P.E.R.C. NO. 86-141

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF GLASSBORO,

Respondent,

-and- Docket No. CO-85-306-155

UNITED FOOD & COMMERCIAL
WORKERS LOCAL 1360,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Borough of Glassboro violated the New Jersey Employer-Employee Relations Act when it discharged Jeffrey Brown and Willard Bryant, Sr. and denied customary wage increases and vacation requests for highway department employees. The Commission, applying the governing tests of In re Bridgewater, 95 N.J. 235 (1984) finds that these actions were taken in retaliation against highway department employees' union organizing efforts. The Commission further holds, however, that the Borough did not violate the Act when it changed insurance carriers, changed the employees' work schedule and issued specifications and solicited bids to subcontract solid waste.

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UNITED FOOD & COMMERCIAL
WORKERS LOCAL 1360,

Charging Party.

Appearances:
For the Respondent, Joseph Lisa, Esquire

For the Charging Party, Tomar, Parks, Seliger, Simonoff & Adourian, Esqs. (Mary L. Crangle, Of Counsel)

DECISION AND ORDER

On May 13, 1985, the United Food and Commercial Workers Local 1360 (Local 1360") filed an unfair practice charge against the Borough of Glassboro ("Borough"). This charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] when it terminated Jeff Brown "because of his

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

union activities and with the intent of discouraging other employees of the Borough of Glassboro from seeking union representation." On May 22, 1985, Local 1360 filed a second charge. This charge alleged the Borough violated subsections 5.4(a)(1) and (3) of the Act when it terminated Willie Bryant because of his union activities. This charge further alleged that the Borough committed the following unlawful acts: threatening employees with extra work if they opted for union representation; threatening employees with layoff and/or subcontracting, changes in work rules and elimination of breaks; refusing to grant employees earned vacation time and changing insurance benefits.

On June 10, 1985, an order consolidating the two charges and Complaint and Notice of Hearing issued. On June 28, 1986, the Borough filed its Answer. It states "All of the allegations set forth in the paragraph of the charge constituting the substantive portion of the Complaint are denied."[2/]

2/ This Answer is woefully inadequate and does not comply with N.J.A.C. 19:14-3.1 which, in part, requires respondent to "specifically admit, deny or explain each of the charging party's allegations set forth in the complaint, unless the respondent is without knowledge...." The purpose of this rule is obvious: it clarifies the issues for hearing and saves time. It would not burden respondent to have followed it. For instance, it would not have been difficult for the Borough to admit terminating Brown and Bryant, but denying that it was for their union activities. Failure to comply with this rule authorizes the Commission to deem allegations to be true. We will not do so in this case since the charging party did not raise it, but will not hesitate to do so in the future.

On July 16, 17 and 18, 1985, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On April 22, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-52, 12 NJPER ___ (¶_____ 1986). Applying the requisite In re Bridgewater, 95 N.J. 235 (1984) test, he found that the Borough violated subsections 5.4(a)(3) and derivatively, (a)(1) of the Act when it discharged Brown and Bryant for union activity. He also found that the Borough committed an independent violation of subsection 5.4(a)(1) when it "interrogated" Brown and another employee. He also found the Borough violated subsections 5.4(a)(3) and derivatively, (a)(1) of the Act when, in retaliation against their union organizing, it denied highway department hourly employees wage increases in April and denied requests for vacations submitted after April 30. The Hearing Examiner recommended the following affirmative relief: reinstate Brown and Bryant with back pay and interest; increase salaries effective April 15, 1985, to "reflect the increases paid to hourly wage department employees in April 1984" and "credit all Department employees vacation days which were requested and denied between April 30 and July 10, 1985, consistent with staffing requirements." He also recommended a cease and desist order and the posting of a notice. He dismissed the charge's remaining allegations.

On May 5, 1986, the Borough filed exceptions. It contends the Hearing Examiner erred in finding that the Borough unlawfully terminated Brown and Bryant. It contends that Local 1360 failed to

establish a prima facie case under Bridgewater with respect to either employee and that protected activity was not a motivating or substantial factor in the Borough's decision to discharge them. It further contends that it established a sufficient business justification for discharging Brown and Bryant.

We have reviewed the record. The Hearing Examiner's findings of fact (3-24) are accurate. We adopt and incorporate them here.

This case involves claims that the employer took certain actions which allegedly discriminated against employees because of their union organizing campaign. Specifically, the Complaint alleges that the employer: (1) discharged two employees; (2) changed insurance carriers; (3) denied wage increases and vacation requests; (4) threatened to subcontract work, and (5) changed the work schedule in retaliation against the employees' union organizing efforts. The test we must apply in determining the merits of such claims is set forth in In re Bridgewater Tp., 95 N.J. 235 (1984):

> the 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. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. [Id. at 242].

We first apply this test to the discharges of Brown and Bryant.

The evidence is direct and compelling that Local 1360 established that Brown's union activity was a motivating or substantial factor in the employer's decision to discharge him. Brown was warned not to engage in union activity; he was told that if he continued to engage in union activity he would be retaliated against; and after he engaged in union activity he was terminated. Soon after the union organizing began, Councilman Mecouch, the head of the Highway Committee, threatened Brown. The Hearing Examiner credited Brown's testimony that:

> Mecouch approached me and took me to the side and said...what are you doing to me...unions are no good...All they want is your money...If I [would] drop the subject now, that he would not hold it against me. [1T37-14 to 39-14]

Mecouch told another worker, James Wilson, that Brown would be fired if he kept organizing:

> Mecouch said, "I hear you guys are trying to start a union. He asked me if Jeff [Brown] was the ringleader...it may take a year or two, but if Jeff keeps going the way he is, we are going to have to get rid of him. It might take a year or two, something to that effect. [3T34-8 to 35-8]

Two weeks later, Brown was terminated. This direct evidence is sufficient to establish a prima facie case. Beyond this direct evidence, surrounding circumstantial evidence exists. The timing of the discharge is startling. Brown was, by all accounts, a fine employee. Indeed, he had received a significant wage increase in February just before he became involved in the union organizing

drive in April. On April 26, 1985, Brown led other employees in collectively putting on union buttons, an act observed by the employer's agents. The next day, Mecouch decided to fire Brown. These two factors -- the timing of the discharge so close to his organizing efforts and his proven good work -- warrant a finding that union activity was a substantial or motivating factor in his discharge. Bridgewater, supra; University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 449 (¶16156 1985); Ridgefield Park Board of Education, P.E.R.C. No. 85-93, 11 NJPER 202 (¶16083 1985) aff'd App. Div. Docket No. A-5536-83T7 (1986); New Jersey Department of Higher Education, P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985) aff'd App. Div. Dkt. No. A-3124-84T7 (1986); Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978), aff'd App. Div. Dkt. No. A-4824-77 (1980). See generally, Morris, The Developing Labor Law (2d ed. 1983) at 193-195.[3/]

We now consider whether Local 1360 established a prima facie showing that Bryant's union activity was a motivating or substantial factor in the his discharge. Unlike Brown, there is no direct evidence of anti-union animus towards him specifically, although there is plenty towards union organizaing generally. Given this absence, to establish a prima facie case, the charging party

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3/ There is other circumstantial evidence to support a prima facie case. We need not reiterate it here. Rather, we adopt the Hearing Examiner's analysis set forth at 26-28 of his report.

must show that: (1) Bryant engaged in protected activity; (2) the employer knew it and (3) the employer was hostile toward the exercise of protected rights. Bridgewater, supra, at 246; University of Medicine and Dentistry; In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443, 444 (¶11227 1980); In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978).

It is undisputed that the first two elements have been met. Bryant openly organized and the employer knew it. We now consider whether the union established that the Borough was hostile towards Bryant's organizing. We conclude that it clearly did. As with Brown, the timing of the discharge was suspect. He was terminated on May 14, 1985 -- less than a month after he was seen wearing a union button and the day after the union filed its first unfair practice charge. By all accounts, he was a good employee and he had been employed by the Borough for over 14 years. Nevertheless, he was terminated, on the stated grounds that "we don't need you anymore", after participating in a union organizing campaign. In addition, Bryant's request for a vacation was turned down "until [it] was straightened out with the union" and Platt accused the union, to Bryant, of being responsible for flat tires. This evidence establishes a prima facie case, especially in light of the other evidence of union hostility during the organizing. See Mantua Streets and Roads Department, P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984); Borough of Teterboro, P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1983) aff'd App. Div. Docket No. A-4371-82T2 (1984)

Once a prima facie case is established, the burden shifts to the employer to establish by a preponderance of the evidence that it had a business justification which would have caused the disputed personnel action even absent the protected activity. Bridgewater at 244. The Borough's defense is that it terminated the two employees for reasons of economy. We first note that the bare claim that money would be saved by the terminations cannot dispositively establish that the Borough was motivated by budgetary considerations. As the Appellate Division said in a related context in rejecting a similar claim, "The mere fact that the removal of an individual from the municipal payroll results in an economy saving is not the exclusive test, since such removal will always be manifested by a saving." Greco v. Smith, 40 N.J. Super. 182, 190 (App. Div. 1956). Rather, the issue is whether the Borough established that budgetary constraints would have motivated and caused the terminations even if the protected activity had not occurred. We have carefully reviewed the record and cannot accept this proffered justification under the circumstances of this case.

