

P.E.R.C. NO. 79-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY

Respondent,

-and-

Docket No. CO-77-77-61

LOCAL 195, INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL
ENGINEERS, AFL-CIO,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Commission held, contrary to the recommendation of the Hearing Examiner, that the Charging Party had failed to prove by a preponderance of the evidence that the State, in discharging an employee, was motivated at least in part by anti-union animus as a result of the employee's processing of grievances as shop steward. Accordingly, the complaint was dismissed in its entirety.

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LOCAL 195, INTERNATIONAL FEDERATION
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ENGINEERS, AFL-CIO,

Charging Party.

Appearances

For the Respondent, John J. Degnan, Attorney General
(Guy S. Michael and Michael J. Diller, Deputy Attorneys
General)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On October 22, 1976, an Unfair Practice Charge was filed with the Public Employment Relations Commission by Local 195, International Federation of Professional and Technical Engineers, AFL-CIO, (the "Union") alleging that the State of New Jersey (the "State") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Union alleged that the State, in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3), discharged Thomas Masterson from his position at the Vineland State School due to his processing of grievances as shop steward and his filing of a personal grievance to the effect that his supervisor had threatened his job due to this union activity.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 19, 1976. A hearing was held on December 27, 1976, June 7, 1977, September 7, 1977 and October 28, 1977 before Edmund G. Gerber, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Subsequent to the close of hearing, the parties submitted memoranda of law, the final memorandum being received on April 10, 1978. On October 5, 1978, the Hearing Examiner issued his Recommended Report and Decision,^{1/} which includes findings of fact, conclusions of law, and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Pursuant to an approved request for an extension of time, timely exceptions to the report were filed by the State on December 13, 1978. The Union did not file a brief in opposition to the exceptions. Affidavits relating to an agreement between the parties to limit the State's potential back pay liability were filed by the State and the Union on December 13, 1978 and December 18, 1978, respectively.

The Hearing Examiner found that Nester M. Shilling, Acting Engineer in Charge of Maintenance at the Vineland State

1/ H.E. No. 79-17, 4 NJPER 428 (Para. 4194 1978).

School, was motivated to file a negative evaluation of Mr. Masterson due, in part, to Shilling's anti-union animus directed at Masterson for having presented grievances as the Union shop steward. The Hearing Examiner further found that the State relied on this tainted evaluation in deciding to discharge Masterson at the end of his probationary period. Accordingly, the Hearing Examiner concluded that the State violated N.J.S.A. 34:13A-5.4(a)(1) and (3) and he recommended that the State be ordered to offer Masterson a position as a Stationary Engineer at the Vineland State School at a salary level under the current contract consistent with the level he would have occupied had he not been discharged on September 27, 1976. The Hearing Examiner further recommended that Masterson be granted back pay from September 27, 1976 to the time of compliance, exclusive of the period from December 27, 1976 to June 7, 1977, less severance pay and all monies actually earned by Mr. Masterson during this time, excluding the December 27, 1976 to June 7, 1977 period.

The Commission, after careful consideration of the record, affidavits and exceptions filed by the State, declines to adopt the Hearing Examiner's Recommended Report and Decision and dismisses the complaint in its entirety.

Witnesses for the Charging Party testified regarding a total of eleven incidents which allegedly proved that Masterson was discharged due to his processing of grievances as shop steward. Three of these incidents, not even being mentioned in the recommended report, were obviously not relied upon by the Hearing Examiner in

reaching his decision.^{2/} The Commission finds that these incidents were not probative of the Charging Party's allegation that Shilling's anti-union animus was the cause of Masterson's dismissal.

