot and at one point was about two feet away from Hogate's face. Scull asked Hogate to remove his glasses and he noticed a small cut on his nose and light black and blue eyes.^{19/}

^{18/} No significance is attached to the fact that Hogate, at the instant hearing, testified that he looked in the mirror on Saturday night, May 31st, while at the departmental hearing on June 17, 1986, Hogate testified that he didn't "...go around looking into mirrors..." (J-9, pp. 32, 33).

^{19/} Scull signed two statements, which were prepared by Keaton on June 2, 1986 in Hogate's office, which were signed by Scull in the presence of a notary at the Court House in Salem. In one statement (CP-34), Scull stated that at about 12:00 noon on May 30, 1986, in the garage, he noticed that Hogate's (Speedy) right cheek bone was red and swollen. In a second statement, also prepared by Keaton on June 2nd, Scull stated that at approximately 10:40 a.m. on May 31, 1986, he saw Hogate at the Jack Rabbit parking lot in Salem and that his right eye was bruised and the bridge of his nose was cut (CP-33).

44. On June 2, 1986, Hogate arranged for statements to be taken in his office as to the incident and statements were taken by Keaton from Scull, Minch, Layman and William Davis. The statements given by Layman and Scull have been referred to previously (see Findings of Fact Nos. 41c & 43, supra). Minch testified that he gave Keaton a statement which she wrote in longhand and then read it to him. After it was typed he signed it at the Court House along with Scull, Hogate and Layman. Keaton testified that she prepared statements for William Davis (CP-35 & 36) but did not know why a line had been drawn through each statement.^{20/}

45. On June 2nd, Hogate testified that he took his glasses to an optometrist who "adjusted bent frames" and a receipt was received in evidence (R-16).

46. Hogate testified that Abernathy's filing of grievances had nothing to do with his termination and that Abernathy had not been a problem for him.

47. Finlaw, in defending his decision to recommend the immediate termination of Abernathy on May 30, 1986, before an investigation had been undertaken, testified that Abernathy's discharge resulted from his having struck a supervisor.

^{20/} Because of a serious question regarding the authenticity of the two statements by Davis, including the appearance of the word "No" on each statement, the Hearing Examiner is giving no weight whatever to the Davis statements.

Credibility Resolutions

48. The critical factual issue in this proceeding is whether or not Abernathy struck Hogate while seated on his tractor mower on Acton Station Road on May 30, 1986, sometime between 11:00 a.m. and 11:15 a.m. The Hearing Examiner finds as a fact that Abernathy did strike Hogate and that this act precipitated the decision of the County to suspend and then terminate Abernathy, effective May 30th. The basis for this ultimate finding of fact is as follows:

a. Abernathy's unfounded demand to Hogate on May 30, 1986, to bring the County clothing policy to him "in writing" when Abernathy well knew the County policy over a lengthy period of time from regular Monday morning meetings of the Road Department employees conducted by Hogate, and from having been directed by Hogate a week or two prior to May 30th to wear a shirt and safety vest on the mower, which directive he complied with at this time without raising any questions.

b. Abernathy's obvious upset and anger when Hogate, according to Abernathy, began yelling at him that he was the boss, which caused Abernathy to reply, "Get the fuck out of my face," which prompted Hogate to respond that Abernathy was fired.^{21/}

c. A most critical factor in discrediting Abernathy as to the events of May 30, 1986, was his testimony that one

^{21/} Clearly, a volatile situation had been created as a result of the verbal exchanges between Abernathy and Hogate, providing a basis to credit Hogate's testimony that Abernathy struck him.

Abernathy and told him that he had to wear a shirt, at which time, according to Hogate, Abernathy told him to "Go fuck yourself" four successive times. Abernathy concedes that he used the word "fuck" although in a different context but still directed at Hogate. Both Abernathy and Hogate agree that Hogate told Abernathy to shut down the tractor and that Abernathy refused. Hogate testified credibly that he felt a blow on his upper right cheek bone, which knocked off his glasses and hard hat. According to Hogate, Abernathy then said, "You can't prove I hit you, you have no witnesses."

e. Hogate obtained immediate corroboration that he had been struck through Finlaw, who testified credibly that he saw Hogate's face immediately after the incident and that there was a welt on the upper right cheek. The Hearing Examiner credits Finlaw whose demeanor as a witness was forthright and direct. The Hearing Examiner so concludes even though Finlaw had in June and August 1985 made statements to Abernathy, indicating animus. There appear to have been no intervening events other than Abernathy's filing a series of grievances which would have caused Finlaw, in the judgment of the Hearing Examiner, to lie at the instant hearing. The Hearing Examiner credits Finlaw's testimony that the grievances filed by Abernathy subsequent to the Stipulation of Settlement of December 5, 1985, had caused him no problem and were nothing more than a "nuisance."

