P.E.R.C. NO. 93-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY JUDICIARY,

Respondent,

-and-

DEREK L. HALL,

Charging Party.

Docket Nos. CI-H-89-65
CI-H-89-75
CI-90-14
CI-90-23

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Charging Party, Harvey & Morris, attorneys
(Richard D. Morris, of counsel)

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on unfair practice charges filed by Derek Hall against the Atlantic County Judiciary. The charges alleged that Hall was reassigned after speaking out at a staff meeting and that the employer denied him an opportunity to apply for a job vacancy because he had filed his earlier unfair practice charge. The Commission found that Hall's comment at the staff meeting about Cape May being in "the boondocks" was protected because it concerned his perception that supervisors from rural Cape May should not be asked to evaluate officers from more urban Atlantic County. The Commission also found, however, that Hall's public and unprovoked statement that he would not meet privately with the Trial Court Administrator because he did not trust him was unprotected and would have led to his reassignment and the denial of his application for a job vacancy even if the first protected statement had not been made. The Commission also affirms the refusal of the Director of Unfair Practices to issue a Complaint on two other charges.

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For the Respondent, Robert J. Del Tufo, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

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DECISION AND ORDER

On January 23, 1989, Derek L. Hall filed an unfair practice charge (CI-H-89-65) against the Atlantic County Judiciary. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] when Hall was

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

reassigned after speaking out at a staff meeting. He further alleges that the employer also violated the Act when the Assignment Judge who reassigned him heard and denied his grievance contesting the reassignment.

On February 21, 1989, Hall filed a second unfair practice charge (CI-H-89-75). That charge alleges that the employer violated subsections 5.4(a)(1) and (4)[2/] when it denied Hall a fair opportunity to apply for a job vacancy in the Adult Supervision Unit (Criminal Part) because he had filed his earlier unfair practice charge (CI-H-89-65).

On September 10, 1990, the two cases were consolidated and a Consolidated Complaint and Notice of Hearing issued. On September 20, 1990, the employer filed an Answer denying that it had violated the Act.

On October 16, 1990, the employer moved for summary judgment with respect to CI-H-89-65. We dismissed Hall's claims about the grievance procedure. Atlantic Cty. Judiciary, P.E.R.C. No. 91-96, 17 NJPER 251 (¶22115 1991). But we denied summary judgment with respect to Hall's retaliation claim and ordered a plenary hearing to evaluate whether Hall's action at the meeting was protected. Id. Hall was subsequently discharged. That discharge

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2/ Subsection 5.4(a)(4) prohibits public employers, their representatives or agents from: (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

is currently being reviewed by the Merit System Board and is not an issue in this proceeding.

On January 14 and February 13, 1992, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by April 20, 1992.

On May 20, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-34, 18 NJPER 310 (¶23132 1992). He found that Hall was reassigned because he made comments during a staff meeting which were not protected by the Act. He also found that Hall was not given an opportunity to apply for a vacancy because of those same unprotected comments.

On June 25, 1992, after an extension of time, Hall filed exceptions to certain findings of fact and conclusions of law.[3/] On July 10, the employer filed a reply responding to each exception and urging adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-13) are accurate. We incorporate them here with these comments and modifications.

We specifically adopt the finding that employees assigned to the Mays Landing office worked under reduced levels of supervision. See Finding no. 1.

3/ We deny Hall's request for oral argument. The parties' positions have been fully briefed.

We modify finding no. 7 to eliminate the reference to a loud and heated exchange. Richard Allen, then director of personnel for the Superior Court, Atlantic and Cape May Counties, testified that there was nothing disruptive about Hall's behavior (2T82) and that there was not "a boxing match" going on (2T83). His subsequent testimony is not clear as to whether there was or was not a loud and heated exchange. We therefore decline to adopt that finding. We also decline to adopt the finding that Hall persisted in his comments. The record does not support a finding that Hall made his comments more than once. Finally, we specifically adopt the finding that Hall stated that managers and assistant managers working in Cape May County were unfamiliar with the nature of the work in Atlantic County and that employees in Cape May County did not work as hard as those in Atlantic County. Judge Williams was aware of only the "boondocks" and "I don't trust you" statements when he reassigned Hall. See Finding no. 10.

We modify finding no. 8 to delete the finding that McCaffery was concerned that Hall would make additional disparaging remarks concerning Cape May employees. The record does not support such a finding. We accept the finding that Hall made his comments in public. The findings of fact accurately portray the nature of the meeting during which Hall made the comments. In his exceptions, Hall points out that the Hearing Examiner found that Hunter broke the "few moments of silence" when the transcript states a "moment of silence" (2T16). We disagree with Hall that this difference

indicates that the Hearing Examiner was slanting his findings against Hall. We add to this finding that Hall complied immediately with the request to return the meeting to a discussion of the evaluation system (1T36-1T37; 2T49-2T50; 2T82).