The Borough contends it was faced with budgetary constraints and stresses the "skyrocketing landfill costs...which occurred in late 1984/early 1985" as the major reason for terminating Brown and Bryant. This certainly does not explain Brown's firing. In fact, the Borough's own conduct demonstrates otherwise. Although it faced these constraints in "late 1984/early 1985", it did not fire Brown then. Quite to the contrary -- they

gave him a significant wage increase designed to retain him in his present employment. It was several months later -- after his leading the organizing campaign -- that he was discharged. Under such circumstances, we are not going to blindly accept this business justification defense. Compare Thomas A. Edison State College, P.E.R.C. No. 86-27, 11 NJPER 574 (¶16201 1985), appeal pending App. Div. Docket No. A-671-85T1; Bergen County Utilities Authority, P.E.R.C. No. 84-52, 9 NJPER 678 (¶14296 1983); Newark Housing Authority, P.E.R.C. No. 83-68, 9 NJPER 24 (¶14012 1982); Township of Teaneck, P.E.R.C. No. 81-142, 7 NJPER 351 (¶ 12158 1981). The Borough also contended it terminated Brown because there was no work for him to do. We do not accept this proffered justification. First, the facts found by the Hearing Examiner (pp. 19-21, 29-31) show otherwise. Indeed, there would have been no reason to give him a pay increase if there was no work for him.

We also find that the Borough did not prove that it would have discharged Bryant absent his protected activity. The Borough stresses that the increase in the dumping fees made his position as heavy equipment operator unnecessary. But the fees increased in January 1985 and he continued to work. It was only after he was observed engaging in protected activity that he was terminated. It is of little moment that he was employed as a "floater" after January. There were other "floaters", some had less seniority than Bryant and there is no evidence that any were better employees than Bryant. But it was Bryant who had openly supported the union and it was Bryant who was terminated.

Accordingly, we conclude that the Borough violated subsections 5.4(a)(1) and (3) of our Act when it discharged Jeffrey Brown and Willard Bryant, Sr.[4/] We order their reinstatement together with back pay and interest at the rate set by R.4:42-11.

We also agree, applying Bridgewater to the circumstances of this case and in the absence of exceptions, that the Borough violated subsections 5.4(a)(3) and derivatively (a)(1) of the Act when it denied, during the union organizing campaign, highway department employees' wage increases and vacation requests. In the absence of exceptions, we adopt his recommended remedy with the exception of his recommendation that the Borough grant employees the same increase they received in 1984. We believe the more appropriate remedy is to grant employees the same percentage increase received by the other non-union employees in April 1985. We also agree that the Borough did not violate the Act when it changed insurance carriers, changed the employees' work schedule and issued specifications and solicited bids to subcontract solid waste.[5/]

4/ We also agree with his conclusion that the threats constituted an independent violation of subsection 5.4(a)(1). See Borough of Mine Hill, P.E.R.C. No. ____, 12 NJPER ___ (¶_____ 1986) (decided today).

5/ Our dismissal of the subcontracting aspect of the charge is limited, of course, to the issuance of specifications and solicitation of bids. We are not called upon to decide what our determination would be in the event the Borough subcontracts work. Such a decision would have to be made after a review of all the pertinent facts.

ORDER

The Borough of Glassboro is ORDERED to:

A. Cease and desist from

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Jeffrey Brown in retaliation for his union activity.

2. 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 rights guaranteed to them by the Act, particularly by discharging Jeffrey Brown and Willard Bryant, Sr. in retaliation for their union activities, denying or withholding annual retroactive wage increases to department employees and arbitrarily denying employees' vacation requests.

B. Take the following affirmative action:

1. Forthwith reinstate Jeffrey Brown and Willard Bryant, Sr. to the positions in which they were employed immediately preceding their terminations on April 29, 1985 and May 14, 1985, respectively.

2. Forthwith make Willard Bryant, Sr. whole for the wage increase he would have received on April 15, 1985, plus interest at 12% per annum through May 14, 1985. The increase shall reflect the percentage wage increase received by non-union employees in April 1985. Forthwith make Willard Bryant, Sr. whole for wages (including the wage increase he would have received on April 15,

1985) and other benefits less income that should be credited in mitigation from May 14, 1985 to the date of reinstatement, plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

3. Negotiate upon demand with the Union a wage increase for Jeffrey Brown retroactive to June 1985. Forthwith make Jeffrey Brown whole for lost wages and other benefits less income that should be credited in mitigation from April 29, 1985 to the date of reinstatement plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

4. Forthwith make all other Highway Department employees whole for the lost wage increases they would have received on April 15, 1985, plus simple interest computed at 12% per annum through December 31, 1985 and 9.5% thereafter. The increases shall reflect the percentage increase paid to other non-union employees in April 1985.

5. Forthwith credit all Department employees vacation days which were requested and denied between April 30 and July 10, 1985, consistent with staffing requirements. Forthwith implement vacation request procedures used prior to April 30, 1985, subject to collective negotiations and staffing requirements.

6. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the

Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other materials.

7. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
June 25, 1986
ISSUED: June 26, 1986

APPENDIX "A"

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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Jeffrey Brown in retaliation for his union activity.

WE WILL cease and desist from 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 rights guaranteed to them by the Act, particularly by discharging Jeffrey Brown and Willard Bryant, Sr. in retaliation for their union activities, denying or withholding annual retroactive wage increases to department employees and arbitrarily denying employees' vacation requests.

WE WILL forthwith reinstate Jeffrey Brown and Willard Bryant, Sr. to the positions in which they were employed immediately preceding their terminations on April 29, 1985 and May 14, 1985, respectively.

WE WILL forthwith make Willard Bryant, Sr. whole for the wage increase he would have received on April 15, 1985, plus interest at 12% per annum through May 14, 1985. The increase shall reflect the percentage wage increase received by non-union employees in April 1985. Forthwith make Willard Bryant, Sr. whole for wages (including the wage increase he would have received on April 15, 1985) and other benefits less income that should be credited in mitigation from May 14, 1985 to the date of reinstatement, plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

(cont'd)

BOROUGH OF GLASSBORO

(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 the Public Employment Relations Commission, 495 West State Street, Trenton, NJ 08608, (609) 292-9830.

NOTICE TO ALL EMPLOYEES

(Cont'd)

WE WILL negotiate upon demand with the Union a wage increase for Jeffrey Brown retroactive to June 1985. Forthwith make Jeffrey Brown whole for lost wages and other benefits less income that should be credited in mitigation from April 29, 1985 to the date of reinstatement plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

WE WILL forthwith make all other Highway Department employees whole for the lost wage increases they would have received on April 15, 1985, plus simple interest computed at 12% per annum through December 31, 1985 and 9.5% thereafter. The increases shall reflect the percentage increase paid to other non-union employees in April 1985.

WE WILL forthwith credit all Department employees vacation days which were requested and denied between April 30 and July 10, 1985, consistent with staffing requirements. Forthwith implement vacation request procedures used prior to April 30, 1985, subject to collective negotiations and staffing requirements.

H.E. NO. 86-52

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

In the Matter of

BOROUGH OF GLASSBORO,

Respondent,

-and- Docket No. CO-85-306-155

UNITED FOOD & COMMERCIAL WORKERS
LOCAL 1360,

Charging Party.

Synopsis

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that under Township of Bridgewater and Bridgewater Public Works Assn., 95 N.J. 235 (1984), the Borough of Glassboro violated N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3) when it interrogated and discharged certain Highway Department employees. The Hearing Examiner also recommends that the Commission find that the Borough violated the same subsections when it withheld and/or denied annual wage increases and denied vacation requests between April 30 and July 10, 1985. Accordingly, the Hearing Examiner recommends reinstatements, back pay, including annual wage increases to all hourly paid Highway Department employees, crediting of vacation days (consistent with staffing needs) and a posting. Finally, the Hearing Examiner recommends that the Commission dismiss those portions of the charge alleging violations of the Act concerning the Borough's changes in health insurance coverage and its decision to issue specifications for bids on trash collection.

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. 86-52

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Appearances:

For the Respondent
Joseph Lisa, Esq.

For the Charging Party
Tomar, Parks, Seliger, Simonoff & Adourian, Esqs.
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On May 13, 1985, the United Food and Commercial Workers, Local 1360 ("Union") filed an Unfair Practice Charge against the Borough of Glassboro ("Borough") with the Public Employment Relations Commission ("Commission"). The charge alleged that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, specifically §5.4(a)(1) and (3)[1/] when on or

about April 29, 1985, it terminated Jeffrey Brown in retaliation for his organizational activities on behalf of the Union.

On May 22, 1985, the Union filed a second charge with the Commission, alleging that the Borough violated the same subsections of the Act when on or about May 14, 1985, it terminated Willard Bryant, Sr. in retaliation for his organizational activities. The Union also alleged that the Borough unlawfully denied the Highway Department employees retroactive wage increases and threatened them with layoffs, subcontracting, changes in work rules and insurance coverage and refusing to grant earned vacation leave.

On June 10, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing and Order Consolidating cases pursuant to N.J.A.C. 19:14-2.1.

On June 28, 1985, the Borough filed Answers denying the charges and at a prehearing conference averred that it terminated the two Highway Department employees because (1) a trash disposal crisis resulting from the impending closure of the Borough's primary landfill cite changed activity in the department and (2) it has a policy of contracting out certain jobs and reducing the work force. The Borough also denied that it threatened employees in retaliation for their union activities.

On July 16, 17 and 18, 1985, I conducted a hearing in this case. The parties examined witnesses and presented exhibits. They

waived oral argument and submitted post-hearing briefs by November 1, 1985.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. The Borough of Glassboro is a public employer within the meaning of the Act.

2. The United Food and Commercial Workers, Local 1360 is a public employee representative within the meaning of the Act.

3. Hourly-paid Highway Department employees, including Jeffrey Brown and Willard Bryant, Sr. are public employees within the meaning of the Act.