f. Minch, who appeared to have no axe to grind, testified credibly that shortly after the incident on Acton Station

Sergeant Andrew Mastella of the State Police indicated or suggested to him at the Barracks in Woodstown that he file a countercharge against Hogate. The Hearing Examiner has not credited Abernathy in this regard but, even if credited, Abernathy then proceeded to file a false complaint and admitted on cross-examination that he lied. Thus, the allegation set forth in R-1 that Hogate struck Abernathy in the chest is totally false and without foundation. Abernathy testified himself that at 7:00 a.m. the following day, May 31st, he sought to retract the complaint, giving as an excuse the fact that he had been angry the preceding day. Trooper Saiia testified that Abernathy was calm the entire time, casting serious doubt on Abernathy's testimony that he was angry when he filed R-1.^{22/}

d. Hogate's testimony regarding the incident of May 30th, which the Hearing Examiner credits as the most likely version of what happened, is based on his impression of the demeanor of Hogate.^{23/} Hogate and Abernathy agree that Hogate approached

^{22/} The Hearing Examiner has given no weight whatsoever to the 1969 and 1973 convictions, notwithstanding the County's urging that the Hearing Examiner should do so pursuant to N.J.S.A. 2A:81-12. The convictions are too remote in time and the Hearing Examiner deems them irrelevant to any credibility resolution in this proceeding.

^{23/} Admittedly, Hogate lacked the ability to recall with precision earlier events or even his testimony minutes apart at the hearing. However, Hogate struck the Hearing Examiner as an essentially truthful witness who harbored no ill will or hostility toward Abernathy, notwithstanding numerous grievances that Abernathy had filed and the Stipulation of Settlement of the earlier Unfair Practice Charge. The Hearing Examiner considers any inconsistencies in Hogate's testimony at the hearing vis-a-vis the departmental hearing on June 17, 1986 (J-9) as inconsequential.

Road he was about three feet from Hogate, face-to-face, and noticed a red mark on Hogate's upper right cheek and that his glasses were bent.

g. State Trooper Saiia, the only independent witness called in this proceeding, testified credibly that he observed Hogate's face, which was reddish on the right cheek and ventured that it might have been from the heat or a blow. Admittedly, this is not conclusive but is evidence from which an inference may be drawn.

h. Scull testified that about noon on May 30th, he saw Hogate and, at a distance of about three feet, observed that his right cheek was raised and red and that there was a slight cut on the bridge of the nose. Scull also testified that he saw Hogate the next day on the Jack Rabbit parking lot, observed a small cut on the nose and light black and blue eyes. The Hearing Examiner accepts as credible the testimony of Scull, who appeared to be a truthful witness, who notwithstanding that he stands in the position of assistant to Hogate.

i. The four witnesses called by CWA to prove that Hogate suffered no injury at the hands of Abernathy are not credited, primarily because their ability to have observed marks on Hogate's cheek is in doubt: Pangburn - he testified that he was six to seven feet away from Hogate and saw "no marks" which might have been true at that distance; Voeckler - his testimony is imprecise

since he did not indicate the distance from which he "noticed nothing"; Layman - he viewed Hogate at about 12:00 noon on May 30th at a distance of about 15 feet and later at the end of the day without any distance indicated; and Sorrell - his view of Hogate at about 3:45 p.m. on May 30th was from about eight feet; Hogate was wearing glasses and there was nothing unusual. The Hearing Examiner, in not crediting these witnesses, is not suggesting that they were lying, but that their observations were imprecise and inconclusive on whether there was a red mark on Hogate's upper right cheek on May 30, 1986.

DISCUSSION AND ANALYSIS

The County Violated §§5.4(a)(1) And (5) Of The Act When It Refused To Negotiate With CWA On June 5, 1986, Because Abernathy, Who Had Been Suspended, Was On The CWA's Negotiations Team.

Given the stipulation of the parties, incorporated into Finding of Fact No. 4, supra, the Hearing Examiner is constrained to find and conclude that the County violated §§5.4(a)(1) and (5) of the Act when, on June 5, 1986, the County by its attorney informed the CWA representative that it would not negotiate with CWA if Abernathy was present at the table, stating that his presence was an affront to management. The fact that the County considered Abernathy an ex-employee of the County was at that time irrelevant to whether or not Abernathy was a public employee under the Act, who was entitled to participate in negotiations on behalf of CWA. The

Hearing Examiner rejects the contention of the County that there was no need for Abernathy to participate in the negotiations since there were on the CWA's negotiations team five other individuals who held various offices in Local 1041.

