P.E.R.C. NO. 96-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CO-H-95-16

AFSCME, COUNCIL NO. 73, LOCAL 2284,

Charging Party.

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CI-H-95-11

CARSON GIVENS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a consolidated Complaint based on unfair practice charges filed by Carson Givens and AFSCME, Council No. 73, Local 2284 against the County of Monmouth. In the absence of exceptions, the Commission adopts the Hearing Examiner's conclusion that Givens' shift change was motivated by a State inspection, not his protected activity, and that any alleged contract violations must be resolved through the negotiated grievance procedure.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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-and- Docket No. CI-H-95-11

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Charging Party.

Appearances:

For the Respondent, Robert J. Hrebek, attorney

For the Charging Parties, Matlin and Siegel, attorneys (Stephan Siegel, of counsel)

DECISION AND ORDER

On July 15, 1994, AFSCME, Council No. 73, Local 2284 filed an unfair practice charge (CO-95-16) against the County of Monmouth. The charge contains eight counts. The first count 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), (2), (3), (4), and (5),[1/] by changing the shift of Local 2284 president Carson Givens and in other ways attempting to curtail his union activities. On August 24, Givens filed an unfair practice charge (CI-95-11) alleging that the employer violated subsections 5.4(a)(1), (2) and (3) when it changed his shift and punished him without charging him for improper conduct because he represents employees at disciplinary hearings.

On September 19, 1994, a Commission designee denied interim relief on CI-95-11. I.R. No. 95-4, 20 NJPER 415 (¶25211 1994). On October 5, the Director of Unfair Practices issued a Complaint and Notice of Hearing on that charge. On October 14, the Director issued a decision refusing to issue a Complaint on all but the subsection 5.4(a)(1) and (3) allegations of count one of CO-95-16. D.U.P. No. 95-9, 20 NJPER 442 (¶25227 1994). The Director consolidated the remaining allegations of the Complaints.

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The employer filed Answers denying that it violated the Act. It claimed, in part, that patients had complained about Givens and that he had agreed to the shift change.

On February 7, 1995, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On May 23, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-25, 21 NJPER ___ (¶____ 1995). He found no evidence that the employer was hostile toward Givens because of his union activity. Instead he found that Givens agreed to a shift change after a State inspection of the County's John L. Montgomery Medical Home revealed complaints concerning his interaction with patients. The Hearing Examiner concluded that the shift change was not motivated by Givens' protected activities.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due June 7, 1995. Neither party filed exceptions. The employer filed a statement in support of the recommended decision.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 6-16). In the absence of exceptions, we also adopt his conclusion that Givens' shift change was motivated by the State inspection, not his protected activity, and that any alleged contract violations must be resolved through the negotiated grievance procedures.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: July 28, 1995
Trenton, New Jersey
ISSUED: July 28, 1995

H.E. NO. 95-25

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

In the Matter of

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CO-H-95-16

AFSCME, COUNCIL NO. 73., LOCAL 2284,

Charging Party.

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CI-H-95-11

CARSON GIVENS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the County of Monmouth did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by the manner in which Carson Givens' shift was changed. The Hearing Examiner found that the shift change was motivated by the results of a State inspection and not Givens protected activities, and Givens agreed to the change.

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. 95-25

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

In the Matter of

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CO-H-95-16

AFSCME, COUNCIL NO. 73., LOCAL 2284,

Charging Party.

COUNTY OF MONMOUTH,

Respondent,

-and- Docket No. CI-H-95-11

CARSON GIVENS,

Charging Party.

Appearances:

For the County of Monmouth
Robert J. Hrebek, attorney

For AFSCME and Carson Givens
Matlin and Siegel, attorneys
(Stephan Siegel, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On July 15, 1994, AFSCME, Council #73, Local 2284 ("AFSCME" or "Charging Party") filed an unfair practice charge (CO-95-16) with the New Jersey Public Employment Relations Commission, alleging that the County of Monmouth violated subsections 5.4(a)(1), (2), (3), (4)

and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] AFSCME, in Count One of an eight count charge, alleged that on or about May 30, 1994, the County did not allow Carson Givens, President of Local 2284, to visit the John L. Montgomery Home; attempted to curtail his union activities; days later threatened to fire or reassign Givens; ordered Givens to change to the morning (from the evening) shift or be disciplined; forced Givens to agree to a leave of absence; and suspended several unit members without just cause.[2/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ AFSCME's other allegations included:

Count Two: That the suspensions of unit members were based upon allegations by a patient that the County will not make available.

