

P.E.R.C. NO. 98-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN FREE PUBLIC LIBRARY,

Respondent,

-and-

Docket No. CO-H-96-70

CAMDEN COUNCIL NO. 10, N.J.C.S.A.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Camden Free Public Library violated the New Jersey Employer-Employee Relations Act when the acting director of the library transferred two library assistants to another library branch and increased proposed three-day suspensions against them to five days. The Commission finds that these actions were taken in retaliation for the employees' having filed grievances contesting the proposed suspensions and Camden Council No. 10, NJCSA's having filed an unfair practice charge against the Library.

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

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CAMDEN COUNCIL NO. 10, N.J.C.S.A.,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys
(Yvonne D. Catley, of counsel)

For the Charging Party, Tomar, Simonoff, Adourian &
O'Brien (Mary L. Crangle, of counsel)

DECISION

On September 12, 1995, Camden Council No. 10, N.J.C.S.A.,
filed an unfair practice charge against the Camden Free Public
Library. The charge alleges that the employer violated the New
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,
specifically 5.4a(1), (3) and (4),^{1/} when the acting director of
the library transferred library assistants Barbara Park and

^{1/} These provisions prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act. (3) Discriminating
in regard to hire or tenure of employment or any term or
condition of employment to encourage or discourage employees
in the exercise of the rights guaranteed to them by this
act. (4) Discharging or otherwise discriminating against
any employee because he has signed or filed an affidavit,
petition or complaint or given any information or testimony
under this act."

Ethel Clay to another library branch and increased proposed three-day suspensions against them to five days. These actions were taken allegedly in retaliation for the employees' having filed grievances contesting the proposed suspensions and Council 10's having filed an unfair practice charge against the Library.

On January 8, 1996, a Complaint and Notice of Hearing issued. On January 25, the employer filed an Answer denying the allegations and asserting that the transfers and suspensions were lawful.

On May 15, 1996, Hearing Examiner Elizabeth McGoldrick conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On May 16, 1997, the Hearing Examiner issued her report and recommendations. H.E. No. 97-32, 23 NJPER 382 (¶28173 1997). She found that the acting director lengthened the suspensions and transferred the employees in retaliation for their having filed grievances contesting a preliminary notice of discipline. She further found that other actions were not motivated by anti-union animus: transferring Clay back four months after she indicated that she no longer wished to pursue her litigation against the Library; deducting \$125 in taxes from a \$132.96 check issued to Park as reimbursement for two of the suspension days; and not giving Council 10 attendance records of other employees until it filed an unfair practice charge. The Hearing Examiner recommended that the Library be found to have violated 5.4a(3) and, derivatively, a(1), but not a(4).

On June 16, 1997, after an extension of time, the employer filed exceptions. It asserts that: Clay withdrew from the case in September 1995 and thus her suspension should not have been considered by the Hearing Examiner; the increase in Park's suspension, her transfer, the change in her work hours, and charging her two vacation days were not motivated by anti-union animus; and transfers for cross-training usually occur in September, the time of this transfer.

On July 7, 1997, after an extension of time, Council 10 filed an answering brief responding to each exception and urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 2-13) and specifically adopt her credibility determinations. We modify finding 5 to indicate that William Garenia became acting director in March 1994. We modify finding 17 to indicate that Park and Clay were transferred effective September 25, 1995.

We summarize the most relevant facts.

Barbara Park is a senior library assistant who had worked for the Library for 31 years as of the hearing. She had worked at the Fairview branch for five years. Ethel Clay is a library assistant who had worked at Fairview for two years. Both are supervised by William Garenia, the acting director.

In July 1995, Garenia issued Park and Clay letters of reprimand and recommended that they be suspended for three days.

Park allegedly did not follow Garenia's directive to close the Fairview branch and report to the Main branch during a heat emergency, and allegedly took one day's sick leave without permission. Clay allegedly did not report to the Main branch as directed and allegedly called in sick one day well after work began. A few days later, Council 10 filed grievances asserting that Park and Clay had been reprimanded and suspended without just cause.

In connection with the investigation of the grievances, Council 10 requested other employees' attendance records. The Library initially declined to provide the records so Council 10 filed an unfair practice charge. At an exploratory conference conducted by a Commission staff agent, the Library agreed to provide the records and the charge was withdrawn. The Hearing Examiner rejected the claim that the employer's initial refusal to provide the records supported a finding of anti-union animus. The records were withheld because of initial uncertainty as to whether Council 10 was entitled to them.