The decision in this matter is clearly governed by the authorities cited by the Commission Designee in I.R. No. 86-23, supra, where the following cases were cited as dispositive on the issue of whether or not a public employee representative, acting on behalf of public employees, may select employees in an appropriate unit to represent it, either in the grievance procedure or collective negotiations: Dover Tp. Bd. of Ed., P.E.R.C. No. 77-43, 3 NJPER 81 (1977); North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980); and Borough of Bradley Beach, P.E.R.C. No. 81-74, 7 NJPER 25 (¶12010 1980). In Dover the Commission found a violation of the Act where the employer refused to process grievances because the public employee negotiations representative sought to appear at the grievance hearing. In North Brunswick the employer was held to have violated the Act by refusing to negotiate with the teachers' Association unless the negotiating team was changed to exclude members of other negotiating units. Finally, in Bradley Beach the Commission concluded that the employer unlawfully interfered with employee rights by requesting the union not to appoint the three least senior officers to its negotiations team.

Based on the foregoing authorities, and independent of the Commission Designee's decision in I.R. No. 86-23, supra, the Hearing Examiner finds and concludes that the County violated §§5.4(a)(1) and (5) of the Act when it refused to negotiate with CWA on June 5, 1986, because Abernathy appeared as part of its negotiations team. However, because of the fact that the County met with CWA and negotiated with Abernathy present after the decision of the Commission's Designee, and reached an agreement on the reopener clauses for the four collective negotiations agreements, the Hearing Examiner will not recommend the posting of a cease and desist notice. He will, however, recommend in this decision that the County, in the future, cease and desist from interfering with the selection of CWA's negotiating team representatives.

The County Did Not Violate §§5.4(a)(1) and (3) Of The Act When It Terminated Abernathy, Effective May 30, 1986.

The Supreme Court of New Jersey in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) adopted the rationale of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases. Under Bridgewater the test, in assessing employer motivation, is that the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to terminate; and once this is established, the employer has the burden of demonstrating that the same action, termination, would have taken place even in the absence of protected activity.

The Supreme Court in Bridgewater further refined the test in "dual motive" cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile toward the exercise of the protected activity. The Hearing Examiner also notes that the Charging Party must establish a nexus between the exercise of protected activity and the employer's conduct and response thereto: Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14182 1983).

The Hearing Examiner has no doubt but that the Charging Party has made out a prima facie case that Abernathy was engaged in extensive protective activity from at least February 1984, when he became Shop Steward for Local 1041, and later became Executive Vice President and President of the Local. He has also participated in negotiations on behalf of CWA since April 1984. (See Findings of Facts Nos. 8-10, supra.)

Further, Abernathy's protected activity on behalf of CWA was necessarily known to the employer by virtue of its visibility through the processing of grievances through Step 3 of the contractual grievance procedure. Also, there is evidence of employer hostility toward Abernathy's exercise of protected activities by virtue of the statements made by Finlaw to Abernathy in June and August 1985 (see Findings of Facts Nos. 20 & 22, supra). In the colloquies between Finlaw and Abernathy, Finlaw characterized Abernathy as a "troublemaker" for writing his grievances and harassing Hogate. However, there is no evidence of

hostility toward Abernathy's activities, i.e. animus, since the Finlaw colloquies in June and August 1985. Other evidence adduced by CWA such as the assigning of Abernathy out of his District do not, in the opinion of the Hearing Examiner, arise to the level of real and substantial animus. Also, the Hearing Examiner is not persuaded that the flurry of activity in September 1985, involving several minor disciplines of Abernathy by Hogate, constitute real evidence of animus, which carried over to May 30, 1986.

Even if the Hearing Examiner were to assume arguendo that CWA has made out a prima facie showing, meeting all of the requisites of the first part of the Bridgewater test, the case ultimately boils down to whether the Respondent County has met the second part of the Bridgewater test, namely, that Abernathy would have been terminated on May 30, 1986, even in the absence of his extensive protected activity. Here the Hearing Examiner is assuming further that CWA has established a nexus between the exercise of protected activity and the County's decision to terminate: Lodi Bd. of Ed., supra.

The Hearing Examiner has already resolved credibility against the witnesses produced by CWA. This is clear from the "credibility resolutions" portion of the Findings of Fact, supra.

Without relying on Abernathy's prior convictions of criminal offenses as a basis for impeaching his credibility, the Hearing Examiner is persuaded that there is ample basis for finding

and concluding that Abernathy was not a truthful witness as to the essentials of what happened on May 30th.

The Hearing Examiner has attached no significance to the fact that Hogate went to Acton Station Road from Finlaw's, notwithstanding that CWA argues that by taking that route he went out of his way to find Abernathy. From the testimony adduced by the County's witnesses, the Hearing Examiner has also concluded that there was evidence of a blow having been struck on Hogate's upper right cheek and that, crediting Hogate, it was Abernathy who struck the blow. CWA questions why Hogate went to Finlaw's house after the incident and the Hearing Examiner responds that it was a perfectly logical course for Hogate to take, namely, reporting to the Freeholder in charge of the Road Department, whom he had met earlier in the day and knew was at home. Logically, Hogate would expect Finlaw to take the appropriate action in his capacity as Freeholder in charge of the Road Department, which Finlaw did.