The other eight incidents involve: (1) an August 24, 1976 informal meeting between Shilling and Masterson concerning the employees' perceived problem with Shilling's lack of the necessary seal (State certification) to assume supervision of the powerhouse; (2) a September 2, 1976 telephone discussion involving a dispute over Shilling's scheduling of training for Masterson, where Shilling allegedly threatened Masterson for filing grievances; (3) Shilling's interruption of a September 2, 1976 meeting between Masterson and Zeitel, another shop steward, to prepare a grievance over the alleged telephone threat; (4) and (5) a September 3, 1976 written reprimand of Masterson listing his unauthorized change of work schedule to allow another employee to attend the August 24 grievance meeting, his unauthorized change of his training schedule, and his improper operation of the boiler on August 16, 1976; (6) Masterson's dispute with Shilling over his attempt, on September 3rd, to substitute for another employee who had to leave work with a medical problem; (7) a September 15th letter of reprimand from Shilling to Masterson stating that at

^{2/} While two of the incidents were concerned with disputes between Masterson and Shilling, Shilling was not personally involved with the processing of these grievances since they were presented directly to the personnel department. The third incident, which occurred after Masterson had been discharged, involved a hearing on a grievance filed by Masterson where the State's Hearing Officer walked out.

the end of his shift he had improperly left the air tank for the diesel generator empty; and (8) Masterson's activities as shop steward in filing eleven grievances, involving himself and other employees, within the one month he held the position of shop steward.

With respect to the September 2nd grievance preparation meeting and Masterson's September 3rd attempt to substitute for a sick employee, the Hearing Examiner found that these incidents played no part in Masterson's discharge. The Hearing Examiner credited the State's versions of the incidents relating to the reprimands of Masterson for improperly operating the boiler and leaving the air tank empty, although he was suspicious of the timing of the former incident since it pre-dated the time when Shilling was responsible and since Masterson was not reprimanded at the time of the incident. The September 2, 1976 telephone discussion was found to be a "harmless misunderstanding" over Masterson's scheduling although he found that Shilling did believe that Masterson failed to report on the day assigned. The Hearing Examiner obviously did not credit Masterson's testimony that Shilling threatened him during this conversation. The Hearing Examiner did not find that the reprimand of Masterson for changing another employee's schedule was unjustified, but merely found that Shilling did not fully investigate this allegation before assuming that Masterson was guilty of the charge. The fact that Masterson filed eleven formal grievances during his one month as shop steward was simply mentioned by the Hearing Examiner without any finding that the State's conduct regarding the

processing of these grievances evidenced any anti-union animus directed against Masterson.

Therefore, the Hearing Examiner relied almost exclusively on one incident, namely, the August 24, 1976 informal meeting concerning Shilling's claimed lack of the necessary State seal to assume supervision of the boiler room. The Hearing Examiner concluded that Shilling perceived this discussion as a threat to his recent promotion and therefore, from this point on, sought to create a negative employment record to obtain Masterson's discharge. While the Hearing Examiner discounted the subsequent incidents as specific evidence of Shilling's anti-union animus, he did find that such prohibited motivation had its genesis at the August 24th meeting and was thereafter "inextricably intertwined" and bound with other non-prohibited motivations. Accordingly, the entire case actually hinges on an interpretation of Shilling's reaction to Masterson's August 24th informal grievance.

At the time of his promotion to Acting Engineer in Charge of Maintenance at the Vineland State School, Shilling had almost twenty-six years of service as an engineer at the school and had previously been Assistant Engineer-in-Charge of Maintenance II at the West Campus of the school. Shilling explained to Masterson, and the other two employees present, that under State regulations his lack of a red seal license did not prevent him from assuming the position as acting overall supervisor of maintenance and, specifically, that the license for the boiler room was not in jeopardy because it was covered by the gold seal of Herbert

Muench, the present supervisor who was on sick leave but resided on the school grounds. From the whole tenor of Shilling's testimony, it appears that he was concerned that he could not provide a more satisfactory or acceptable explanation to allay the fears of his employees. Considering Shilling's years of experience, it is more than reasonable to conclude that he had considerable knowledge of the Rules and Regulations of the Mechanical Inspection Bureau and the Civil Service job descriptions for the various maintenance engineer titles, knew that his promotion was in compliance with both, and, therefore, realized that Masterson's grievance posed no real threat to his promotion. Further, Shilling's interpretation of the regulations was quickly confirmed by the Mechanical Inspection Bureau and a notice to that effect was posted by the school on August 25th.

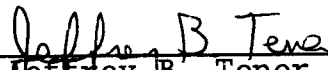
The Hearing Examiner based his legal conclusion that a violation of the Act took place, in very large measure, upon the August 24th meeting. We disagree.