4. Glassboro has a Mayor and Council form of government. The Mayor and six members of the Borough Council preside over the Borough's four departments - police, water and sewer, administrative and highway (2 Transcript ["T"] 130, 134). The Mayor appoints Council members to "standing committees" which determine the budget for and generally oversee each department. The Mayor also selects one committee member chairperson of each committee. The Mayor has the discretion at the time of reorganization each calendar year to relieve the existing committee appointees and select a new chairperson and members of each committee. In Glassboro, the Highway Committee oversees the Highway Department (2T 134).

5. On January 1, 1985, Mayor William Dalton appointed councilman Douglas Mecouch chairman of the three-member Highway Committee (2T 18, 135). He told Mecouch to cut costs in the department, if feasible (2T 136). Dalton testified that under the previous Highway Committee Chairman, the Department was overstaffed, spent too much money and "a lot" of employees worked four hours and were paid for eight (2T 135).

Clayton Platt is Highway Administrator. He prepares the Highway Department budgets, oversees the operation of the highway garage and plans construction of streets and sewers. He also "manages" the highway superintendent, Bill Scaffidi and the shop/automotive foreman, George Hays (1T 126-27). Platt reports to the Highway Committee and the Mayor (2T 18-19).

6. In November 1984 a Gloucester County Superior Court judge issued a preliminary injunction (in Boro of Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders, (No. L-070476-84PW, 11/13/84) limiting the expansion of the County's only dumpsite at Kinsley Landfill and requiring in part the County (of which the Borough is a municipality) to "implement" another landfill within a year (R-10). The order also required three counties including Gloucester County to "maximize recycling efforts, including curbside pickup [and] mandatory ordinances..." (R-10). See also, Glassboro v. Gloucester Cty. Bd. of Chosen Freeholders, stay denied, 98 N.J. 186 (1985).

In late December 1984 the Borough passed an ordinance requiring its citizens to separate all paper, glass and aluminum waste and yard debris, such as leaves, cut grass and branches for collection and recycling by the Highway Department (R-11). On January 1, 1985, the Highway Department started collecting newspapers, glass and aluminum at specified neighborhood sites where residents deposited these wastes (2T 87). The Borough did not begin residential curbside collection until June 17, 1985 (2T 76, 87).

On January 7, 1985, following a petition for a rate increase filed by Kinsley Landfill with the State Board of Public Utilities, the Board ordered an increase for solid waste disposal from $2.85 per cubic yard to $10 per cubic yard (R-14). The Borough's estimated annual solid waste disposal costs increased from about $130,000 to $250,000 (2T 136).

7. In December 1984 and early January 1985 the Highway Committee and Platt began preparing the 1985 Highway Department budget (2T 46, 155, 231).[2/] Platt submitted his estimates for street repairs, new equipment and labor to Mecouch (1T 128-29, 2T 48). Platt testified regarding labor costs that he prepared worksheets demonstrating that the Borough would save money by subcontracting major repairs on the trash truck (1T 130, 2T 49). He also complied with Dalton's directive to compare the Borough's cost of disposing of solid waste with an informal estimate for the same work prepared by an independent contractor (2T 137, 1T 151-52). In

March or early April 1985 Platt reported "rough figures" to the Mayor and Highway Committee and then was asked to prepare specifications (2T 90, 137, 1T 152). Platt solicited and allegedly received specifications concerning trash disposal from surrounding communities. On May 14, 1985, the Borough publicly issued its specifications for a bid on "collection and removal of garbage and refuse" (R-12).

Mecouch wanted to administer the Department cost-efficiently (2T 210) and reduce its budget five percent from the preceding year (2T 230).[3/] Supply and salary costs were stable and the overall Department budget did not increase (2T 211). The Department's expenditures for road paving dropped 50 percent from the previous year (2T 115).

The court-mandated recycling efforts lessened the Borough's need for its tractor trailer and bulldozers (2T 211-213). Before the Borough collected recyclable waste the Highway Department used two trash-packer trucks and four dump trucks. The dump trucks dumped garbage in the department yard where it was bulldozed on to a demolition tractor-trailer and deposited at the Kinsley Landfill. The tractor-trailer made about nine trips per week to the landfill (1T 146). After January 1, 1985 the Department used two trash-packer trucks, a pick-up truck, a dump truck (1T 143-44 but see Finding of Fact #13) and a "fifth-wheel trailer," which was leased especially for the recycling program (2T 76-77). The

bulldozer and tractor trailer have been used only twice since January 1 to dispose of waste at Kinsley Landfill (IT 147). They have been used a few times on other jobs, including transporting iron to a local junk yard (1T 147).

8. Seventeen full-time employees, excluding the three supervisors, work in the Highway Department (1T 130). The roster has decreased from 35 ten years ago to 28 three years ago to 18 at the end of May 1985 to 17 at the time of hearing (1T 127-28, 130). One department employee was discharged (for cause) before Brown, but Platt could not recall exactly when (2T 30). He also could not remember if any other employee was terminated (2T 10).

The department is divided into three divisions - automotive, highway and sanitation. Hays oversees three hourly-paid employees in the automotive division, which maintains all Borough vehicles except those in the fire department (1T 127, 2T 6, 52). Brown was employed in this division until he was discharged on April 29 (1T 26, 69). One of the three current employees, John Brady, was hired on or about April 23, 1985 (1T 27, 2T 127, 222). Mecouch and Platt testified that the Borough wanted to hire a tune-up mechanic since February 1985 and Brady filled the position (1T 160, 2T 223). Brady is paid $7.50 per hour (1T 160). Wilbur Calloway, a department employee for 22 years and one of three hourly-paid employees in the automotive division testified that like himself,

Brady was assigned "everything"...including hydraulic repairs but excluding welding (3T 30-31).

Eight full-time employees work in the Highway division, which maintains Borough roads, cuts grass and collects leaves (2T 6, 7, 21). Six full-time employees work in the sanitation division, which collects and disposes of solid waste (2T 6). Scaffidi supervises both divisions. Platt admitted that employees in both divisions are deemed interchangeable and can "fill in" wherever they are needed (2T 43). Sometimes an employee in the sanitation division will be assigned to the highway division and vice versa, if he has special expertise or is substituting for another employee on vacation or sick leave (2T 20-21). Bryant was employed in the highway division but was assigned to the sanitation division (2T 23). He occasionally substituted for drivers in the latter division before his discharge (1T 83, 2T 20).

The Borough also hires students and adults each summer to work in the Highway Department. The number of people hired varies from year to year depending on the amount of money the County and Borough allocate to the program (2T 10-11). In the summer of 1984 between ten and 15 students were hired with County funds and four to six others were hired on the Borough's payroll (2T 11-12).[4/]

In the summer of 1985, about 14 students were hired on County money (2T 10, 14) and three adult employees were hired on the Borough's payroll (2T 12, 13, 16). All three were hired in early

May 1985 as part-time employees and worked primarily in the recycling program (2T 13, 9).[5/]

9. In August 1982 Brown was hired as a mechanic in the automotive division of the department. He repaired police cars, parks and recreation vehicles, garage trucks, bulldozers, tractors, dump trucks, asphalt pavers, leaf machines and mowers (1T 27, 22, 3T 28). He also welded, fabricated metal and worked on hydraulic systems. Brown testified that no other employee welded or fabricated parts (1T 27). Hays testified credibly that Brown worked primarily on heavy equipment, repaired trucks and "...pretty much anything that came in the door." (3T, 16).[6/] Brown's assignments sometimes differed from those of Brady, Calloway and Turner because Brown was a skilled welder (3T 17, 30).

Brown was paid $8 per hour to start and received raises in January and June 1983, and January and July 1984 (R-7, 8, 1T 136). On February 22, 1985, Mecouch promoted him to leaderman mechanic and on February 25, the next workday, he gave Brown a $1 per hour wage increase, making him the Department's highest paid hourly employee at $10.65 per hour (2T 52-53, CP-1, R-9).

Brown was never disciplined while employed by the Borough. Supervisors Hays, Scaffidi and Platt complimented his work often (1T 29-30). Platt described Brown's work as "good" (1T 159). He testified that Brown merited his last wage increase and was promoted

because the Department needed someone to assume foreman Hays' duties if Hays was unavailable (1T 135).

Mecouch testified that Brown was given the increase because he threatened to quit and because he griped about supervision conditions.[7/] He was allegedly promoted to replace another employee who had worked on heavy equipment and resigned. He added that Brown "went through the rigamorole - that's a good word - and that was the reason we gave it [the raise] to him." (2T 215).

I discredit Mecouch's assertion that Brown was given a wage increase and promotion in part because of "all the griping...about conditions." (2T 215). First, Platt recorded at most two occasions (R-13A and R-13B; 2T 215) in which Brown allegedly complained about a condition of employment before he received the wage increase on February 25. These hardly constitute a chronic condition. Discounting the date of R-13B I find that Platt recorded only one "complaint" before the promotion. Second, it stretches credulity that employers promote employees who complain about working conditions. Third, Hays had more contact with Brown than either Mecouch or Platt. He never testified about any of Brown's "gripes" and could not recall one instance where Brown refused an assignment (3T 17).

The Union does not dispute that Brown threatened to quit unless he received a raise. That Mecouch gave him a "substantial" increase (2T 237) is persuasive evidence of Brown's worth to the

department on February 25, about two months after the Borough started recycling waste.

10. Willard Bryant, Sr. was hired as an operator in or around 1971 (1T 84). His principal duties were operating a bulldozer, loading a tractor-trailer with refuse, driving it to the Kinsley Landfill, unloading and returning to the collection site, where he typically repeated the process (1T 119, 146). Bryant has a specialized ("articulated") driver's license to drive the tractor-trailer (2T 83-84). He also operated a backhoe and sweeper, cut grass, removed snow and drove trash, dump and pick-up trucks (2T 85-86).