We modify finding no. 9 to indicate that Howard told Williams that she had been told that Hall had been somewhat disruptive and disrespectful at the orientation meeting. Just how much detail Howard got into is not in the record. Williams testified that he did not remember whether Howard told him the specifics or the thrust of the comments (2T88).

We must determine whether the Assignment Judge's actions were motivated by hostility to Hall's exercise of protected rights. That determination is governed by the standards in In re Bridgewater Tp., 95 N.J. 235 (1984).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation

without further analysis. Sometimes, however, the record demonstrates that both a motive unlawful under our Act and another motive contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Assignment Judge testified that he reassigned Hall because of his concern over two comments that Hall made at the staff meeting called to present the employer's new performance evaluation program. The first comment was Hall's reference to Cape May County as the boondocks; the second was his statement to the trial court administrator, in front of his co-workers, that he did not trust him. Hall admits that he made those comments. He claims, however, that his right to make the two statements was protected by the Act.

Hall apparently misunderstood the explanation of the new evaluation system and thought that supervisors from rural Cape May County would be evaluating officers from the more urban Atlantic County. He believed the nature of the work in the two counties was different and stated that Cape May is in the boondocks and that those in Cape May did not know what officers up in Atantic County

did. We agree with the Hearing Examiner that Hall's right to ask a question regarding the evaluation program was protected under the Act. See North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454, n. 16 (¶4205 1978), aff'd App. Div. Dkt. No. A-698-78 (4/11/79). We also find that Hall's use of the word "boondocks" to describe the rural nature of Cape May County was protected. It was simply his way of explaining why he thought that supervisors from Cape May County should not supervise employees from Atlantic County. The word is not so clearly offensive that it transported Hall's legitimate questioning beyond the bounds of protected activity.[4/]

Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), is distinguishable. There the employee berated the college president in a private setting because of the college's failure to satisfy her individual complaint. Here, Hall was commenting on a condition of employment affecting all employees at a meeting of employees called to discuss the very item Hall commented upon. City of East Orange, P.E.R.C No. 84-70, 10 NJPER 28 (¶15017 1983), is also distinguishable. There, a supervisor called a meeting to berate employees for allowing another employee to receive an unauthorized paycheck. One employee got into a heated argument with the supervisor and, despite the union's efforts at calming

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4/ We do not endorse the comment specifically or consider the accuracy of comments in employer-employee debates generally. We merely hold that Hall's comment was a legitimate part of a dialogue protected by our Act.

things down, persisted in disrupting the meeting and made it impossible to continue. Here, Hall was not disruptive and his questions, although based on a misunderstanding, were appropriate to the meeting's agenda.

We view differently Hall's statement to Trial Court Administrator McCaffrey that he would not meet privately with McCaffrey because he did not trust him. That response to McCaffery's invitation to meet privately to discuss Hall's concerns was a public challenge to McCaffery's authority and outside the bounds of protected speech. It was made by an individual employee in front of a large group of co-employees with no apparent provocation. McCaffery was simply trying to avoid taking up everyone else's time to clear up Hall's confusion about the evaluation program.[5/]

Having found that Hall's reassignment was motivated in part by his protected conduct and in part by unprotected conduct, we must now examine whether the employer proved that it would have taken the same action absent the protected conduct. The Assignment Judge believed that Hall's statement to the trial court administrator was offensive, disrespectful and demonstrated a lack of discretion on Hall's part. He concluded that it would be inappropriate for Hall

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5/ We are not being asked to evaluate the limits of employee speech during a grievance meeting or as part of some other union/management proceeding.

to remain at an outlying office with its reduced level of supervision and, therefore, directed that Hall be moved back to Atlantic City. Based on the record before us, we conclude that Hall would have been transferred for the "I don't trust you" statement even if he had not also described Cape May as the "boondocks." Accordingly, we conclude that the employer has met it burden under Bridgewater and we dismiss the allegation that Hall was transferred in retaliation for protected activity.

Hall's opportunity to apply for reassignment back to the criminal supervision division was denied for the same reasons as the transfer. Accordingly, we also find that the employer has proved that it would have denied Hall the opportunity to apply absent his protected conduct.

On July 28 and August 4, 1989, Hall filed two additional unfair practice charges. The first alleges that the employer violated subsections 5.4(a)(1) and (4) when the trial court administrator served as a hearing officer during the processing of a grievance pursuant to the negotiated grievance procedure (CI-90-14). The second charge alleges that the employer violated subsections 5.4(a)(1), (3) and (4) when it denied Hall the opportunity to be reassigned to the adult superivison division (CI-90-23).