Although we adopt the Hearing Examiner's findings of fact and his credibility determinations, we disagree with his legal conclusion. The Charging Party, in our judgment and after having reviewed the entire record, failed to meet its burden of proof. It has not proved the allegations of the Complaint by a preponderance of the evidence.

Masterson was a probationary employee. His working test period was coming to an end and he had to be evaluated at that time. Shilling became his supervisor and had responsibility

for that evaluation. The Hearing Examiner did not dispute the State's claims that there were some reasons for not making Masterson a permanent employee (e.g., his improper operation of the boiler on August 16th and his failure to leave the air tank for the diesel generator full or to report the fact that it was empty), although, as noted above, he was suspicious of the timing of the former incident. The Hearing Examiner did not believe that these incidents and the other infractions which he characterized as "relatively minor" justified the State's action in firing Masterson. However, as pointed out by the State, the State need not prove "just cause" in firing a probationary employee. We do not believe, given the fact that there were several incidents cited by the State to support its decision to fire Masterson and the absence of evidence to support the claim that his firing was motivated by anti-union animus, that the Charging Party has sustained its burden. Accordingly, the Complaint is hereby dismissed in its entirety.^{3/}

BY ORDER OF THE COMMISSION



 Jeffrey B. Tener
 Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Schwartz voted for this decision. Commissioner Hipp voted against this decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
 January 16, 1979
 ISSUED: January 17, 1979

^{3/} In view of the Commission's dismissal of the complaint, it is unnecessary to consider the exceptions filed by the State. These exceptions largely challenge or question the inferences drawn by the Hearing Examiner.

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

In the Matter of

STATE OF NEW JERSEY,

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-and-

Docket No. CO-77-77-61

LOCAL 195, INTERNATIONAL
FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS,

Charging Party.

SUPPLEMENT TO HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

"Notice" page - Insert additional paragraph between paragraphs 1 and 2 as follows:

WE WILL offer to Thomas Masterson a position of Stationary Engineer at the Vineland State School at a salary level under the current contract consistent with the level he would be at had he not been discharged on September 27, 1976.



Edmund G. Gerber
Hearing Examiner

DATED: October 12, 1978
Trenton, New Jersey



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

429 EAST STATE STREET
TRENTON, NEW JERSEY 08608
Telephone: (609) 292-9830

COMMISSION MEMBERS:

Jeffrey B. Tener, Chairman
Carole A. Graves
Bernard M. Hartnett, Jr.
Frederick L. Hipp
Charles H. Parcells
Lawrence S. Schwartz

October 12, 1978

Guy S. Michael, Esq.
Deputy Attorney General
Department of Law & Public Safety
State House Annex
Trenton, New Jersey 08625

Sanford R. Oxfeld, Esq.
Rothbard, Harris & Oxfeld
744 Broad Street
Newark, New Jersey 07102

Re: State of New Jersey
-and-
Local 195, IFPTE
Docket No. CO-77-77-61

Gentlemen:

Enclosed is a supplement to a Hearing Examiner's Recommended Report and Decision No. 79-17 which issued on October 5, 1978. Please make the necessary alteration in the reports that were sent to you.

Yours truly,

Edmund G. Gerber
Hearing Examiner

EKG:ab

Enc.

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE PUBLIC EMPLOYMENT
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AND TECHNICAL ENGINEERS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission that they find that the State of New Jersey violated §§5.4(a)(1) and (3) of the New Jersey Public Employer-Employee Relations Act by discharging its employee at the Vineland State School, Thomas Masterson. Masterson was a shop steward at the institution and the Hearing Examiner found that the discharge was motivated in part by Masterson's activities as shop steward.

A Hearing Examiner's Recommended Report and Decision is not a final administrative action 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.

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Appearances:

For the State of New Jersey
John Degnan, Attorney General
(Guy S. Michael, Deputy Attorney General)

For Local 195, International Federation of Professional and Technical
Engineers, Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On October 22, 1976, Local 195 of the International Federation of Professional and Technical Engineers, AFL-CIO (IFPTE) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (Act), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, IFPTE alleges that Thomas Masterson was discharged from his position of employment because of his union activities as a shop steward, in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3).