The Hearing Examiner further finds that Abernathy scores negatively in his testimony that he never knew about a County policy on wearing safety vests and shirts while acknowledging that several weeks before May 30th, Hogate told him to put on a shirt and vest and he did so without asking for anything in writing. Why would Abernathy, according to his own testimony, request something in writing from Hogate on May 30th unless he was seeking to provoke Hogate? Given the use of the word "fuck" by Abernathy, as testified

to by both Abernathy and Hogate, and coupled with the fact that Abernathy said it was a "hot" day, it requires little imagination to conclude that Abernathy struck Hogate. Recall that Hogate had told Abernathy that he was fired for his insubordination, an additional factor in accounting for Abernathy having struck Hogate.

The Hearing Examiner has previously made the credibility resolutions as to whether or not there was a red mark or welt on Hogate's face after the incident and they will not be repeated here. What is emphasized, however, is the Hearing Examiner's critical reaction to the conduct of Abernathy in having made a false complaint against Hogate at the State Police Barracks on May 30th. The testimony of Trooper Saiia was that Hogate was upset at the scene while Abernathy was calm the entire time. However, Abernathy testified that he filed the countercharge because he was angry. The Hearing Examiner credits the testimony of Saiia as to the calm of Abernathy, all of which makes more damning the false allegations of Abernathy in the complaint (R-1). The Hearing Examiner does not accept the argument of counsel for CWA that it is common to countercharge when an assault and battery is involved. That may be true in the case of two individuals, who have exchanged blows between one another. This, however, is not the case and the filing of a false countercharge by Abernathy is reprehensible in the extreme.

Obviously, the filing of the false complaint has weighed seriously against Abernathy's credibility. Note is again made of

the fact that the Hearing Examiner cannot credit Abernathy's testimony that it was a State Police officer (Mastella) who prompted or suggested to Abernathy that he file a countercharge. There was no evidence that Mastella knew anything about the case to begin with and the Hearing Examiner cannot believe that a State Police officer would intervene without knowing the facts and, even knowing the facts, that he would instigate the filing of a countercharge.

Admittedly, the County's case would be stronger, if need be, had Hogate taken photographs of his physical condition over the weekend and/or sought medical treatment. However, by crediting Hogate's testimony generally the Hearing Examiner can accept as a fact that Hogate's condition was as he described it and that the condition had disappeared by Monday, June 2, 1986. Scull, it will be recalled, corroborated Hogate's black eyes on Saturday morning, May 31st, at the Jack Rabbit parking lot. Having credited Scull's testimony previously, the Hearing Examiner is reinforced in his conclusion that Hogate's condition over the weekend was one of two black eyes.

Finally, any discrepancies between the testimony of the County's witnesses at the departmental hearing on June 17, 1986, vis-a-vis the testimony at the hearing in this matter are deemed of no significant consequence.

In conclusion, the Hearing Examiner finds that although the Charging Party met the first part of the Bridgewater test arguendo, the Respondent County has proven by a preponderance of the evidence

that the termination of Abernathy would have taken place even in the absence of his protected activity.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent County violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when on June 5, 1986, it refused to meet in collective negotiations with CWA because a suspended employee, Oscar Abernathy, was a member of the negotiations team.

2. The Respondent County did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it terminated Oscar Abernathy on May 30, 1986, because of his insubordination and his striking the Road Supervisor, Francis L. Hogate.

RECOMMENDED ORDER NO. 1
(Docket No. CO-86-338-210)

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent County cease and desist from:

1. Interfering with, restraining or coercing its employees of the exercise of the rights guaranteed by the Act, particularly, by refusing to negotiate with representatives of the CWA because of the presence of a suspended employee, Oscar Abernathy, on the negotiations team..

2. Refusing to negotiate in good faith with CWA regarding terms and conditions of employment of employees in an appropriate unit, particularly, by refusing to negotiate with

representatives of the CWA because of the presence of a suspended employee, Oscar Abernathy, on the negotiations team.^{24/}

RECOMMENDED ORDER NO. 2
(Docket No. CO-86-332-209)

The Hearing Examiner recommends that the Commission ORDER that the Complaint, involving the termination of Oscar Abernathy, be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: August 29, 1986
Trenton, New Jersey

^{24/} The Hearing Examiner is not recommending the posting of a notice in view of the fact that after the decision of the Commission's Designee on June 16, 1986 (I.R. No. 86-23) the County engaged in good faith negotiations with Abernathy present and agreement was reached on the reopener clauses for the four collective negotiations agreements.