On April 1, 1992, the Director of Unfair Practices refused to issue a Complaint on those two charges. D.U.P. No. 92-15, 18 NJPER 216 (¶23098 1992). We affirm that decision. CI-90-14

complains about the negotiated grievance procedure, but does not allege that the procedures followed by the employer violated the Act. CI-90-23 raises claims identical to those dismissed in this decision.

ORDER

The Complaint in CI-H-89-65 and CI-H-89-75 is dismissed. The refusal to issue a Complaint in CI-90-14 and CI-90-23 is affirmed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992

H.E. NO. 92-34

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

In the Matter of

ATLANTIC COUNTY JUDICIARY,

Respondent,

-and-

Docket Nos. CI-H-89-65
& CI-H-89-75

DEREK L. HALL,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Atlantic County Judiciary did not violate the New Jersey Employer-Employee Relations Act when it moved the Charging Party from the Criminal Supervision Division in Mays Landing, New Jersey, to the Support Enforcement Division in Atlantic City and refused to consider Charging Party for a job vacancy in the Criminal Supervision Division. The Hearing Examiner found that the Charging Party was moved because he made comments during a staff meeting which did not constitute protected activity within the meaning of the Act. Later, Charging Party was not given an opportunity to apply for a vacancy in the Criminal Supervision Division because of those same unprotected comments. Charging Party failed to meet the Bridgewater standards requiring the establishment that his protected activity was a substantial or motivating factor in the employer's actions.

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. 92-34

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

In the Matter of

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Docket Nos. CI-H-89-65
& CI-H-89-75

DEREK L. HALL,

Charging Party.

Appearances:

For the Respondent, Hon. Robert Del Tufo, Attorney General (Michael L. Diller, D.A.G.)

For the Charging Party, Harvey & Morris, Attorneys (Richard D. Morris, Attorney)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On January 23, 1989, Derek L. Hall ("Hall" or "Charging Party") filed an unfair practice charge (CI-H-89-65; C-3)[1/] against the Atlantic County Judiciary ("Respondent"). The charge alleges that the employer violated Sections 5.4(a)(1) and (3)[2/] of

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1/ Exhibits received in evidence marked "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits, and those marked "R" refer to the Respondent's exhibits. The transcript citation "1T1" refers to the transcript developed on January 14, 1992, at p. 1 and the citation "2T1" refers to the transcript developed on February 13, 1992, at p. 1.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when the Assignment Judge who reassigned him also heard and denied his grievance contesting the reassignment.

On February 21, 1989, Hall filed a second unfair practice charge (CI-H-89-75; C-4). This charge alleges that the employer violated Sections 5.4(a)(1) and (4),[3/] of the Act when it denied Hall a fair opportunity to apply for a job vacancy in the Adult Supervision Unit (Criminal Part), because he filed an unfair practice charge in January, 1989 (Docket No. CI-H-89-65).

On April 9, 1990, Hall submitted a statement claiming that he was reassigned because he engaged in protected activity. Specifically, in regard to Docket No. CI-H-89-65, he alleges that at a November 16, 1988 staff meeting held for the purpose of orienting employees to a newly developed employee performance evaluation program ("PEP") conducted by the Trial Court Administrator, Hall expressed his concern about the manner in which the performance ratings would be conducted in his vicinage. Hall's questioning

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2/ Footnote Continued From Previous Page

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

3/ This subsection prohibits public employers, their representatives or agents from: (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

during the meeting indicated an apparent misunderstanding of the new procedures. When the Trial Court Administrator offered to discuss the matter in his office, Hall refused and stated that he (Hall) did not trust him. Hall alleges that the events which occurred during the orientation meeting constitute protected activity within the meaning of the Act, and that he was reassigned the next day in retaliation for exercising his right to participate in such protected activity.

On September 10, 1990, the two cases were consolidated (C-5) and a Consolidated Complaint and Notice of Hearing (C-1) issued. On September 20, 1990, the Respondent filed an Answer (C-2) denying that it had violated the Act.

On October 16, 1990, the Respondent filed a Motion to Dismiss or, alternatively, for summary judgment, with respect to CI-H-89-65.[4/] The Commission treated the Respondent's motion as one for summary judgment and granted summary judgment thereby dismissing Hall's claims about the grievance procedure. Atlantic County Judiciary, P.E.R.C. No. 91-96, 17 NJPER 251 (¶22115 1991). However, the Commission denied summary judgment with respect to Hall's retaliation claim and ordered a plenary hearing to evaluate Hall's action at the meeting to determine whether that action was protected. Id.

4/ The motion did not concern CI-H-89-75.