Count Three: That when the County suspends employees it orders them off the premises immediately without a pre-suspension hearing.

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On August 24, 1994, Givens filed his own unfair practice charge (CI-95-11) with the Commission alleging that the County violated subsections 5.4(a)(1), (2) and (3) of the Act. He alleged that: the County unilaterally changed his shift (from evening to morning) even though he had the second highest seniority; violated its collective agreement with AFSCME by requiring him to work the day shift; punishing him without charging him for improper conduct because, as union president, he represents employees at disciplinary hearings.

AFSCME, in its charge, sought relief in Count One by having Givens returned to the Montgomery Home, and have the County stop harassing him because of the exercise of protected activities. Givens, in his charge, sought to work on the evening shift based upon his seniority rights.

2/ Footnote Continued From Previous Page

Count Four: That the County has refused to negotiate over the penalties for employees for certain infractions.

Count Five: That the County does not provide written decisions explaining the reason for discipline.

Count Six: That unit employees should not be required to use vacation or administrative leave to attend hearings.

Count Seven: That LPN's who are in the unit are required to discipline other unit members.

Count Eight: That unit members have been denied medical treatment and required to continue working after a job related injury.

Procedural History

Givens' charge, CI-95-11, was accompanied by a request for interim relief, N.J.A.C. 19:14-9.1 et seq., which resulted in a Show Cause hearing held on September 14, 1994. On September 19, 1994, the Commission Designee issued a decision, County of Monmouth, I.R. No. 95-4, 20 NJPER 415 (¶25211 1994), denying the request. He held, in part, that Givens had not been disciplined, and that if Givens believed that his contractual shift selection rights had been violated he could pursue a grievance. Relying on State of N.J. (Dept. Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission Designee held that a contract violation is not necessarily an unfair practice.

On October 5, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing in the Givens charge.

On October 14, 1994, the Director of Unfair Practices issued a decision, County of Monmouth, D.U.P. No. 95-9, 20 NJPER 442 (¶25227 1994), refusing to issue a complaint on most of AFSCME's charge. He dismissed counts two through eight of the charge, and refused to issue a complaint regarding the 5.4(a)(2), (4) and (5) alleged violations of the Act. He held he would issue a complaint on Count One of the charge, and consolidate that charge with Givens charge in CI-95-11.

The Director noted that AFSCME did not allege the County changed a term or condition of employment, or refused to process a grievance. He further noted that matters involving the contract,

grievance processing, and minor discipline should be pursued through the parties grievance procedure.

On October 27, 1994, the County filed an Answer (C-2) to the Complaint in Givens' charge. It denied violating the Act. It raised as affirmative defenses that: Givens, through his attorney, had requested a leave of absence; Givens had agreed to work the day shift from 8:00 a.m. to 4:15 p.m.; and patients had raised complaints regarding Givens, but their names could not be released.

On November 2, 1994, the Director of Unfair Practices issued an Order Consolidating the Cases, and a Consolidated Complaint and Notice of Hearing combining the two charges for hearing. Pursuant to the D.U.P. decision in County of Monmouth, supra, the Complaint was limited to the allegations of a violation of subsections 5.4(a)(1) and (3) of the Act, based on Count One in CO-95-16, and the charge in CI-95-11.

On November 10, 1994, the County filed a letter (dated November 8, 1994) requesting that its Answer to CI-95-11 (C-2) also serve as its Answer to the consolidated complaint.

A hearing was conducted in this matter on February 7, 1995 in Trenton, New Jersey.[3/] Both parties filed post-hearing briefs which were received by April 13, 1995.

Based upon the entire record I make the following:

3/ The transcript will be referred to as "T".