It appearing that the allegation of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 19, 1976. Pursuant to the Complaint and Notice of Hearing, hearings were held on December 27, 1976, June 7, 1977, September 7, 1977, and October 28, 1977. The parties entered into a stipulation that if the Commis-

sion were to award back pay as damages, such damages would not run for the period between the first two hearing dates; that is, December 27, 1976, to June 7, 1977. ^{1/}

Thomas Masterson was hired by the Vineland State School on May 11, 1976, as an Operating Engineer I, Blue Seal. In the pay period ending August 13, 1976, Masterson was raised from Step I to Step V on the pay scale and received a retro-active pay raise. On August 19, 1976, Masterson was elected shop steward along with Russell Zeitel at an organizational meeting of Local 195. Up until this time, Masterson was apparently a satisfactory employee with no record of any disciplinary action. Shortly after Masterson became shop steward, there was a change in supervision of the operating engineers. Masterson and the new supervisor, Nestor Shilling, immediately became embroiled in a series of disputes and within a month's time Masterson was discharged.

On August 23, a notice was posted at the powerhouse where Masterson worked, stating that the Engineer in Charge of Maintenance, Mr. Herbert J. Muench, would be on sick leave for a minimum of two months. He would be replaced by Nester M. Shilling, who was designated as Acting Engineer in Charge of Maintenance with "responsibility and authority to carry out all duties and responsibilities which previously had been handled by Mr. Muench."

Under the Rules and Regulations of the Mechanical Inspection Bureau (New Jersey Department of Labor and Industry, Division of Labor Standards) there are different level licenses corresponding to the size of the boilers at a given installation. The former chief engineer, Muench, held a Gold Seal or first-class license which qualified him to serve as chief engineer at any installation. Shilling held only a Blue Seal or third-class license, and under the rules of the Mechanical Inspection Bureau, he could not serve as a supervisor of power plants of the size of the two at the Vineland School since their size exceeded the limitations of the Blue Seal license. Similarly, other Blue Seal engineers could work at a boiler with a capacity which exceeded the limitation of their license only if their supervisor held the appropriate license.

On August 24, Masterson called Shilling and set up a meeting to discuss this licensing problem. Masterson testified that he brought two fellow workers,

^{1/} Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs were submitted by both parties by April 10, 1978. Upon the entire record of this proceeding, the Hearing Examiner finds that the State is a public employer and IFPTE is an employee representative within the meaning of the Act. Questions concerning alleged violations of the Act exist and this matter is appropriately before the Commission for determination.

Kaminsky and Lewis, along with him. Masterson, who five days before had become shop steward, told Shilling that he wasn't there to file a grievance but just wanted to resolve this matter on an informal basis. According to Masterson, Shilling stated that since he (Shilling) had been appointed by the State the rule didn't apply to him - and that if Masterson caused him "any trouble, there would be job repercussions" and stated, "if you take the saber out of sword and rattle it (sic) or something to that effect and repeated, I know people in Trenton and I can take care of you." ^{2/} When Shilling testified, he denied that he threatened Masterson and claimed that he told him Muench was still in charge. ^{3/} But he was surprised when Lewis and Kaminsky also came since he only gave Masterson permission to come up to see him.

After this meeting with Shilling, Masterson went by himself to the School's Personnel Office and explained the problem to Ciancarelli, a personnel officer. He then called the State Mechanical Inspection Bureau and confirmed for himself what the State licensing requirements were. He then urged Ciancarelli to call the Bureau himself. Ciancarelli did so and on August 25 the personnel office sent out a memo to the effect that Muench still retained final responsibility for the operation of the powerhouse. ^{4/}

On Monday, August 30, Shilling told Masterson that he wanted Masterson to receive training at the Colony Powerhouse. Until this time Masterson had only worked at the main powerhouse. Masterson claimed that he was scheduled to have off on Wednesday and Thursday (September 1 and 2) and that he was given a choice between the two days. He told Shilling he would have to check with his wife to see if they had anything planned first. When Masterson went to work on Tuesday he told Shilling that he would go in on Wednesday and Shilling said okay. ^{5/} Shilling testified he scheduled Masterson for either a Wednesday or Thursday - one of the two days - but couldn't remember which one (Vol. II, p. 140).