In January 1985, Bryant ceased operating the bulldozer and driving the tractor-trailer. He became a "floater" (i.e., assigned "wherever we [the department] could find something for him to do") (1T 148).[8/] One of his assignments in April was tying newspapers in bundles to be recycled. Bryant was never disciplined in the course of his employ. His pay at the time of his discharge was $8.45 per hour (1T 86).

Wilbur Brown, Vincent Spinella and Alex Fanfarillo also were floaters in the highway division (2T 88). They were employed twelve, ten and twenty years, respectively, and earned $7.60, $7.75 and $10.60 per hour. Fanfarillo occasionally welded parts. Lloyd Reinek was originally employed in the sanitation division, assigned to the highway department since about July 1984, drives a pickup

truck which pulls the "fifth wheel trailer" in the Borough's recycling program, has been employed ten years and earns $9.50 per hour. Santiago ("James") Velasques also works in the recycling program, has been employed eight years and earns $8.60 per hour (2T 22).[9/] The Borough did not contradict Bryant's testimony that Velasques was a lesser skilled employee than he (1T 119).

11. In December 1984, the Borough considered changing its health insurance carrier to provide comparable but less expensive coverage for its employees (2T 178-79). After locating one such carrier Dalton convened an open meeting in January 1985 at Borough Hall to review and compare policies and premiums (2T 140-41). No hourly-paid Highway Department employees attended the meeting (2T 141).

Department heads are responsible for informing their employees of Borough meetings (2T 195). Platt testified that he informed his employees of the insurance coverage meeting (2T 41). Brown and Bryant denied that they were informed of it (1T 81, 88). On or about February 4, 1985, the Borough conducted an election among its employees to determine their health insurance carrier preference (2T 179-80; R-16a-s). The Highway Department employees voted overwhelmingly against the proposed change in carriers (2T 181; R-16a-s). Inasmuch as the Department employees voted in the election long before they began their organizational drive and were necessarily aware of the possible change in carriers I find the

Borough's alleged failure to inform employees of the meeting is factually insignificant, even if true.

Sometime in April 1985, Harrell informed Brown and a few other employees that they were no longer insured under Blue Cross and Blue Shield (1T 51). Brown also asked for but was not told the name of the new insurer. Bryant apparently believed that the employees were not insured in April (1T 88).

12. In early April 1985, Brown contacted the Union on behalf of Highway Department employees, signed a showing of interest card, solicited signatures of fellow employees on cards and notified them by word of mouth of the first organizational meeting on April 9 (1T 31, 70). Bryant also signed a card in early April (1T 106). Organizational meetings were not held at the workplace and no notices were posted there (1T 31, 70).

13. Before April 11, 1985 sanitation employees worked continuously from 7:00 a.m. until they completed their assigned routes and then quit for the day (1T 96, 188). On Mondays and Fridays the routes were completed by 1:00 p.m.: on Tuesdays, Wednesdays and Thursdays the employees finished by 2:30 p.m. (1T 189).

On April 11 Platt issued a letter to all sanitation employees stating that beginning April 15 they will work an 8-hour day and their schedules will be 7:00 a.m.-3:30 p.m., including a lunch period at the shop from 12:00-12:30 and two 15 minute break

periods at 9:00 a.m. and 2:00 p.m. (2T 68-69, CP-5).[10/] It also stated that on Mondays and Fridays only one truck will be used for trash collection and that the Borough will not "tolerate any slow down of service to the community" (CP-5). After April 11 the Borough used two additional trash trucks and one more driver [Bryant] to dump waste at the landfill (2T 74, 75).

Platt testified that he changed the schedules to coordinate the efforts of the six sanitation employees with the three employees assigned to the recycling program (1T 146). Specifically, he wanted the sanitation employees to assist in the recycling program after they completed their routes (2T 70). He added that the Borough had also received citizen complaints about sanitation employees "short" hours (1T 196). Mecouch discussed the matter with Platt and testified that "[t]he reason for the change is to work eight hours for eight hours' pay." (2T 266-67, 225).

Soon after Platt changed the schedule he observed a slowdown in trash collection and an increased incidence of flat tires on the trash trucks, necessitating immediate repair. The flats were caused by nails and Platt commented to Bryant, "maybe they're union nails" (1T 187-88, 98-99). Bryant testified that the delays were caused by the new schedule which required sanitation employees to return to the Department for lunch and break periods, adding about one hour of travel time to their rounds (1T 98). He also denied that the employees intentionally caused the flat tires

and stated that they were caused by trucks running over accumulated trash (1T 98). The new schedule was enforced until the end of April when Mayor Dalton proposed a change to the employees (see Finding of Fact #18). Platt admitted that during the period when the "new" schedule was enforced at least some citizens complained about the quality of trash collection (2T 71).

14. On or about April 16 at approximately 11:00 a.m. Councilman Mecouch approached Brown while he was on duty at the Borough garage (1T 37, 2T 218). Mecouch observed that Brown "happened to be by himself." (2T 252). He told Brown that he had heard of organizational activity and that he (Brown) was the leader (2T 218, 252). Mecouch then said to Brown, "What are you fucking doing to me?" (1T 37). Mecouch also mentioned Brown's recent wage increase, expressed negative opinions about unions and stated that one was not needed at the Highway Department (1T 37-39). Brown responded that all the employees in the department were interested in representation and that a union was needed to provide them with a voice (1T 38-39). Mecouch then told Brown, "if [you] drop the subject now, [I] would not hold it against [you]." (1T 39). Brown responded that he would get back to him (1T 39). Their discussion lasted about ten minutes (1T 39). Brown did not discuss the issue with Mecouch again.[11/]

Mecouch then approached James Wilson, another Highway Department employee and said, "I hear you guys are trying to start a

union" (2T 254). Mecouch commented negatively about unions and asked if Brown was the "ringleader," to which Wilson answered affirmatively. Mecouch also commented that the Borough recently gave Brown a $1 per hour wage increase and he wondered why he (Brown) was griping. Mecouch also stated that if Brown persisted in his efforts he would be fired within a year or two (3T 34-35). Wilson and Mecouch next spoke of social activities in which they both participated, based largely on Mecouch's friendship with Wilson and his father, a former Borough council member (3T 35, 38, 2T 219, 256). Their conversation lasted approximately 15 minutes (3T 35).[12/]

15. All unrepresented Borough employees customarily receive annual wage increases in mid-April retroactive to January.[13/] The Borough granted the increases consistently since 1980 (2T 152-53, 154). Employees Bryant and Wilson received increases each of their 14 and 12 years, respectively, they were with the Department except 1985 (1T 103, 3T 38). No one disputes that all unrepresented Borough employees are paid in accordance with the pay scales of the 1985 salary ordinance (R-6).

In mid-April 1985 all unrepresented Borough employees except hourly-paid Highway Department employees received the annual increase (2T 153-54).[14/] Salaried personnel in the Department, namely, Platt, Scaffidi, Hays and Harrell received increases (2T 29).

The Chairman of the Committee for each Department has discretion to grant yearly wage increases (2T 190-91). Mecouch determined which Highway Department employees received a 1985 wage increase (2T 260). He testified that he withheld increases to hourly-paid employees because of an alleged "cost containment factor" and then added that he was still "considering" and "evaluating" the matter (2T 260). I discredit Mecouch's reason for denying the raises because his testimony is evasive, vague, defensive and self-contradictory (see 2T 260). The Borough presented no evidence of changed economic circumstances which is consistent with Mecouch first denying but "still considering" the raises.

16. On April 26, 1985, at the end of their lunch period around 12:30 p.m. the Highway Department employees congregated in the shop area and pinned union buttons on themselves (1T 34, 35). All employees wore buttons (1T 35, 87). Bryant wore three (1T 87). Brown assisted another employee, Wilbur Brown, in pinning his button (1T 35).

Warren Layton was administrative assistant to Mayor Dalton and routinely visited the Department to socialize and check vouchers and vehicle repairs (2T 185). He was at the facility on April 26 and observed some employees wearing buttons (2T 186, 188) and some pinning them on (2T 202).[15/] Also on April 26 supervisor Bill Scaffidi expressed a mixed opinion to Bryant about the merits and

prospects of organizing the department employees (1T 87). Platt observed the employees wearing union buttons (1T 185, 2T 66) and spoke with Mecouch about the union drive at an unspecified time (2T 66-67).

17. On April 27, 1985, a Saturday, Platt was in front of his home when Mecouch visited him. He told Platt that he decided to terminate Brown (2T 100). Mecouch instructed Platt to write a termination letter and on April 28 he typed the letter (CP-2) at the Department office (1T 177).[16/] On April 29 at about 7:15 a.m. Platt presented the letter to Brown at the Department (1T 42, 177). Brown opened and read the letter and asked Platt why he was fired (1T 43). Platt responded that the letter was "self-explanatory" and he asked Brown to turn in his uniform (1T 43, 177)[17/]

Platt denied that he participated in the decision to fire Brown and that he knew anything about the situation before April 27 (2T 104). He specifically denied discussing with Mecouch or the Committee before April 27 either the number of positions which would be terminated or the names of employees who would be discharged (2T 104). Mecouch testified that he "obtained input" from Platt in deciding to terminate Brown (2T 213). He stated that around April 1 he, Platt and Committee members met informally "somewhere around Borough Hall" to discuss terminating the lead mechanic position (2T 236).