Findings of Fact

1. Carson Givens has been employed by the State of New Jersey, Department of Human Services as a nurse's aide at the Marlboro Psychiatric Hospital for approximately twenty-one years. For at least the last twelve years, he has worked the "midnight" shift at Marlboro, from 11:30 p.m. to 7:30 a.m. (T13-T14).

Since 1984, Givens has also been employed as a nurse's aide by the County of Monmouth at the John L. Montgomery Medical Home. He began his employment at Montgomery on the 3:00 p.m. to 11:00 p.m. shift, but changed in early June 1994 to an 8:00 a.m. to 4:15 p.m. shift (T11-T12, T15, T31-T32). During a one week period, Givens normally works four days at both institutions. Before the Montgomery shift change he normally worked eight hours at Montgomery, then eight hours at Marlboro, then off for eight hours. After the change he worked Marlboro first, then Montgomery (T30). There were six or seven other nurses aides on the same floor with Givens on the Montgomery evening shift, and approximately 28 nurses aides throughout Montgomery on the evening shift. Givens had the second highest seniority of nurses aides at Montgomery (T21).

Both Marlboro and Montgomery have a "mandate" policy which requires nurses aides to work after their regular shift ends, even through the completion of the succeeding shift, when there is insufficient coverage on their floor, or in their area (T14, T28). Givens is mandated at Marlboro approximately twice a week (T15). The Marlboro mandates did not interfere with his Montgomery evening

shift, but have interfered with his Montgomery day shift. Givens has sometimes found co-workers to work his Marlboro mandates, but on at least two occasions since the Montgomery shift change his Marlboro mandate has interferred with his Montgomery day shift, causing him to miss that shift (T15, T34). Givens has rarely been mandated at Montgomery (T29).

2. The County operates the Geraldine L. Thompson Medical Home in addition to the Montgomery Home. For the past eight or nine years Givens has been the President of the AFSCME Local representing employees at both homes (T17). Prior to Givens' shift change, disciplinary hearings involving employees he represented were held at 9:30 a.m. on work days (T18). Givens was able to attend those hearings unless he was mandated at Marlboro. Since changing to the Montgmery day shift Givens is unsure whether he will be able to attend morning disciplinary hearings. That issue has not arisen (T18). But Givens' practice of receiving telephone calls regarding union activity while he was on the evening shift has not been allowed to continue on the morning shift (T22-T23).

Givens, in his County nurses aide position, is supervised first by an LPN, then by an RN, and finally by a building supervisor (T20). He has not been disciplined, and his supervisors have not told him his conduct was improper (T19, T20).

3. The County and AFSCME are parties to a collective agreement effective from January 1, 1993 through December 31, 1994 (J-1). Article 5, Section 2 of J-1 provides, in part, for shift assignments to be determined through seniority.

4. The State of New Jersey inspects the Montgomery and Thompson Homes on a yearly basis. The inspection is comprehensive. Five or six inspectors spend seven to ten days at each facility. The inspection includes interviews with approximately 33% of the residents. If the State uncovers problems during the inspection it has the discretion to extend the resident interviews to all the residents in the facility. All those interviews are confidential. County officials do not participate (T57-T59, T61).

The State inspection officials have exit conferences with administrators at each facility at the end of each working day, and before they leave the facility the final time, where they notify the administrators of any problems or deficiencies. The State follows up with a written report (T60-T62).

The State examines every element of a facility's operation and patient care including, but not limited to, the building and physical environment, patient quality of life, patient rights, patient behavior and facility practices, pharmacy and administration. If the inspection goes very well the State may limit its remarks to making observations on particular matters, but not cite deficiencies. If deficiencies are found the facility would be required to prepare a plan of correction.

There are three deficiency levels. Level "C" is the lowest deficiency. It is used to note a problem that has only occurred once, is not emergent and can be easily resolved. Level "B" denotes deficiencies that are found in the facility on more than one

occasion but not considered life threatening. Level "A" deficiencies are the most serious, and often may be life threatening. Level A may include major financial sanctions or fines. Patient admissions can be stopped, and the facility can be closed (T70-T71). In 1993, no deficiencies were noted in the Montgomery Home inspection (T59).