Hearings were conducted on January 14, 1992 at the Commission's offices in Trenton, New Jersey, and on February 13, 1992, at the Atlantic County Courthouse in Atlantic City. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by April 20, 1992.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Atlantic and Cape May Counties are included in a single judicial vicinage. As of November 1988, Derek Hall had worked for 14 years as a probation officer in the Atlantic County part of the vicinage. During all of that time Hall served in the adult criminal supervision division (1T25; 1T69). In September 1988, a branch office of the criminal supervision division was opened in Mays Landing, New Jersey (1T69-1T70; R-1). Employees assigned to the Mays Landing office worked under reduced levels of supervision. The highest level supervisor assigned to that office was a senior probation officer rather than a principal probation officer. (1T75). Hall was one of the probation officers who was reassigned from the Atlantic City office to the new Mays Landing office (1T26; 1T70; R-1).

2. A new performance evaluation program was developed for employees in the Atlantic and Cape May Counties vicinage (Vicinage I). This program was strongly supported by Assignment Judge Richard J. Williams (2T51). In order to introduce the new program, a series of meetings was conducted by Trial Court Administrator Charles McCaffery, Director of Human Resources Richard Hunter and Assistant Trial Court Administrator Harold Berchtold (1T29; R-2).

3. On November 16, 1988, the PEP orientation program was held at the Mays Landing location (1T27; 2T6; R-2). Approximately 50 employees attended the session including Hall and Roberta Sandrow-Scull, President of the Probation Officers Association, the majority representative for the vicinage's probation officers (1T28; 2T6-2T7). The meeting was divided into two segments. The first segment included brief presentations delivered by McCaffery, Hunter and Berchtold (1T78; 2T9-2T10). During McCaffery's overview of the PEP, he explained that employees would receive initial evaluation reviews from a "rater." The rater is a middle manager functioning as the team leader. The rater's evaluation would then go to a "reviewer" for additional analysis and finalization. The "reviewer" is a higher level manager such as a case (or division) manager (2T12-2T13). McCaffery indicated that "raters" would be local middle managers (2T13). Thus, probation officers in Cape May would be rated by Cape May raters; whereas probation officers in Atlantic County, either in Atlantic City or Mays Landing, would be rated by "raters" assigned to those respective locations (2T13).

4. McCaffery invited employees to ask questions concerning the PEP during the second segment of the meeting (2T11). McCaffery took the lead in fielding employee questions (2T11). Six or more employees raised questions (1T88; 2T41). Two of the questioners were Association President Sandrow-Scull and Hall. Sandrow-Scull's question preceded Hall's (2T19). Sandrow-Scull questioned why the administration had consulted with the leadership of another employee representative representing employees other than probation officers regarding the PEP but had failed to raise the matter with the Association (1T33; 1T80-1T82; 2T19). Sandrow-Scull indicated that until the Association got the PEP informational package which the other employee representative received, it would refuse to cooperate with the program's implementation (1T33; 1T83). McCaffery responded to Sandrow-Scull by conceding that the Association's failure to receive the PEP informational package was an oversight on management's part (1T82).

5. Hall mistakenly understood McCaffery's explanation of the PEP to provide for case managers and assistant case managers to evaluate probation officers on a vicinage-wide basis. Accordingly, it was Hall's understanding that such managers in Cape May County could evaluate probation officers in Atlantic County (1T35-1T36; 1T83-1T85). During the latter half of the question/answer portion of the meeting, Hall raised his hand and McCaffery turned the floor over to him for a question (1T34; 2T13; 2T44). Hall asked McCaffery why managers from Cape May County would evaluate probation officers

in Atlantic County (1T35-1T36; 1T84-1T85; 1T88; 2T13-2T14; 2T75). Hall had reservations regarding Cape May managers evaluating Atlantic County probation officers. Hall perceived Atlantic County to be a more urbanized county with a greater caseload than Cape May County. Hall felt that Cape May managers, unfamiliar with Atlantic County's urban-oriented caseload, would be incapable of properly evaluating Atlantic County probation officers (1T36; 1T84).

6. McCaffery responded to Hall's question by indicating that probation officers in Cape May County would be reviewed only by Cape May assistant case managers, and Atlantic County probation officers would be reviewed only by Atlantic County assistant case managers (2T14).

7. A loud and heated exchange developed between Hall and McCaffery (2T83). Hall persisted in stating that Cape May County is in the "boondocks" and that managers or assistant managers working there were unfamiliar with the nature of the work performed by probation officers in Atlantic County (1T84-1T85; 2T14). Hall also indicated that employees in Cape May County did not work as hard as those assigned to the Atlantic County offices (2T17).