Masterson testified that on Thursday morning, September 2, Shilling telephoned Masterson at home and immediately started hollering. He threatened

^{2/} Vol. I, p. 32. See also Vol. I, p. 114.

^{3/} Vol. II, p. 120.

^{4/} Vol. I, p. 42.

^{5/} Vol. II, p. 123.

Masterson with job repercussions again. Masterson stated that Shilling was a "raving maniac" on the phone and he couldn't recall whether Shilling mentioned switching days without approval or not. ^{6/} After Masterson hung up on Shilling he called the State Police to file a complaint against Shilling for harassment. Masterson also called Ciancarelli in the personnel office at the school. Shilling's testimony concerning this incident is at odds with Masterson's. He claimed that he asked Masterson why he didn't go to the assignment on the date he was assigned, that Masterson asked him what was the difference. He did not threaten Masterson in any way (Vol. II, p. 125). Mrs. Muller, Shilling's secretary, said she could overhear all of Shilling's telephone conversation from where she sat and Shilling did not use obscenity or threats on the phone during this period, but she could not recall the specific conversation. She admitted that Shilling has a strong, loud voice so that it sometimes sounds like he's raising his voice.

That afternoon Masterson went to the electrical shop at the school to talk to Russ Zeitel, the other shop steward, to discuss the possibility of filing a grievance concerning this phone call, for Zeitel had the only copy of the contract. Around 12:20 p.m. they were going over the contract when John Davis, Zeitel's immediate foreman, came in and asked them what they were doing. They explained that they were discussing a grievance. Since it was Zeitel's lunch break, Davis permitted them to continue and left. A short time later Shilling came in with two other supervisors. Shilling told Masterson to leave because he was disturbing his employees and repeated this when Masterson said he was trying to file a grievance. Both Masterson and Zeitel thought there was going to be a fight. Shilling said he didn't recall seeing Masterson at the school that day; he might have, but would have to look at the records.

On September 3rd, Masterson received an official reprimand listing these incidents. It accused Masterson of calling in another employee, Mr. Panichello, to cover for Kaminsky when Kaminsky accompanied Masterson at the August 24th meeting with Shilling and also changing his work assignment by coming in for training on Wednesday, September 1st, rather than Thursday, September 2nd, without prior

6/ Vol. I, pp. 137-142.

authorization or even apparent notification of his supervisor. The third incident occurred before Shilling became Masterson's supervisor. The reprimand stated that Masterson improperly operated the boiler in the main boiler house on August 16. Masterson was accused of this action on the basis of charts which record the operation of the boilers.

The testimony concerning these charts was technical and highly contradictory. Essentially, there are two recording gauges on the boiler in question. The Bristol Recording Pressure Gauge records the steam pressure at the boiler header (a header is a central pipe to which other distribution pipes are attached) and the Hagan Ring Balance Meter records the flow and temperature of steam as well as the air/fuel ratio in the boiler. Both of these circular charts are driven by clock motors and are calibrated for time. As they revolve, pens record the level of pressure, flow, etc. of the steam. One, therefore, can "read" the condition of the boilers at any moment in time. It is undisputed that on August 16, while Masterson was on duty, the boiler header valve, which controls the flow of steam into the system, was shut down to make repairs to the steam pipes and then reopened. The proper procedure to restore steam into a system is to just barely open or "crack" the valve and thereafter limit the flow of steam so that it will take one to two hours before full steam flow and pressure is restored to the system, for a fast surge of steam into the system can be highly destructive.

Shilling testified that the charts indicated that Masterson improperly opened the valves of the boiler; both the Hagan Ring Balance Meter and the Bristol Recording Pressure Gauge indicated an extremely rapid rise in the flow and pressure of steam into the system.

The State called Albert Dix, the assistant chief of the State Department of Human Services, as an expert witness. His interpretation of the charts was in accord with Shilling's for he also testified that the boiler was improperly operated.