5. The Montgomery Home was being inspected in May 1994. On or about May 26, 1994, the State inspection team notified County officials that it was extending the patient interviews, and in an exit conference notified Diana Scotti, the County's Executive Director of the Department of Medical Homes, and other County officials, that there were Level "A" deficiencies, particularly in the treatment of residents and their quality of life, that necessitated closing the facility to new admissions (T61-T65, T71-T72). The County was also told they had 35 days to improve conditions at Montgomery or that Home would be closed (T78).

The minutes from the May 26 exit conference (R-3) show, in part, that 36 of the 38 residents interviewed complained of harassment, mistreatment and intimidation by the Montgomery staff; they were fearful of verbal intimidation and withholding of treatment by staff; residents were afraid of staff; resident complaints about staff were not promptly resolved; residents are abused, intimidated and deprived of services by staff; facility lacks effective abuse policy; residents are not treated well, and other complaints (T72-T77).

Scotti was told to appear before the State Health Department in Trenton the following day (T79). At that time State officials told her that they believed the conditions at Montgomery to be life threatening, and that if the matter were not rectified, the facility would be closed (T80-T81). The State officials told Scotti that the residents had identified Givens, the union president, as one of the primary problems at Montgomery (T81-T83). Residents claimed that Givens had intimidated them and told other employees to withhold their services (T83).

The State subsequently issued the deficiencies in a written report. Complaints by residents against Givens appeared on page 13 of the report (R-4) including the following:

> The residents stated that the orderly who is the union president tells them:
>
> "...nobody big enough to make me do anything I don't want to do."
>
> "Nobody can hurt me: I'm president of the union." They also reported that he tells staff not to perform certain duties for residents or they'll have to do it all the time."
>
> "He calls me a liar."
>
> "He teases me and I get mad."
>
> "He runs the floor."
>
> Redsidents stated they believe the nursing staff is afraid of this individual. (T85-T86).

The State, however, did not tell the County what to do about Givens. It just wanted the problems corrected. It did not

say Givens could not work with patients, nor require that he be removed from the evening shift (T121-T122).

6. As a result of the State inspection, County officials held a meeting with Givens on June 7, 1994 to ask him to change to the day shift (T94-T95). The meeting was attended by Robert Collins, the County Administrator; Scotti; Mary Jane Eddings, the Administrator at Montgomery; and Givens (T37, T94).

Collins ran the meeting. He told Givens about the State inspection and showed him the written report containing R-4. Collins told Givens that it would be in his, and the County's, best interest if he switched to the day shift, which ran from 7:00 a.m. - 3:15 p.m., where there was more supervision (T37, T95, T132, T133). Givens rejected the request explaining it would be a hardship because those hours would interfere with his Marlboro hours where the shift did not normally end until 7:30 a.m. (T37). Givens then told Collins to file charges against him because making him work a 7:00 a.m. shift at Montgomery would effectively remove him from his County job because he couldn't leave Marlboro until after 7:30 a.m. (T96, T133-T135). Collins told Givens he did not have enough evidence to charge him, but changes had to be made to keep Montgomery open (T96, T133-T134).

Collins did not want to remove Givens from his Montgomery position. After Givens explained the conflict with his Marlboro shift and the Montgomery day shift, Collins turned to Scotti and Eddings and asked if Givens could be placed on the day shift from 8:00 a.m. to 4:15 p.m. They said, yes (T96-T97, T135).

Collins offered Givens the day shift beginning at 8:00 a.m. and he accepted. He told Collins that he had wanted to work days but could never arrange it, because the end of the Marlboro and beginning of the Montgomery day shift always overlapped. He expressed relief that Collins wasn't really after him, agreed to the shift change, they shook hands and the meeting ended (T97, T135-T137).