8. McCaffery felt that continued discussion along these lines between him and Hall was inappropriate, since many other employees were attending the meeting, and it was apparent to him that Hall had misunderstood the manner in which the PEP would be administered (2T14-2T15; 2T47; 2T82). McCaffery also was concerned that Hall would make additional disparaging remarks concerning Cape

May County employees in front of those attending the meeting (2T17). Consequently, McCaffery asked Hall to meet with him privately in his office at a later time to further discuss his (Hall's) concerns. Hall declined McCaffery's invitation stating, in public, that he did not trust McCaffery (1T36; 1T86; 1T112; 1T115; 2T15; 2T76). Richard Hunter broke the few moments of silence which followed Hall's remark by indicating that the discussion had moved away from the PEP and suggested a return to the issue at hand (2T16; 2T77). After the meeting resumed, Hall neither made additional comments nor posed other questions (1T37; 2T16; 2T49-2T50; 2T77). The meeting concluded shortly after the exchange between McCaffery and Hall (1T37; 1T89). McCaffery and Hall had no further communication that day (1T37).

9. On November 16, 1988, the day of the PEP orientation program, Judge Williams was on the bench in the Mays Landing courthouse (2T85). After Williams came off the bench, he met Assistant Case Manager Terry Howard in the building (2T85; 2T95). Howard told Williams what occurred between McCaffery and Hall during the PEP orientation meeting (2T86; 2T95).

10. On the morning of November 17, 1988, McCaffery arrived at his Atlantic City office and proceeded to meet with Williams in accordance with his normal daily routine. Before McCaffery could say anything, Williams asked him to relate what occurred during the Mays Landing PEP orientation meeting on the preceding day (2T24; 2T86). McCaffery told Williams that Hall was disrespectful and made

derogatory comments regarding Cape May County employees. He stated that Hall said that Cape May County was in the "boondocks" and said publicly that he did not trust McCaffery (2T86-2T87). McCaffery told Williams that he was concerned about Hall's comments but was unsure as to the appropriate response. Williams told McCaffery that he (McCaffery) did not need to concern himself with determining an appropriate response, since he (Williams) had decided to immediately move Hall to the Support Enforcement Division in Atlantic City (2T25). Williams then called Vicinage Chief Probation Officer (VCPO) Green and asked him to join Williams and McCaffery in Williams' office (2T25-2T26; 2T89). Williams informed Green of the incident which occurred on the previous day in Mays Landing (2T110). Williams told Green and McCaffery to take the necessary steps to move Hall to the Support Enforcement Division immediately (2T89). The meeting with Williams concluded; McCaffery and Green proceeded to implement the reassignment. McCaffery contacted Association President Sandrow-Scull and Hall's supervisor in the Mays Landing office. Green contacted the person who would become Hall's new supervisor in the Support Enforcement Unit in Atlantic City in order to advise him of Hall's imminent arrival (2T26-2T27).

11. On November 17, 1988, between 11 and 11:15 a.m., McCaffery telephoned Hall (2T27). McCaffery told Hall that he was calling at the direction of Judge Williams to advise him that he was being immediately reassigned from the Adult Criminal Supervision Division in Mays Landing to the Support Enforcement Division in

Atlantic City. McCaffery instructed Hall to report to Director of Child Support Sullivan at 1 p.m. that day. McCaffery told Hall that his supervisor in Mays Landing was aware of the movement and would take care of the cases Hall was scheduled to handle that afternoon (1T38; 2T28). Hall reported to Sullivan that afternoon as directed and was given the balance of the day off (CP-1; 1T40; 1T93-1T94). Beginning on November 18, 1988, Hall served as a probation officer in the Support Enforcement Division in Atlantic City (1T41; 1T94).

12. As Assignment Judge for Vicinage I, Williams is responsible for administering the judicial functions taking place in three court houses (2T87). Since the Assignment Judge's office is located in Atlantic City, Williams believes that employees generally consider Atlantic City as the "home office." Williams is concerned that employees located in offices outside of Atlantic City may feel disadvantaged vis-a-vis "home office" employees (2T87). Thus, Williams thought that Cape May employees would learn of Hall's "boondocks" comment and, absent an appropriate administrative response, such remarks would reinforce employee perceptions that they received "...the short end of things..." (2T87; 2T106-2T108).

13. Judge Williams was also concerned about Hall's "I don't trust you" remark directed toward McCaffery. Williams thought that that comment, made in a public forum to a key administrator in the vicinage, was offensive, disrespectful to other colleagues and demonstrated a lack of discretion on Hall's part (2T88; 2T101). On the basis of Williams' belief that Hall's remarks demonstrated poor

judgment and a lack of discretion, Williams decided that it would be inappropriate for Hall to remain at an outlying office with its reduced level of supervision and, therefore, directed that Hall be moved back to Atlantic City (2T93; 2T98; 2T101-2T102).