Masterson maintained that the Hagan chart indicated a sharp rise because he had just bled the control off and this gave a misleading reading. He did not operate the control improperly and Muench, who was Chief Engineer at that time, was present when he opened the steam valves. Masterson contends it was Muench's

duty to stop him and take over if he did anything wrong (Vol. I, p. 57)! However, David Monteleone, a plumber foreman, testified that he saw Masterson open the valves in less than five minutes and Muench didn't walk into the powerhouse until after the valve had been turned back on.

Masterson further maintains that the recording charts are inaccurate and the controls were bad for many months. The powerhouse report of August 29, 1976, states that "the Hagan controls were going screwy" (Vol. IV, p. 40) and on the sign-in chart from August 1976 there is a notation that Muench wrote to Hagan on August 19, 1976, requesting that they send someone to adjust the controls.

As noted above, Shilling was not supervisor on August 16. Shilling testified that he became aware of the improper operation of the boiler after he became supervisor and he went back through the records of the prior three months to see how the boilers were being operated. Shilling could not, however, remember when he first looked at the charts.

On the same day Masterson received the reprimand, Kaminsky, a fellow employee, was on duty and got something in his ear. It was around 10:30 p.m. and Kaminsky called Shilling, who called Panichello to come in and then tried to call the infirmary. Panichello had already left since he was due in at 11 p.m. Shilling testified that while trying to call the infirmary, Masterson called him twice, insisting that he be allowed to relieve Kaminsky, which made it difficult for Shilling to get through to the infirmary (Vol. II, p. 129). Masterson called the operator and the operator broke into the conversation Shilling was holding at the time (Vol. III, p. 22). Shilling also testified that he told Masterson the first time that he was trying to get through to the hospital because someone had a bug in their ear but then Shilling testified that he didn't tell Masterson what was happening (Vol. III, p. 51).

On September 15th Shilling sent Masterson a memo stating that Hansen, a fellow engineer in the powerhouse, had found the air tank for the diesel generator empty when he relieved Masterson. (The compressed air in the tank is used to start the generator if there is a power failure. If there is no air in the tank, then the generator could not be started.) Shilling testified that Hansen called him as soon as Hansen got on duty, and Hansen said the air tank was empty,

that he went over there immediately and saw the gauge was on zero, and that Masterson had made no entry into the log. ^{7/} Masterson had claimed that the tank was full and everything was okay when Hansen relieved him; otherwise, Hansen would not have assumed responsibility of the boilers after his preliminary check of the boiler room. Masterson further claimed that Hansen and Shilling were good friends, that as far as he was concerned they "concocted the whole damn thing to try to write me up for something else."

Masterson filed a grievance on September 15th concerning the letter about the empty air tank he had received from Shilling earlier that day. Shilling then sent Masterson a memo dated September 17th stating that the letter of September 15th was merely a memo and not an official disciplinary action, that Masterson's grievance concerning this letter would be handled on this basis.

Masterson was very active as a shop steward in the month's time he held that position. He filed eleven grievances and these were handled by Shilling. In a number of these grievances Masterson himself was the grievant. Masterson charged Shilling with harassment for inappropriately withholding overtime from him, for not giving him the minimum 48-hour notice of a change in shift, with failure to follow the grievance steps and outright disregard for same, and with denying Masterson his rights.

On September 27th Masterson was sent a letter notifying him that he was to be discharged.

ANALYSIS

The resolution of this matter must rest upon credibility judgments concerning the testimony of Shilling and Masterson.