Givens acknowledged he agreed to change shifts and work 8:00 a.m. - 4:15 p.m. at Montgomery, but he testified he did so under pressure. He claimed he objected to the change, but agreed to do it to buy time because Collins pressured him (T38-T39). He also testified that Collins told Scotti and Eddings to remove him if he did not accept the day shift (T37). Both Collins and Scotti testified that Givens said he had wanted to work the day shift and was happy and relieved to accept the 8:00 a.m. shift (T97, T136-T137). Although I can understand Givens feeling some pressure to accept the day shift, I credit Collins and Scotti that Givens voluntarily, and even happily, agreed to the shift change. Both Collins and Scotti had a good command of the facts, corroborated one another, and were reliable. Consequently, I do not believe that Collins threatened Givens' removal if he did not accept the change.

On June 7 or 8, Givens contacted his, or AFSCME's, attorney regarding the shift change (T40). Late in the afternoon of June 8, Collins received a letter from Givens' attorney (R-11), requesting that Givens remain on the Montgomery evening shift, until "the real

issues surrounding your [Collins] requirement for Mr. Givens' shift change can be resolved." R-11 requested a meeting to resolve the matter. Since Collins felt that R-11 was contrary to what he and Givens had agreed to, he telephoned Givens' attorney and informed him of the results of the State inspection and that Montgomery could be closed down (T139).

During that discussion, Givens' attorney requested the County grant Givens a leave of absence for two months (T40, T140). Later that same day he FAXed Collins a letter (R-12) formally making the leave request to commence on June 9, 1994.[4/] Collins responded with his own letter of June 8 (R-13) approving Givens' leave of absence beginning June 9.

On June 8 Collins wrote a note on R-12 addressed to Givens' attorney that Givens would not appear at the Montgomery premises during his leave unless otherwise agreed upon. Collins included that same language in R-13.[5/] That language was included in R-12

4/ R-12 states:

> "As per our recent conversation, this FAX letter will serve to confirm that Carson Givens is requesting a LEAVE OF ABSENCE from his employment with John L. Montgomery Home, commencing June 9, 1994 and continuing for a period of two months. This letter will further confirm your acceptance and approval of this requested leave."

5/ Collins R-13 letter granting Givens leave provides: "This is in reply to your fax of June 8, 1994 requesting a two (2) month leave of absence for Carson Givens. Your request is approved effective June 9, 1994 for a two (2) month leave of

Footnote Continued on Next Page

and R-13 because the State had told the County that it would be required to file a report if Givens were on the premises. Since Givens was going on leave, Collins did not want him at the Montgomery site, even to conduct union activity, to avoid any question about keeping Montgomery opened (T145).

7. Within a few weeks of the State inspection, and as a direct result of the State's findings, Administrator Eddings was forced to retire, and the Director, and Assistant Director, of Nursing resigned (T127-T128). However, no LPN, RN, or supervisor on the evening shift was disciplined as a result of the State inspection (T119).

8. Givens' two month leave began on June 9, 1994. After that leave began the State returned to Montgomery, reinspected the facility, interviewed residents, and within a few weeks lifted all of the Level A deficiencies. State officials asked Scotti about Givens. When told he was on leave, they asked Scotti to let them know in writing when he was returning, and if he were going to be in the facility for any other reason. Scotti requested the State put that requirement in writing (T107-T109).

5/ Footnote Continued From Previous Page

absence without pay. It is agreed that Mr. Givens will not appear on the premises of John L. Montgomery Medical Home or Geraldine L. Thompson Medical Home during this two (2) month period unless mutually agreed to by the County and Mr. Givens. I will see that the formal Civil Service Leave of Absence paperwork is sent to Mr. Givens as soon as possible at his home by mail."

On July 22, 1994, the State's Coordinator of Inspections, in response to Scotti's request, sent a document to Montgomery containing the following language (T109):

> Request that the Administrator of the facility notify the Department of Health when Mr. Carson Givens, the president of the union, returns to work from his current leave of absence. Request his return date, unit assignment and what shift he will be working. (R-8)

On July 27, 1994, Scotti sent Givens a letter (R-5) notifying him that his leave of absence was expiring on August 8, 1994, and that he would return to work on August 9, 1994 for an 8:00 a.m. to 4:15 p.m. shift. Givens returned to work on August 9 as scheduled, he worked on August 9, 10 and 11, came in on overtime on August 12, and was scheduled off for August 13, 14 and 15 (T100-T101, R-6).