14. On November 18, 1988, Hall filed a grievance with VCPO Green contesting his movement from the Criminal Supervision Division in Mays Landing to the Support Enforcement Division in Atlantic City (CP-3; 1T44). On November 23, 1988, Green sent a memo to Hall acknowledging receipt of his grievance (R-3; 1T95; 2T112). Also, on November 23, 1988, the Atlantic County Probation Officers Association sent Green a letter supporting Hall's grievance and advising that it would represent Hall in that matter (CP-4; 1T46-1T47; 2T112). On November 29, 1988, Green advised the Association that he had received its grievance on Hall's behalf and merged the two grievances (CP-5; 1T52; 2T112). That same day, Green denied the merged grievances (R-4; 1T97; 2T113). On December 5, 1988, the Association appealed Green's denial to Judge Williams (CP-6; 1T55-1T56; 2T29-2T30). On December 9, 1988, Richard Hunter, Director of Human Resources, sent a memo to Hall and the Association confirming that Judge Williams would conduct a grievance hearing on December 15 (R-5; 1T54). During the grievance hearing, Williams analogized Hall's situation to baseball and suggested that Hall needed to become a "team player" (1T54; 1T102; 2T114). Williams indicated that Hall's movement to the Support Enforcement Division in Atlantic City was not necessarily permanent and that Hall could

show himself to be a team player and, thereby, instill confidence in Williams that a return to the Mays Landing outpost office would again be appropriate for Hall. However, until Williams was satisfied that it was in everyone's best interest to assign Hall to Mays Landing, Hall would stay in the Support Enforcement Division in Atlantic City (2T37; 2T64; 2T90-2T91; 2T114). Williams denied the merged grievance on the merits, holding that the assignment or reassignment of personnel is an inherent managerial prerogative (R-6; 1T102; 1T113; 2T90-2T91).

15. On January 10, 1989, VCPO Green posted a notice advising of an opening for a probation officer in the Criminal Supervision Division (CP-7; 1T60; 1T102; 2T115). Hall learned of the vacancy on January 11, 1989, and, on January 12, 1989, delivered a memorandum to Green expressing his interest in the position (CP-8; 1T60-1T61; 1T105; 2T116).[5/]

16. In late January or early February, 1989, Hall coincidentally met Green in the men's lavatory. Green told Hall that he would check with someone to determine whether Hall would be granted an interview for the Criminal Supervision vacancy (1T106). Green sought Judge Williams' input regarding whether Hall should be considered as a viable candidate for the vacancy (2T92; 2T103;

5/ There is a conflict in the record regarding the office location in which this vacancy was found. Hall states that the location of the vacancy was in the Atlantic City office (1T64-1T65; 1T108). It is apparent from Williams' testimony that he understood this vacancy to be located at the Mays Landing office (2T92; 2T103).

2T116). Williams told Green that Hall should not be considered for the vacancy (2T116). On February 2, 1989, at about 4:15 p.m., Green asked Hall to meet with him in his office (1T62; 1T106; 2T116). Green told Hall that he would not be allowed to interview for the Criminal Supervision vacancy (1T62; 1T106).

17. Williams did not allow Hall to be considered for the Criminal Supervision vacancy because only a few weeks had passed since Hall was moved from Mays Landing to the Atlantic City office. Moreover, insufficient time had passed for Hall to demonstrate a change in his attitude or behavior toward management (2T92; 2T103-2T104). Williams did not believe that anything occurred with respect to Hall's attitude which served to convince him that Hall would be an appropriate candidate to function under the reduced levels of supervision found at the Mays Landing office (2T93). Williams believed that Hall's return to the Mays Landing office so soon after his movement to Atlantic City would have a deleterious affect on the Mays Landing operation (2T93). Williams' primary consideration in denying Hall an opportunity to be considered for the Criminal Supervision vacancy was based on the comments Hall made during the November 16, 1988 PEP orientation meeting (2T104).

18. Hall's movement from the Criminal Supervision Division in Mays Landing to the Support Enforcement Division in Atlantic City constituted a lateral move. His title, probation officer, did not change after the movement, nor did he suffer a decrease in salary, benefits or employment status (1T90; 1T93; 2T34).

ANALYSIS

In Docket No. CI-H-89-65, the Charging Party alleges that he was moved from the Criminal Supervision Division in the Mays Landing outpost office to the Support Enforcement Division in Atlantic City in retaliation for exercising his rights protected by the Act. Specifically, Charging Party contends that questions he raised and comments he made during the orientation meeting called by management officials to introduce the new vicinage performance evaluation program were protected by the Act, and that his movement out of the Mays Landing office was in retaliation for such questions and comments. In Docket No. CI-H-89-75, the Charging Party alleges that the Respondent refused to consider his application for a vacancy in the criminal supervision division because he had recently filed an unfair practice charge (Docket No. CI-H-89-65) against Respondent.

N.J.S.A. 34:13A-5.4(a)(3) prohibits public employers, their representatives or agents from "discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act." The "rights guaranteed" by the act include the rights "to form, join and assist any employee organization." N.J.S.A. 34:13A-5.3.