When Masterson received the letter of discipline, one of the items related to the first meeting between Masterson and Shilling where Masterson questioned whether Shilling could assume the role of supervisor. Shilling accused Masterson of calling in another employee, Panichello, to cover for Kaminsky, but when Shilling first testified on June 17th he admitted he merely assumed it was Masterson who called in Panichello and made no inquiry into the facts. Masterson

^{7/} Vol. II, p. 27.

testified that he never called in Panichello. On a subsequent hearing day, September 7, 1977, Shilling said Panichello told him some time after the prior hearing date that Masterson had called Panichello at work on August 23rd and asked him to come in the following day. However, Shilling then testified that this conversation had to have taken place before the June 7, 1977, hearing because he knew then how Panichello came to be at the boiler house. When asked why he didn't give that answer to the question the first time, he testified that he didn't know if the question had been asked.^{8/} The undersigned is satisfied that Shilling merely assumed that Masterson called Panichello to come to work. Shilling's presumption about Masterson shows a certain antagonistic predisposition; there was not an evenhanded attempt by Shilling to investigate the incident. This predisposition combined with Shilling's inconsistency leads the undersigned to accept the testimony of Masterson that Shilling did make reference to "saber rattling" and otherwise threatened Masterson. Such threats would be consistent with Shilling's demeanor as observed by the undersigned. Shilling clearly respected and, in turn, demanded discipline. On a number of occasions he referred to the need for employees to follow orders as well as his own willingness to do so. It must not be forgotten that Shilling had been working at Vine-land School for approximately 20 years, and Masterson's questioning Shilling as to his capacity to serve as a supervisor had to be perceived as a threat to his recent advancement. Masterson was a subordinate under Shilling's control yet Masterson was telling Shilling he could not have his recent promotion. In his doing so, Masterson was engaged in protected activity within the meaning of the Act. Although Masterson stated he didn't want to file a grievance concerning this matter, it was clear he met with Shilling in his capacity as shop steward. Shilling claimed that at the time of this meeting he did not know Masterson was shop steward. This testimony is unconvincing. Even if Shilling did not know it before the meeting, and Masterson did not tell him, Shilling certainly would have realized it from the conversation. Masterson certainly was there representing the interests of all the stationary engineers at the school. To take a disciplinary action against an employee because he participated in protected activity would clearly be violative of §5.4(a)(1) of the Act. See City of Hackensack v. Hackensack

^{8/} Vol. II, pp. 56 and 157; Vol. III, p. 18.

Fire Fighters Local 2081, IAFF, AFL-CIO, P.E.R.C. No. 78-71, 4 NJPER ____ (7____, 1978),
appeal pending App. Div. Docket No. A-3562-77.

The second incident in the reprimand concerned Shilling's phone call to Masterson on September 2nd. Shilling's account of this incident is more logical than Masterson's. Why else would Shilling call Masterson at home on his day off if something didn't happen to arouse Shilling's ire. Even Masterson's version of the phone call makes more sense if Shilling believed that Masterson was supposed to go for training on Wednesday, but he went on Thursday instead. The Hearing Examiner finds that Shilling did believe that Masterson did not report on the assigned day. However, Masterson was only supposed to receive instruction in the other boiler room. He was not to relieve anyone who was assigned duty and, at worst, this incident constituted a harmless misunderstanding. As to the phone call, the truth probably lies somewhere between the two versions. What is questionable in the undersigned's mind is that on the day after the phone call, Masterson received the reprimand which accused him of improper actions which occurred before Shilling became supervisor.

The undersigned is satisfied that the expert witness of the State testified in good faith that the boiler was improperly operated and Shilling could very well have honestly believed that the boiler was improperly operated. However, there are several areas of uncertainty. Why wasn't Masterson reprimanded at the time the event happened? Muench, his supervisor, was in the powerhouse and on duty, if not at the moment when steam was returning to the system, then shortly thereafter. Yet, no disciplinary action was taken at that time but rather only when Shilling brought it up three weeks later. Masterson testified that the charts were not functioning properly and Muench wrote to Hagan around this time asking to have someone come in to adjust the controls. The charts introduced by the State into evidence to show what a proper return of steam to the system should look like was dated September 8, 1973. It was three years older than the chart in question and the undersigned cannot help wonder why the State had to go back so far in time to find a chart that shows the correct operation of the boiler if the meters were working properly at the time of Masterson's discharge. It is more than coincidental that Masterson should be disciplined at this particular time so shortly after his run-in with Shilling. As to the other incidents dis-