Platt stated that from January to April 1985 the amount of work needed on heavy equipment was "very light" (1T 175). Brown was terminated allegedly because the Borough was not anticipating any need for the services (i.e. repairs on heavy equipment) in which Brown was skilled (1T 163, 176). Platt also informed a Borough payroll clerk (who asked him why Brown was discharged in order to respond to the same question posed by an Unemployment Compensation official to whom Brown applied for money) that he was discharged for "lack of work and leadership" (1T 178).[18/]

Mecouch asserted that Brown's workload did not decrease in the first couple of months of 1985 but gradually diminished under the recycling program, which eliminated the Borough's use of the tractor-trailer and bulldozers. When Mecouch felt that Hays could "handle" the remaining jobs he discharged Brown (2T 213-214, 216). After April 29 Hays, Calloway and Fanfarillo welded and one job (which Brown would have performed had he remained employed) was subcontracted (3T 21). Hays denied that the amount of mechanical work performed in the automotive shop decreased after January 1, 1985 (3T 18).

Given that Layton and Platt admitted observing the Department employees wearing union buttons and given the closeness in time between their observations and Mecouch's decision to discharge Brown, I find that Platt and/or Layton informed Mecouch of the employees' button wearing on either April 26 or April 27.

I discredit Mecouch's reasons for discharging Brown. The Borough presented no evidence suggesting why Brown's workload diminished only in March and April 1985. The only possible lawful reason is that beginning sometime after Mecouch gave Brown the February 25 raise the Borough used its heavy equipment (i.e. tractor-trailer, bulldozer(s) infrequently. This reason was partially contradicted by Platt's testimony that Brown's workload remained light between January and April and more persuasively contradicted by Hays' testimony that the Borough had no decrease in mechanical work since January (Hays, like Harrell, was a subpoenaed, salaried and unrepresented employee who testified on behalf of the union).

I also discredit Mecouch's testimony that he, Platt and the Committee members conferred informally about terminating the lead mechanic position around April 1, and that he received Platt's "input." It stretches credulity that Mecouch acted on their discussion some 3-1/2 weeks later and coincidentally less than 24 hours after the Highway Department employees unanimously demonstrated their interest in the union. Furthermore, Platt denied that he discussed terminating the position or the employee with Mecouch before April 27. Finally, I discredit Mecouch's testimony that he terminated Brown when he felt that Hays could "handle" the heavy equipment jobs because there appears to be no logical basis for the decision. Hays and Platt are Brown's most immediate

supervisors and are responsible for knowing about his duties. Neither of them discussed terminating the lead mechanic position with Mecouch before April 27. In light of Mecouch's full-time job in another county I question on whose recommendation and on what facts Mecouch relied in deciding that Hays could handle the Department's heavy equipment repairs.

18. Near the end of April or in early May 1985, Dalton visited the Highway Department in the early afternoon. (2T 144). He could not recall the last time he visited the Department (2T 159). In his 14 years at the Department Bryant had never seen the Mayor at the workplace (1T 99). Dalton expressed his dissappointment to the employees over their interest in union representation. He assured them that any grievances could be redressed through the Borough's personnel policy (2T 145).

Dalton also explained the Borough's problems in complying with the mandatory recycling program and proposed reinstituting the old schedule for trash collectors if they would work on recycling at Platt's or Scaffidi's directions. The employees purportedly agreed to the proposal (2T 145-46). Dalton testified that he was most concerned about what motivated the employees to seek union representation. He denied threatening anyone (2T 146).

19. Before May 1985 Highway Department employees scheduled their vacations informally with the department secretary, Rene Harrell (3T 6). Although the Borough advised employees in writing

every February or March that it was accepting their vacation requests until a certain date (in 1985 it was April 30), after which it may or may not grant vacations (see R-1, 2, 3, 4), the policy was not enforced (1T 181). In practice, employees asked Harrell to write their names on a Department wall calendar by the date(s) they wanted for their vacations. "At the drop of a hat" and even as late as July or August, they could change their requests (1T 181).

On May 2, 1985, Platt told Harrell that he was denying vacations requests received after April 30. Vacations requested after April 30 were in fact denied[19/] until early July, when Platt notified employees that he was again accepting their requests (2T 36, 3T 7).

Near the end of April 1985 Mecouch instructed Platt to deny vacations requested after April 30 (2T 67). Mecouch testified that Platt decided to deny the vacations and that he supported it as an "administrative decision" (2T 263). Mecouch also stated that in July he decided to accept vacation requests based upon "administrative decisions" (2T 265). Platt stated that vacation requests were denied in May because of staffing problems inherent in a small work force (1T 180, 181).

Mecouch offered no facts supporting nor specific reasons justifying either the denial of vacations after April 30 or Platt's reinstatement (in effect) of them in July. In light of his vague

response and previously discredited testimony I discredit Mecouch's justification for denying vacations.

20. On May 2, 1985, the union filed a petition for certification of public employee representative, Docket No. RO-85-141, with the Commission seeking to represent a unit of Highway Department employees employed by the Borough. On June 28, 1985 the Commission conducted a secret ballot election among employees in the proposed unit (Stipulation of Fact at 1T 8-9).

21. On May 14, 1985, Platt gave Bryant a termination letter (CP-4, 1T 102) citing "lack of work" for Bryant's position as operator as the reason for discharge. He received no advance notice of the discharge.

Platt denied that he participated in the decision to terminate Bryant (2T 105). He admitted that he discussed terminating the operator position with Mecouch "before or after a Council meeting" between April 29 and May 14 (2T 105, 108). His participation was limited to supplying Mecouch with "facts of who he had operating what equipment and how long they had been with the Borough" (2T 109, 110). On direct examination Mecouch stated that Bryant's position was an "obvious area for layoff" and "[I]t was left in [Platt's] hands to decide if the position was no longer required; I supported his laying off" (2T 222).

Platt testified that Bryant was discharged because the Borough "had no use whatsoever for another operator..." (1T 194).

Mecouch stated that Bryant's continued employment was not "cost effective" (2T 248).

ANALYSIS

Discharge of Jeffrey Brown

In In re Township of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court articulated the standard to determine whether a public employer illegally discriminated against employees in retaliation for union activity:

> ...the 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 factor or a substantial reason for the employer's action. [NLRB v. Transportation Management, ___ U.S. at ____, 113 LRRM 2851 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place in the absence of the protected activity. Id. at 244. 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.

In some cases, the prima facie showing may be made out by direct evidence of anti-union motivation for the disciplinary action; in others, the case may be made out by circumstantial evidence that the employee(s) engaged in protected activity, the employer knew of this

activity and the employer was hostile towards the protected activity. Id at 246. Applying these standards, I find that the Charging Party established a prima facie case.

There is direct evidence of anti-union motivation for Brown's discharge. Highway Committee Chairman Mecouch admitted that on April 16, 1985, he approached Brown at the workplace, confirmed with him that an organizational drive was underway and that he was the leader. I credited Brown's testimony (over Mecouch's denials) that Mecouch said to him concerning the organizational drive, "What are you fucking doing to me?" and "If [you] drop the subject now, [I] would not hold it against [you]." I also credited employee Wilson's testimony that Mecouch identified Brown as the "ringleader" of the union drive and confided to him that if Brown persisted in his efforts he would be fired within a year or two.

Circumstantial evidence also confirms the Union's allegations that Brown was discharged in retaliation for his union activity. Brown was employed by the Borough for two and one-half years without incident. On February 25, 1985, the Borough promoted Brown and made him the highest-paid hourly employee. On April 16, one week after Brown solicited signatures of his fellow employees on showing of interest cards and organized the first union meeting, Mecouch, the highest ranking employer representative in the Highway Department visited the workplace and spoke separately with Brown and employee Wilson about the union drive. Notwithstanding his threats

to discharge Brown, Mecouch admonished them about unions in general, urged them to reconsider organizing, rhetorically asked Wilson why Brown wanted union representation in light of his recent wage increase and promotion and told them to report back to him their decision. Neither employee spoke with Mecouch again.

At the end of their lunch period on April 26, all hourly-paid department employees pinned union buttons on their clothes. Administrators Layton and Platt observed their gesture of solidarity and foreman Scaffidi spoke with Bryant about the merits of unions. The next day Mecouch instructed Platt to discharge Brown. (Mecouch never discussed the elimination of the leaderman mechanic position with department supervisors before April 27.) Platt gave Brown a typewritten notice of discharge, stating that his services were no longer required. When Brown asked Platt for an explanation Platt responded that the notice was self-explanatory.

The standard to determine whether an employer has violated §(a)(1) of the Act was stated in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

> It shall be an unfair practice for an employer to engage in activities which, regardless of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions lack a legitimate and substantial business justification [Id. at 551 n. 1].

An employer may express opinions about unions so long as the statements are not coercive. Black Horse Pike Reg. Bd. of Ed.,

P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981). The cases must balance the employer's right to free speech and the employees' rights to be free from coercion, restraint or interference in the exercise of protected activities. County of Mercer and PBA Local #167, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985). The Commission considers the "total context" of the situation and evaluates the issue from the standpoint of employees over whom the employer has a measure of economic power. Id. See also NLRB v. E.I. DuPont de Nemours, ___ F.2d ____, 118 LRRM 2014, 2016 (6th Cir. 1984).