In In re Bridgewater Tp., 95 N.J. 235 (1984), the New Jersey Supreme Court, affirming the Commission's determination that

an employee had been illegally transferred and demoted, articulated the following standards for determining whether an employer has illegally discriminated:

> ...[T]he employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [NLRB v. Transportation Management, 462 U.S. at 401, 103 S.Ct. at 2474, 76 L.Ed. 2d at 675, 113 LRRM 2857 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. Id. at 242. [Footnote omitted.]

Under Bridgewater, no violation will be found unless the Charging Party proves, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

In North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454, n. 16 (¶4205 1978), aff'd App. Div. Dkt. No. A-698-78 (4/11/79), the Commission held that "...individual employee conduct, whether in the nature of complaints, arguments, objections,

letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act. See Dreis v. Krump Mfg. Co., 545 F.2d 320, 93 LRRM 2739 (7th Cir. 1976) and NLRB v. Interboro Contractors, Inc., 388 F.2d 455, 67 LRRM 2083 (2nd Cir. 1967)." Thus, in North Brunswick Tp. Bd. of Ed., the Commission has adopted a broad definition of individual employee conduct which would constitute protected activity. However, such broad definition is not without its limitation. Protected individual conduct must occur in the context of enforcing an agreement or existing working conditions in a recognized or certified negotiations unit.

In Essex County College, H.E. No. 88-5, 13 NJPER 648 (¶18245 1987), adopted P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), the Commission held that the College did not violate the Act in discharging the Charging Party since her actions did not constitute an exercise of protected rights. In that case, the Charging Party was a part-time employee whose hours of work during July and August concluded at 1:15 p.m., Monday through Thursday. 13 NJPER at 649. During July and August, the College paid its employees on Thursdays on or after 4:00 p.m., biweekly. Id. Charging party wished to receive her pay check at 1:15 p.m., the end of her workday, rather than wait until 4 p.m. in accordance with College policy. Id. On a payday in August, Charging Party did not receive her paycheck at the end of her workday. Later that

afternoon, she saw the College's President in the cafeteria dining with two other persons. Id. Charging party proceeded to tell the College President "what she thought of him" but did not do so in a loud or abusive manner. Id. Shortly thereafter, Charging Party was terminated for the conduct which occurred in the cafeteria "...which was both unprofessional and unbecoming of the conduct expected of Essex County College employees...." Id. at 649-650.

The Hearing Examiner concluded, and the Commission adopted, that the Charging Party did not fall within North Brunswick Bd. of Ed., notwithstanding the fact that she was included in a recognized or certified negotiations unit. The Hearing Examiner found that her complaint about not receiving a paycheck at the time that she wished at the end of her workday in July and August did not occur in the context of enforcing the collective negotiations agreement or any existing working condition. Accordingly, the Hearing Examiner concluded that the Charging Party's actions did not fall within the definition of protected activity and, consequently, did not violate the Act. The Hearing Examiner noted that the evidence conclusively established that the motivation of the College in discharging the Charging Party originated solely from her conduct in the cafeteria when she approached the College President and two others at a table and told the President what she thought of him. Id. at 651. The Hearing Examiner stated:

> The fact that she claims she was not loud or abusive is beside the point. No employee can expect to approach the highest official in an organization in public and berate him.... [Id.]

In City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (¶15017 1983), the Commission found that an employee's outbursts and disruptive conduct during a general staff meeting did not constitute protected activity on the part of the employee, since she was not acting as spokesperson for the employee organization. The relevant facts are as follows. An employee on an unpaid maternity leave erroneously received a paycheck. Id. at 29. The municipal court administrator believed that the entire staff knew that the employee on maternity leave was not entitled to the paycheck, but no one brought it to her attention. Therefore, she believed the entire staff shared responsibility for the wrongful issuance of the paycheck. Id. The administrator called a staff meeting and accused the employees collectively of employing a conspiracy of silence for the purpose of permitting another employee to receive unearned money. Id. The Charging Party, who was not an employee organization official, ultimately became embroiled in a heated argument which disrupted the staff meeting. Id. Shortly thereafter, the city suspended the Charging Party because she "...threatened [the municipal court administrator's] position in front of the staff of 38 people...by disrupting the meeting." Id.

In holding that the Charging Party's actions were not protected by the Act, the Commission balanced two equally important, but conflicting, rights. The Commission stated the following:

> On the one hand is the employer's right to maintain discipline in his establishment. It is beyond cavil that insubordination and disruption of staff meetings are actions which an employer need not tolerate. On

> the other hand is the employee's right to engage in activities protected by this Act, assuredly including the right to present grievances to her employer. [Id.]