cussed earlier, Shilling did not recall Masterson's meeting with Zeitel in the electrical shop on the day Shilling made the phone call to Masterson. Nor was Masterson ever disciplined for this meeting. There is no reason to assume that this incident played a part in his discharge. Similarly, when Panichello had to go to the infirmary for an ear ache and Masterson called Shilling to volunteer to cover for Panichello, Masterson was simply trying to be cooperative and no disciplinary action was taken. It would be hard to see how this incident played a part in the discharge. As to the empty air tank, the Hearing Examiner cannot accept Masterson's contention that Shilling and Hansen conspired to concoct such a story. What is noteworthy, however, is that after Masterson grieved the letter of reprimand, Shilling sent a memo to Masterson stating that the original letter to Masterson complaining of his negligence was only a memo and not an official disciplinary action.

While the undersigned cannot substitute his business judgment for that of the State, the proffered reasons for their actions must be examined in order to determine if they are pretextual or legitimate. The undersigned cannot say they are legitimate.

Given Shilling's less than total candor as a witness, his testimony cannot be unreservedly accepted. Based on the entirety of the evidence and particularly in light of the timing of the incidents involved, the questions surrounding the steam charts and the relatively minor nature of Masterson's other infractions, the undersigned believes that Shilling was "out to get Masterson" since their first meeting. Masterson apparently is not an easy person to get along with. At the hearing he proved to be argumentative and headstrong. A good deal of Shilling's actions may very well have been based upon conduct not protected by the Act. But one cannot carve out or separate the various motivations here. They all blend and become inextricably intertwined.

Shilling allowed his feelings of animosity toward Masterson, which were kindled by Masterson's protected activity, to interfere with his evaluation of Masterson and became one of the factors in this evaluation in violation of §5.4 (a)(1) and (3) of the Act. See In the Matter of Haddonfield Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) and City of Hackensack v. Winner, Sarapuchiello and Krejsa, P.E.R.C. No. 77-49, 3 NJPER 143, reversed App. Div. Docket

No. 2546-76; pet. for cert. filed by respondent.

Although Ciancarelli and Gesty testified that the decision to fire Masterson did not rest with Shilling, the State relied on Shilling's evaluation and made no real attempt to investigate his accusations. It therefore follows that since Shilling's evaluations are tainted then the State's action is likewise tainted. In the Matter of North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER __ (1978).

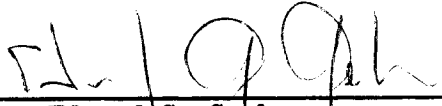
Accordingly, the undersigned will recommend to the Commission that they issue the following order that the Respondent shall

1. Cease and desist from interfering with employees in the exercise of rights guaranteed by the New Jersey Employer-Employee Relations Act and discriminating in regard to hire or tenure of employment to discourage employees in the exercise of rights under the Act by discharging Thomas Masterson;

2. Offer to Thomas Masterson a position of Stationary Engineer at the Vineland State School at a salary level under the current contract consistent with the level he would be at had he not been discharged on September 27, 1976.

3. Reimburse Thomas Masterson monies he would have earned from September 27, 1976, to the time of compliance if he were not discriminatorily discharged, exclusive of the period from December 27, 1976 to June 7, 1977, less severance pay and less all monies actually earned by Mr. Masterson during the time, excluding the period of December 27, 1976 to June 7, 1977.

4. Post in a prominent place at the Vineland State School copies of the attached notice. Copies of said notice, on forms provided by the Commission, shall, after being signed by the Respondent's representative, be posted for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by any other material.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
October 5, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of rights under the Act by discharging Thomas Masterson.

WE WILL offer to Thomas Masterson a position of Stationary Engineer at the Vineland State School at a salary level under the current contract consistent with the level he would be at had he not been discharged on September 27, 1976.

WE WILL reimburse Thomas Masterson monies he would have earned from September 27, 1976, to the time of compliance if he were not discriminatorily discharged, exclusive of the period from December 27, 1976 to June 7, 1977, less severance pay and less all monies actually earned by Mr. Masterson during the time, excluding the period of December 27, 1976 to June 7, 1977.

WE WILL post in a prominent place at the Vineland State School copies of this notice for a period of sixty (60) consecutive days.

VINELAND STATE SCHOOL

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 E. State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.