In view of Mecouch's direct threats of discharge, negative comments about unions, asking if Brown was the "ringleader", and wanting the employees to report back further interest in the union, I find that the Borough unequivocally violated subsection (a)(1) of the Act when Mecouch interrogated Brown and Wilson on April 16. See also Township of Jackson, P.E.R.C. No. 81-76, 7 NJPER 31 (¶12013 1980). That Mecouch shook hands with Brown, briefly discussed social activities with Wilson and was curious about union activity in his department, fails to prove a legitimate and substantial business justification for the interrogations.[20/]

I also find that the direct threats of discharge, the decision to discharge made less than two weeks after the threats were mentioned and less than 24 hours after Brown and other employees wore union buttons, the failure to discuss the elimination

of the leaderman mechanic position with department supervisors before April 27, the failure to notify Brown prior to discharge, the failure to adequately inform him of the reason for discharge at the time of discharge and the elimination of Brown's position two months after he was promoted to it and in the face of a good work record, establish a prima facie case that Brown's union activity was a substantial or motivating factor in his discharge. See Bridgewater, supra, University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985), mot. for recon. denied, P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd App. Div. Docket No. A-11-85T7 (April 14, 1986); Township of Mantua, P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984); Commercial Twp. Bd. of Ed., supra, and generally, Morris, The Developing Labor Law (2nd ed. 1983) at 193 and First Supplement (1985) at 51 (American Bar Association).

Once a prima facie case is established, the burden shifts to the employer to show by a preponderance of the evidence that it had a business justification for the action--i.e., it would have taken the same action, even absent the protected activity. Bridgewater, supra, at 244. I find that the employer has not met this burden.

The Borough alleges that it terminated the lead mechanic position because the court-mandated recycling program drastically reduced the department's need for its tractor-trailer and

bulldozer(s), concommitantly reducing its needs for Brown's "high-priced" skills as a "heavy equipment" mechanic. The reduction in force (RIF) was also consistent with the Borough's alleged program of reducing manpower in the department. Finally, it maintains that the position was eliminated because of the sharp increase in the cost of dumping waste at Kinsley Landfill.

The Borough used its tractor-trailer and bulldozer infrequently after January 1. This fact is corroborated by the Borough's implementing of its recycling program on that date and its assigning of Bryant (the principal bulldozer and trailer operator) to other duties. Glassboro also acquired or leased other equipment, including a pick-up truck and fifth wheel trailer. In April, it added two more trash packers to the pair it already owned. These facts corroborate foreman Hays' credited testimony that the automotive division of the department suffered no decrease in mechanical work after January 1. When Brown was not welding or repairing a hydraulic system he was assigned "pretty much anything that came in the door." The Borough must have been satisfied with Brown's work through the first two months of enforced recycling (during which the trailer and bulldozer were used infrequently) because it promoted and gave him a wage increase on February 25.

The only credible evidence of changed circumstances after February 25 that could have warranted a RIF in the lead mechanic position is Platt's notes of February 27 and March 7 (stating that

Brown complained about having no work when Hays was unavailable to assign it). I give very little weight to this evidence because (1) on its face it may be critical only of Brown's initiative, (2) Calloway credibly testified that he never observed Brown idle and (3) it stretches credulity that if on March 7 the Borough was concerned about paying unnecessarily for Brown's skills, it would wait seven more weeks before discharging him. Furthermore, after April 29, the Borough admittedly subcontracted one welding job which Brown would have performed had he remained employed. The Borough has failed to prove that its reduced need for repairs on "heavy equipment" would have resulted in a RIF of the lead mechanic position. Assuming that the Borough would have RIFed the lead mechanic position, it was unreasonable under the circumstances not to at least offer Brown a lesser title with less pay. (The Borough hired an employee in the automotive division on April 23).

Between 1982 and April 27, 1985, attrition reduced the department's full-time employee roster from 28 to 21. Another employee was discharged for cause. Consistent with the Borough's alleged program to reduce the number of department personnel is the Highway Committee's denial of Platt's request in his 1985 budget proposal to hire three full-time employees.

The Borough program does not square with its hiring of one full-time department employee in October 1984 and another on April 23, 1985. Moreover, the Borough never RIFed a department employee

before Brown's discharge on April 29th. Accordingly, I am not persuaded that the Borough's "program" to reduce the number of highway department personnel was enforced consistently and that a RIF was consistent with whatever program the Borough instituted.

With respect to its last business justification, i.e., the doubling of dumping costs in 1985, I find that the Borough did not prove why the lead mechanic position was necessarily RIFed. Moreover, the Borough was aware of the increased dumping rates in early January 1985. It nevertheless created the position and hourly wage on February 25. It is simply incredible that the Borough would ignore the impact of the rates when creating the position and two months later rely on those same rates to dissolve it. Accordingly, I recommend that the Commission find that the Borough violated §(a)(1) and (a)(3) of the Act when it discharged Jeffrey Brown.

Retroactive Wage Increase and Insurance Coverage

I also cannot ascribe to mere coincidence that in mid-April (when Mecouch admittedly heard rumors of union organizing in the department), Mecouch denied hourly paid employees annual wage increases and gave increases to salaried personnel. All other unrepresented Borough employees received the increases in mid-April 1985 and the highway department employees had received them annually

in mid-April at least from 1980 to 1984. The Borough's only credible justification for denying the increase is that the employees are paid within the pay scales established by ordinance. This reason is meritless because employees who presumably were given the 1985 increase are also listed by title and salary in the ordinance. Moreover, the alleged reason fails to explain why highway department employees were treated differently than other Borough employees in 1985. Accordingly, I find that the Borough's disparate treatment of salaried and hourly-paid highway department personnel and its withholding and/or denial of annual wage increases violated §§(a)(1) and (a)(3) of the Act. See, for example, Inductive Components and IBEW, Local 1922, 271 NLRB No. 209, 117 LRRM 1207 (1984).

With respect to the change in health insurance coverage, the union alleges that the Borough unlawfully failed to notify employees of the new carrier before and after new coverage started. The employees must have known about the proposed change because in February they voted overwhelmingly against a change in carriers. That Harrell did not name the new provider to Brown upon request in April fails to create a prima facie showing that the Borough failed to inform the employees of the change in violation of the Act. Accordingly, I recommend dismissal of this portion of the Union's charge.

Schedule Changes and Vacations

The Borough's concern about the union drive apparently did not cease with Brown's discharge. At the end of April or in early May Mayor Dalton visited the department and addressed the hourly-paid employees for the first time in many years. He expressed disappointment with their interest in union representation and assured them that their grievances could be resolved through the personnel policy. Dalton also advised employees that he was reinstating the old trash collection schedule provided that sanitation employees were willing to spend some time in the recycling program.

The circumstances of the schedule change on April 11 and its revocation at the end of the month are suspect. Back in December 1984 or January 1985 Dalton informed Mecouch of his displeasure with employees who worked "four hours and were paid for eight." In January the Borough began its recycling program which was enforced until June when it commenced residential curbside collection. Notwithstanding general allegations that some citizens complained about the sanitation employees' short hours, the Borough failed to show why it waited more than three months before changing the schedule to require "eight hours work for eight hours pay." It also failed to demonstrate the insufficiency of the number of employees assigned to the recycling program between January and April 11. However, the Union did not prove that the Borough knew of the employees' union activities before the schedule change.

Accordingly, I find that the Borough did not violate subsections (a)(1) and (a)(3) of the Act when it changed the trash collection shcedule on April 11.[21/]

When the Mayor visited the highway department at the end of April or early in May the Borough was well aware of the union drive. However, Dalton did not threaten nor punish employees for engaging in union activity. See Black Horse Pike Reg. Bd. of Ed, supra. He reinstated their old schedules to assure prompt trash collection and disposal. Furthermore, the employees expressly approved the reinstatement of the status quo. I conclude that the Borough did not violate the Act when it changed and then reinstated the work schedules of the sanitation employees.

On May 2, 1985, the union filed its representation petition with the Commission. On the same date Platt denied all employees vacations requested after April 30.[22/] The Borough admittedly never before enforced its vacation request policy and it permitted employees to schedule their vacations informally throughout the summers. The Borough's only credible reason for denying the vacations is that staffing demands (upon a diminished work force) required it to abandon informal scheduling. Belying this reason is the Borough's failure to propose any alternative schedule before the April 30 deadline and its apparent refusal to consider any vacation requests consistent with staffing needs until July 1985. Furthermore, Mecouch testified at the hearing that he was still

"considering" granting the vacations and had not "overruled anything at this point." There was no indication in the record that Platt's May 2 denial was in any way temporary or conditional. This shifting of reasons is classic evidence of anti-union animus. Dennis Twp. Bd. of Ed. and Dennis Twp. Ed. Assn., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). See also Morris, The Developing Labor Law, supra at 193 citing Coca-Cola Bottling Co., 232 NLRB 794, 97 LRRM 1290 (1977). Considering the overall timing of the unprecedented enforcement of the vacation scheduling policy, its retroactive application, the Borough's failure to provide any reasonable alternative schedules, its shifting characterization of the denial and its failure to justify the decision, I conclude that the Borough violated §§(a)(1) and (a)(3) of the Act when it denied all employee vacations requested after April 30.[23/] See, Bronx Metal Polishing Co., 268 NLRB No. 138, 115 LRRM 1112 (1984).

Discharge of Willard Bryant, Sr. and Subcontracting

On May 13, 1985, the Union filed its first unfair practice charge with the Commission. On May 14 the Borough discharged Bryant and issued its specifications for a bid on the collection and removal of garbage. The remaining issues are whether the Borough's actions violated the Act.

In early April Bryant signed a showing of interest card and attended one or more union organizing meetings. In mid-April, soon after the Borough changed the sanitation employees' schedules and Bryant was assigned to drive one or more trash trucks Platt commented to Bryant that "maybe union nails" caused the trucks' flat tires. Bryant also requested and was denied a personal day and vacation time. Platt told him that it would not be granted "until it was straightened out with the union." On April 26 Bryant wore three union buttons and briefly discussed the merits of organizing with foreman Scaffidi. Platt also observed that the employees wore buttons. Finally, on May 14 Platt gave Bryant a termination letter citing "lack of work" as the reason for discharge.