On or about August 17, 1994, Givens applied for, and was granted, a three week sick/disability leave of absence (T106, R-7). Since Givens' return to the day shift, Scotti has not received complaints about his performance, the State Health Department has continued to inspect the facility but has not informed her of any problems with Givens, and there has been no problem with his 8:00 a.m. to 4:15 p.m shift (T122-T123).

9. On or about August 17, 1994, Givens filed a grievance over his shift change (R-1) seeking to be returned to the 3:00 p.m. to 11:00 p.m. shift. The grievance was denied at the first step on August 24, 1994 (R-2) based upon Givens agreement with Collins to

work the special morning shift hours. On August 30, 1994, the grievance was denied at the second step (R-9). Montgomery's administrator held that no contract clauses had been violated, Givens had not been disciplined, and that Givens' shift was changed by agreement. On September 21, 1994, Scotti denied the grievance at the third step (R-10). She held that Givens and Collins had reached an agreement to change Givens' shift. Neither Givens nor AFSCME brought the grievance to arbitration.

ANALYSIS

The County did not violate the Act by the manner in which Givens' shift was changed. The standard for determining whether an employers actions violated subsection 5.4(a)(3) of the Act was established by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have

occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

In this case, as in most (a)(3) cases, the Charging Party succeeded in proving the first two Bridgewater elements, but not the last. The decision on whether a charging party has proved hostility in (a)(3) cases is not based only on the evidence produced by the charging party, nor by the mere denial of a motion to dismiss. The Commission in Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987), explained that the decision on whether the charging party has proved hostility will be based upon consideration of all the evidence presented at hearing, as well as the credibility determinations and inferences drawn by the hearing examiner. There was no evidence here that the County was hostile toward Givens because of his exercise of union activity.

There are really two issues in this case. Did the County discipline Givens, and/or unilaterally change his shift, and if so, what was the County's motive? If the answer to the first question is no, then the answer to the second question is really irrelevant, but I will resolve the issues for the parties' benefit.

The only action the County took in this case was asking Givens to change his shift. The County did not discipline Givens. In fact, Collins said there was insufficient basis for discipline. Givens' shift was changed by mutual agreement, and only after he

accepted a shift with hours that were specifically designed to accomodate his schedule. The reason the County requested Givens change his shift was not because he was AFSCME President, or because he engaged in union activities. The uncontroverted evidence shows that Collins requested the shift change only in response to the State inspection and to avoid more serious State action at the Montgomery Home.

Although Givens felt pressured to accept the shift change, and even if Collins did pressure him, the motive for the pressure was the State inspection results and the desire to keep Montgomery open, it was not Givens' protected activities.

The Charging Party apparently believes that the issue in this case concerns Givens' right to exercise his seniority for shift assignment. In its post hearing brief it refers to the seniority clause in J-1, and argues that shift changes are mandatorily negotiable subjects, and it seeks an order compelling the County to comply with J-1. That argument is misplaced. The Director of Unfair Practices did not issue a complaint regarding J-1 or over contractual seniority rights. In County of Monmouth, supra, he specifically held that:

> If the substance of the claim is that the County has breached the terms of the parties agreement, then the preferred method of resolving such dispute is through the parties negotiated grievance procedure. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). 20 NJPER at 443.

Givens filed a grievance regarding his seniority. The Charging Party is not entitled to a review of the contractual issue, or the grievance, in this proceeding.

To the extent the Charging Party suggests that Givens' shift change represented a unilateral change in, or a refusal to negotiate over, a term and condition of employment, there is no evidence to support such arguments. There was no unilateral change here, and no refusal to negotiate. Givens shift was changed by agreement, motivated only by the results of the State inspection. The charges, therefore, should be dismissed.

Accordingly, based upon the above facts and analysis, I make the following:

Conclusion of Law

The County did not violate the Act by the manner in which Carson Givens' shift was changed.

Recommendation

I recommend the consolidated complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: May 23, 1995
Trenton, New Jersey