The Commission then went on to state that "...in the processing and resolution of grievances the parties must be on an equal footing and not in a master and servant relation." City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389, 390 (¶10199 1979). However, in E. Orange, the Commission held that the Charging Party's

> ...outburst did not occur during a grievance meeting; [she] was not acting as a spokesperson for the majority representative seeking to represent or defend employees during an investigation of suspected employee misconduct; and her behavior went beyond the bounds of propriety....We do not believe that, under these circumstances, an individual employee has a protected right to unilaterally convert a meeting called by the employer for the purpose of commenting upon its impressions of faulty work performance into a grievance conference where the parties are on an equal footing. [City of E. Orange, 10 NJPER at 30. Footnote and citation omitted.]

In the instant matter, the Respondent exercised its clear right to convene a meeting with its employees to discuss the new performance evaluation program it wanted to implement. Hall's question regarding the PEP constitutes protected activity under the Act. North Brunswick Tp. Bd. of Ed. However, the facts in this case establish that Hall was not moved from the Criminal Supervision Division in Mays Landing to the Support Enforcement Division in Atlantic City because of the question he asked relating to the PEP. Trial Court Administrator McCaffery attempted to answer Hall's question without incident. Rather, the facts show that Hall's movement was the direct result of derogatory and disruptive comments

which he made during the meeting after he asked his question. Hall claimed that employees stationed in the Cape May County part of the vincinage worked in the "boondocks" and that such employees did not work as hard as those assigned to the Atlantic County offices. That was not a question to McCaffery. It was Hall's own inappropriate assertions regarding a work location and employees assigned there. Additionally, when McCaffery asked Hall to meet with him in his office to further discuss Hall's concerns, Hall publicly stated in front of the approximately 50 employees attending the meeting that he did not trust McCaffery and would not meet with him privately. Hall was not a union representative nor was he acting on behalf of the union when he made those remarks. Probation Officers Association President Sandrow-Scull, in attendance at the meeting, expressed concern only regarding the fact that the Association had not received the PEP informational package in advance of the meeting as had another employee representative.

The PEP orientation meeting was not a grievance hearing. Accordingly, Hall was not on an "equal footing" at that time with the management officials conducting the meeting. See, City of Asbury Park. Hall's public comments berated the second highest management official in the organization. The comments which Hall made during the meeting do not constitute protected activity under the Act. Essex County College; City of East Orange. Hall was moved to the Support Enforcement Division in Atlantic City in direct response to these unprotected comments. Accordingly, I find that

the Respondent has not violated the Act by moving Hall from the Criminal Supervision Division in Mays Landing to the Support Enforcement Division in Atlantic City because Respondent's rationale for such movement does not relate to Hall's exercise of any rights protected by the Act.

On January 10, 1989, VCPO Green posted a notice advising Probation Officers of a vacancy in the Criminal Supervision Division. Hall advised Green that he wished to be considered for that position. Later, Green told Hall that he would not be interviewed or considered for the Criminal Supervision Division vacancy. Hall contends that he was not given the opportunity to be considered for the vacancy because he had recently filed an unfair practice charge (Docket No. CI-H-89-65) against the Respondent.

I find that Judge Williams decided that Hall should not be considered as a candidate for the vacant position on the grounds that he believed it was too soon to return Hall to the Mays Landing office. He reached that conclusion independently. Williams felt that there had not been sufficient time for Hall to demonstrate any change in conduct or attitude toward management and, therefore, was not convinced that Hall could function under the reduced levels of supervision found at the Mays Landing office. Williams' primary consideration in denying Hall an opportunity to be considered for the vacancy was based on Hall's comments made regarding Cape May employees and made to McCaffery during the PEP orientation meeting. I have already held that those comments did not constitute protected

activity within the meaning of the Act. Judge Williams' decision to deny Hall the opportunity to be considered for a vacancy in the Criminal Supervision Division was also based on Hall's unprotected comments.

Consequently, I find that Hall's unprotected activity was the motivating factor in the Respondent's decision to move Hall from the Criminal Supervision Division in Mays Landing to the Support Enforcement Division in Atlantic City, and for denying Hall the opportunity to be considered for the job vacancy which subsequently arose. Hall did not satisfy the Bridgewater standards. Thus, protected conduct was not a substantial or motivating factor in Hall's movement, nor in his being denied an opportunity to be considered for the job vacancy.

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

CONCLUSIONS OF LAW

The Atlantic County Judiciary did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (4) when it moved Derek Hall from the Criminal Supervision Division in the Mays Landing office to the Support Enforcement Division in the Atlantic City office, and, subsequently, denied him the opportunity to be considered for a vacant position in the Criminal Supervision Division.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the consolidated Complaints be dismissed.

Stuart Reichman
Hearing Examiner

Dated: May 20, 1992
Trenton, New Jersey