Applying the Bridgewater test I find that the Borough knew of Bryant's union activities and demonstrated some hostility towards them through Platt's comments and actions in April. I also find that the timing of the discharge (coming less than two weeks after the representation petition was filed and about 24 hours after the union filed an unfair practice charge), the failure to notify Bryant prior to discharge and the unprecedented elimination of the operator position in the face of Bryant's unblemished 14 year work record etablished a prima facie case that Bryant's union activity was a substantial or motivating factor in his discharge.

The Borough must now prove by a preponderance of evidence that it would have discharged Bryant even absent the protected

activity. Bridgewater, supra. The Borough alleges that it terminated the operator position for one of the same reasons that it terminated the lead mechanic position, i.e., the court-ordered recycling program reduced its need for the tractor-trailer and bulldozer(s), concommitantly reducing its need for the principal operator of that equipment.

Bryant's principal duties were driving the tractor-trailer and operating the bulldozer. He admittedly was a "floater" since January 1985, when the Borough commenced recycling waste. One of his duties as a "floater" was tying newspapers in bundles, a task which the Borough paid other employees less than one-half of Bryant's hourly wage to perform. These facts could warrant the Borough's reduction in force of the operator position.

Bryant was one of four designated "floaters" in the highway division. Reinek and Velasques are also assigned to the highway division and are apparently no more skilled than Bryant. The latter two have been employed fewer years than Bryant and earn higher hourly wages. Two floaters, Spinella and W. Brown have been employed fewer years than Bryant and earn, respectively $.70 and $.85 less per hour than he. Given the admitted "interchangeability" of employees in the sanitation and highway divisions (which conflicts with the notion that Bryant's usefulness to the department was circumscribed by his "operator" title), the many duties which Bryant in fact performed and the continued employment of comparably

or lesser skilled workers than Bryant at higher wages with less seniority, I am not persuaded that the Borough eliminated the operator position for economic reasons.

The credibility of the Borough's justification is also undermined by Mecouch's and Platt's testimony that the other decided to RIF the operator position. (They also testified that the other decided to deny employee vacation requests.) In such a small department their inconsistent testimony connotes an unwillingness to assume responsibility for a problematic employment decision. Accordingly, I find that the Borough has not sustained its burden of proving that it would have discharged Bryant even absent the protected activity and that it violated §§(a)(1) and (a)(3) of the Act when it discharged Willard Bryant, Sr.

The substantive decision to subcontract is a non-negotiable managerial prerogative. In re IFPTE Local 195 v. State,, 88 N.J. 393 (1982). An employer violates the Act if its decision to subcontract is motivated by anti-union animus. Dennis Twp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). Dalton credibly testified that in January 1985 he requested Platt to compare the Borough's costs of disposing of solid waste with an informal estimate prepared by an independent contractor. In March or early April Platt reported estimates to the Highway Committee. He prepared specifications which the Borough issued on May 14. The Borough received one bid which was neither rejected nor accepted by

the date of hearing pending further cost analysis. Although the timing of the Borough's issuance of the specifications is suspect I cannot find that the Borough unreasonably delayed its decision on the bid in order to verify its cost estimates. Accordingly, I find that the Borough did not violate §(a)(1) of the Act when it issued specifications on garbage collection on May 14.

CONCLUSIONS

1. The Borough of Glassboro violated §5.4(a)(1) of the Act when Douglas Mecouch interrogated Jeffrey Brown and James Wilson on or about April 16, 1985.

2. The Borough violated §§5.4(a)(1) and (a)(3) of the Act when it discharged Jeffrey Brown on April 29, 1985 and Willard Bryant, Sr. on May 14, 1985.

3. The Borough violated §§5.4(a)(1) and (a)(3) when it denied or withheld retroactive wage increases to Highway Department employees in mid-April 1985. It violated the same subsections when it denied employee vacation request after April 30, 1985.

4. The Union did not prove by a preponderance of evidence, the remaining allegations in its charge. I recommend those portions of the Complaint be dismissed.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. The Respondent Borough cease and desist from

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Jeffrey Brown in retaliation for his union activity.

2. 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 rights guaranteed to them by the Act, particularly by discharging Jeffrey Brown and Willard Bryant, Sr. in retaliation for their union activities, denying or withholding annual retroactive wage increases to department employees and arbitrarily denying employees' vacation requests.

B. The Respondent take the following affirmative action:

1. Forthwith reinstate Jeffrey Brown and Willard Bryant, Sr. to the positions in which they were employed immediately preceding their terminations on April 29, 1985 and May 14, 1985, respectively.

2. Forthwith make Willard Bryant, Sr. whole for the wage increase he would have received on April 15, 1985,[24/] plus interest at 12% per annum[25/] through May 14, 1985. The increase shall reflect the wage increase Bryant recived in mid-April 1984. Forthwith make Willard Bryant, Sr. whole for wages (including the wage increase he would have received on April 15, 1985) and other benefits less income that should be credited in mitigation from May

14, 1985 to the date of reinstatement, plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

3. Negotiate upon demand with the Union a wage increase for Jeffrey Brown retroactive to June 1985.[26/] Forthwith make Jeffrey Brown whole for lost wages and other benefits less income that should be credited in mitigation from April 29, 1985 to the date of reinstatement plus interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.[27/]

4. Forthwith make all other Highway Department employees whole for the lost wage increases they would have received on April 15, 1985, plus interest computed at 12% per annum.[28/] The increases shall reflect the increases paid to hourly wage department employees in April 1984.

5. Forthwith credit all Department employees vacation days which were requested and denied between April 30 and July 10, 1985,[29/] consistent with staffing requirements. Forthwith implement vacation request procedures used prior to April 30, 1985, subject to collective negotiations and staffing requirements.

6. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonably steps shall be taken to insure that such notices are not altered, defaced or covered by other materials.

7. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Jonathon Roth
Hearing Examiner

DATED: April 22, 1986
Trenton, New Jersey

FOOTNOTES

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

2/ The Mayor participates in preparing the budget only if any department is facing a "substantial increase in expenditures" (2T 154).

3/ The Mayor testified that in recent years the State cap law forced the Borough to reduce its overall budget resulting in reductions in force (RIFs) in the police and water and sewer departments (2T 130, 132-33). The Highway Department was allegedly the last one to receive any "substantial reductions" (2T 132). Increased insurance, lighting and gasoline costs also allegedly forced RIFs. The Borough also proffered a copy of an Emergency Resolution passed on July 9, 1985, appropriating $135,000 for payment of an unanticipated increase in insurance premiums (R-15). The appropriation was to be "provided for in full in the 1986 budget," pursuant to N.J.S.A. 40A:4-48.

I do not credit that testimony to prove an economical justification for the Borough's actions. The Borough did not demonstrate how a cap law passed years ago had any specific (including temporal) relationship to the alleged RIFs in the Highway Department in April and May 1985. I heard no testimony about the effect of cap laws on the Borough's administrative department. Furthermore, the Borough did not RIF any Highway Department employee before Brown was terminated on April 29 (see Finding of Fact #17) and did not show why the department was spared RIFs since the cap law was passed. Similarly, I find R-15 irrelevant because the Borough again failed to substantiate the relationship between it and the alleged RIFs (especially in light of its passage about two months after Brown and Bryant were terminated).

4/ The record was unclear as to how many Borough-paid summer 1984 employees were adults.

5/ Platt testified that these employees were "summer help" and were notified at their time of hiring that their positions would terminate at the end of August 1985 (2T 13). Their pay is approximately $4 per hour (2T 17). Rene Harrell is the secretary for the Highway Department and has access to the employees' personnel records. She testified that some employees are designated "summer help." She also testified that Platt told her that the three adults hired by the Borough in May 1985 were "part-time." (3T 4, 5, 14). I find that Harrell's testimony as a subpoenaed witness on behalf of the union is particularly creditable. She was not included in the petitioned-for collective negotiations unit (Docket No. RO-85-141) and did not vote in the secret ballot election conducted on June 28, 1985. See, N.J.A.C. 19:14-6.6.

6/ Platt initially testified that Brown was hired as a "heavy equipment mechanic" to repair the grader, hydraulic systems and all heavy equipment (1T 158, T 11, 120-21). He later admitted that Brown was hired as a "mechanic" and that Hays, not he, had personal knowledge of Brown's daily work (2T 52).

7/ In support of its position about Brown's complaints about supervision, Respondent introduced four hand-written notes which Platt recorded on small pieces of paper in February and March 1985. Platt wrote the notes at the time(s) the alleged incident(s) occurred (1T 165). He kept them in Brown's personnel folder (1T 166). Mecouch testified that he asked Platt to record any such incidents (2T 215).

The first note was dated 2/11/85 and read, "complained about Geo [sic] on hydraulic hook-up on truck 385." (R-13A). Platt testified that his note referred to Brown's complaint to him about Hays' preferred method for installing a hydraulic system on a truck (1T 171-72).

The next note was dated "2/14/85" but erasures in the month and date force me to find only that this document was recorded sometime in 1985. The note referred to Brown's refusal to work overtime and Platt's subsequent subcontracting the job (R-13B).

The next note was dated 2/27/85 and referred to an incident in which Scaffidi told Brown to "quit complaining and find work if he wasn't told by Geo [sic] who was out getting parts." (R-13C) Platt testified that Scaffidi told him about the conversation (1T 172-73). Brown denied that he ever complained about not being able to find work (1T 77).

The last note lists three dates (3/7, 3/13 and 3/25) and corresponding comments (R-13D). The first entry states, "Complained

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7/ Footnote Continued From Previous Page

about not having any work in Geo H. [sic] absence." Respondent did not establish to whom Brown complained (see 1T 173-74). Platt's March 13 entry states, "unhappy with parts room set up." The March 25 entry states, "Dissatisfied with container hook-ups on trash packers." Brown was never informed that notes were placed in his personnel folder.

8/ Bryant testified under redirect examination that he had been a floater for four years. Minutes earlier he testified that he was assigned odd jobs over the previous four months and repeated his answer under my questioning (1T 119, 120)

9/ The Borough's election eligibility list was filed on June 12, 1985, in RO-85-141. The list includes the Highway Department employee names, home addresses, years of service and 1984 hourly wages. See, N.J.A.C. 19:14-6.6.

10/ Bryant testified that he never received a copy of CP-5, perhaps because he was not regularly assigned the duty of driving a trash truck. Platt told him and the sanitation employees about the schedule change at the workplace (1T 107-08).

11/ Mecouch testified that after he approached Brown and confirmed with him that he was leading the organizational drive, he stated to Brown that some department employees had been employed by the Borough for 35 years (2T 218). Mecouch explained that Brown and a few other named employees had been employed less than five years (2T 218). Mecouch then asked Brown to compare the wages and benefits of the Highway Department employees with those offered in surrounding communities (2T 219). He also asked Brown to present him with any grievances the employees might have. Brown responded that he and other department employees were concerned about medical benefits. See Finding of Fact #11. Mecouch denied asking Brown "what are you fucking doing to me?" and denouncing unions in general (2T 220). He specifically denied that he threatened retaliation against Brown (2T 220) and testified that their meeting ended when he shook Brown's hand and left (2T 221).

12/ I discredit Mecouch's testimony concerning his conversations with Brown and Wilson. First, during direct examination Mecouch was vague and tentative about his verbal exchanges with the employees (2T 217-221). For example, Mecouch testified that

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12/ Footnote Continued From Previous Page

when he approached Brown he (Mecouch) said: "Jeff, I understand there's possibly some rumors going on that there might be some organizational activity here and that you're the leader." (2T 218). I find that this statement is suspiciously tentative and not consonant with the nature of the workplace. Second, I noted in Mecouch's demeanor hesitation, evasiveness and feigned embarrassment or humility when he was asked if he had said to Brown, "what are you fucking doing to me"? By his own admission Mecouch is no stranger to supervision of employees in the workplace and I was not persuaded by his professed aversion to epithets. (2T 219). Furthermore, on cross-examination in response to a question seeking reasons why he wanted Brown and Wilson to "get back to him" about future union activity, he responded: "Fill me in on what's going on. I always thought, especially Jim Wilson, was a friend of mine. I knew, as I said earlier, Jim for 30 years" (2T 256). Although (Mecouch) subsequently denied that he regarded union activity as "unfriendly" (2T 256), I am persuaded that his previous statement coupled with Wilson's testimony (that Mecouch expressed to him bewilderment at Brown's organizational activity after he gave him $1 per hour wage increase) demonstrates that Mecouch was affronted by Brown's union activities and was disposed to ask Brown about them in the alleged manner.

I credit Brown's and Wilson's testimony that Mecouch expressed negative opinions about unions in general. I credit Brown's testimony that Mecouch said to him, "if you drop it [union activity] now I won't hold it against you." I also credit Wilson's assertion that Mecouch confided to him that Brown would be removed if he persisted in organizational activities. A friend of 30 years is someone to whom one would confide such a plan, especially if one was unaware of the extent of organizational activity just beginning in a small department and wanted to verify "friendship" of management and labor. Furthermore, Wilson's demeanor was open, unrehearsed and candid; for example, on cross-examination Wilson had the following repartee with counsel for Respondent:

Q: You were active also in organizing this union activity?
A: Yes, sir.
Q: And Mr. Mecouch, didn't he--
A: I don't know if he knew it at the time but he knows it now (3T 37).

I credit his testimony.

13/ Borough Hall and Police Department employees are apparently represented by majority representatives and receive negotiated wage increases, if any (2T 25).

14/ Platt testified that one hourly-paid department employee hired in 1984 was given a substantial increase in April 1985 (2T 18).

15/ Brown testified that he saw Layton observing him assist Wilbur Brown. Layton denied that he saw Brown place a button on another employee (2T 202). He also denied reporting his observations at the shop to either Mecouch or Dalton (2T 202). See Finding of Fact #17.

16/ The letter stated that Brown's services were no longer required and that he was terminated on April 28. It also advised him to turn in his uniform (CP-2).

17/ The Borough's personnel policies, adopted by ordinance, contains sections for "Disciplinary Actions" and "Separations." The former section includes a list of disciplinary conduct and a series of disciplines beginning with verbal reprimand and ending in termination. Employees subject to suspension or termination are notified and given a hearing within seven days of the alleged offense. The "Separations" section states, "Separation from service may result from voluntary resignation of the employee, or by the termination of his services by the Borough Council Committee." No provision in this section requires the Borough to notify employees of "termination of services." Although the Union did not prove that the Borough violated its personnel policies by discharging Brown and Bryant without notice, I may consider the failure to notify before discharge as an indicia of the Borough's hostility toward these employees' protected union activities. See, Bridgewater analysis, infra (CP-3).

18/ Platt testified that he never observed Brown "doing leadership work" (1T 175). Platt allegedly explained to Brown around the time of his promotion that "leadership work" meant he was to assign jobs and start new ones when George Hays was absent (2T 54-55). Hays testified that except possibly for a personal day and occasional brief trips to pick up equipment parts locally he was not absent between February and April 1985 (3T 16, 19). Accordingly, I credit the literal meaning of Platt's testimony and find that the Borough did not prove that Brown failed to do "leadership work."

19/ Bryant testified that in April Platt denied his request to take his vacation in June (1T 94). When Bryant asked why his vacation request was being denied Platt responded that he was refusing it "until it was straightened out with the union." (1T 94). He had never before been denied a vacation (1T 122). Bryant's testimony is not contradicted by the Borough's proffer of vacation request forms which Bryant signed in previous years (R-1, 2, 3, 4). Bryant also testified that in April he requested and Platt denied him a personal day (1T 95). Platt did not recall Bryant's request. I credit Bryant's testimony.

20/ Charging Party did not specifically allege that Mecouch's interrogations violated §(a)(1). However, I have considered such evidence and found a violation because the matter was fully and fairly litigated. Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (1983).

21/ There is some circumstantial evidence of this knowledge: 1) the Borough changed the schedule two days after the union's first organizational meeting, 2) Mecouch admittedly "heard rumors" of organizational activity in mid-April, 3) Platt warned sanitation employees in his April 11 letter that "the Borough will not tolerate any slow down of service to the community," and 4) around April 15 Platt commented to Bryant that "union nails" punctured trash truck tires.

22/ The union does not allege nor do I find that Platt's denial violated N.J.S.A. 34:13A-5.4(a)(4), which prohibits public employers from "[d]ischarging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition (emphasis added) or complaint...under the Act." Furthermore, the union did not prove that Platt informed Harrell of the decision to deny vacation requests after the Borough was notified that the petition was filed.

23/ The granting of scheduling of vacations is a term and condition of employment. See, for example, In re City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982).

24/ Based on credited testimony that the Borough paid wage increases in "mid-April", I set the date of payment on April 15.

25/ See R. 4:42-11.

26/ Brown was paid increases in January and June or July. I find that the timing of these increases place Brown outside of the pool of employees who received percentage increases in April retroactive to January. Nor does the record suggest any specific dollar value on any increase he would have received in the leaderman mechanic title. Accordingly, I cannot recommend any increase tied to a percentage or dollar value.

27/ See footnote 25.

28/ Excepted are salaried personnel, one hourly paid employee who may have received a wage increase in April and Jeffrey Brown, who did not historically receive wage increases in April. Moreover, the record did not reveal any history wage increase for the leaderman mechanic position and I cannot reasonably determine a dollar value on any increase.

29/ Based on the record, I find that on or about July 10, 1985, the Borough accepted vacation requests from department employees.

APPENDIX "A"

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 interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening Jeffrey Brown in retaliation for his union activities.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by discharging Jeffrey Brown and Willard Bryant, Sr. in retaliation for their union activities, denying or withholding annual retroactive wage increases to department employees and arbitrarily denying employees vacation requests.

WE WILL forthwith reinstate employees Jeffrey Brown and Willard Bryant, Sr. to the positions in which they were employed immediately preceding their terminations on April 29, 1985 and May 14, 1985, respectively.

WE WILL forthwith make Willard Bryant, Sr. whole for the lost wage increase he would have received April 15, 1985 through May 14, 1985, plus interest computed at 12% per annum. The increase shall reflect the wage increase the Borough paid Bryant in mid-April 1984. We will negotiate upon demand a wage increase for Jeffrey Brown retroactive to June 1985. We will forthwith make Jeffrey Brown and Willard Bryant, Sr. whole for lost wages and other benefits less income that should be credited in mitigation for the periods of April 29, 1985 and May 14, 1985, respectively, to the date of this decision, plust interest computed at 12% per annum through December 31, 1985 and 9.5% per annum thereafter.

NOTICE TO ALL EMPLOYEES
(continued from page 1)

WE WILL forthwith make all other Highway Department employees whole for the lost wage increases they would have received on April 15, 1985, plus interest computed at 12% per annum. The increases shall be based on the wage increases the Borough paid the Highway Department employees in April 1984.

WE WILL forthwith credit all Department employees vacation days which were requested and denied between April 30 and July 10, 1985, consistent with staffing requirements. Forthwith implement vacation request procedures used prior to April 30, 1985, subject to collective negotiations and staffing requirements.

_____
(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 James W. Mastriani, Chairman, Public Employment Relations Commission, 495 West State Street, Trenton, NJ 08618 609-292-9832