On July 26, 1995, Garenia denied the grievances but agreed to hold the suspensions in abeyance pending a departmental hearing. The employer's hearing officer upheld the reprimands and three-day suspensions.

On August 29, 1995, Garenia increased the suspensions to five days. The Hearing Examiner rejected Garenia's explanation that he increased the penalties because the employees' actions

were "egregious." The Hearing Examiner noted that the increase was imposed without notice to the employees by the same supervisor who had recommended a lesser penalty immediately after the incident and that no new information had come to light later. Given the timing and nature of the action relative to the filing of the grievances, the Hearing Examiner inferred that Garenia was hostile to the protected grievance filings. That inference is supported by the record and we accept it.

After Park and Clay received their five-day suspensions, Henry Dunn, president of Council 10, protested to a member of the Library Board. Dunn made a presentation to the full Board which then restored the three-day suspensions. Park and Clay were reimbursed two days' pay on January 9, 1996.

Although Park's gross pay for the two days was \$132.96, she received a reimbursement check for \$5.14 because she had earlier requested that a minimum of \$125 be deducted from each paycheck for federal taxes. We accept the Hearing Examiner's conclusion that the reimbursement check was not reduced because of anti-union animus.

When Park received her annual statement of accumulated vacation, sick and personal time in early 1996, she believed that she had earned 96 vacation days, not the 94 listed on the statement. The Hearing Examiner credited Park's testimony that administrative assistant Lorraine Greene told Park that she was docked two days because of the suspension. Consistent with that

testimony, the Library Board later ordered Park re-credited with two vacation days. However, Park also testified that she took two vacation days immediately after her suspension and Greene testified that she was charging Park for those days. The Hearing Examiner found that Greene's explanation did not account for the Board's action in re-crediting Park for the two days. Because of the confusion surrounding the charging of these two vacation days, we will not rely on the charging of the vacation days as evidence of anti-union animus.

Two days after he lengthened the suspensions of Park and Clay from three to five days, Garenia notified them that he was transferring them from the Fairview branch to the Main branch effective September 25, 1995. The two employees transferred to Fairview to replace Park and Clay continued to work the same hours that Park and Clay had worked. Park and Clay were assigned hours at the Main branch that started and ended later than the hours they had worked at Fairview and differed from the hours worked by the employees they replaced. No other employees were transferred between branches that year. The Hearing Examiner rejected Garenia's explanation that the Library had an informal, unwritten policy of cross-training employees and that he transferred Park and Clay pursuant to that policy. She found his testimony unconvincing, contradictory and conclusory and therefore did not credit it. We accept her findings and her conclusion that the transfers were motivated by Garenia's animus.

On September 30, 1995, Clay wrote to a Council 10 representative that she would like to drop all matters concerning her suspension due to stress and hardship to her and her family. In January 1996, Clay told Garenia that her transfer was a hardship because she did not have a car and she could better supervise her son if she were assigned to Fairview which is closer to her home. Clay was transferred back to Fairview effective January 23, 1996.

At the hearing, Park testified that her transfer was a hardship because the Main branch is five miles from her home and she does not own a car; Fairview is one mile from her home and she could sometimes walk to work. In addition, she cares for her invalid mother-in-law and when she was at Fairview, she could go home every day at lunch to care for her. Garenia testified that had Park requested a transfer back to Fairview because of a hardship, he would have viewed the request favorably. However, at the hearing, when asked if he was prepared to transfer her back, he responded that he would prefer to wait for the result of the hearing.

In re Tp. of Bridgewater, 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by

direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

It is undisputed that Park and Clay engaged in protected activity, Council 10 engaged in protected activity on their behalf, and the employer was aware of that activity. Based in large part on credibility determinations that we will not disturb, the Hearing Examiner found that Garenia's decisions to transfer them, change their hours, and increase their suspensions to five

days were in retaliation for that protected activity. We agree with the Hearing Examiner's analysis that the timing and nature of the actions justified an inference of hostility to protected activity and that the explanations for the actions did not dispel that inference. Accordingly, we agree with the Hearing Examiner that these actions violated 5.4a(3) and, derivatively, a(1).

The Library argues that Clay should not have been a focus of the decision or recommended order because she withdrew from the case. We disagree. Council 10 filed the charge and has a right to pursue its claims on behalf of a particular unit member or in the interests of all unit members. As the Supreme Court has stated:

When an employee elects to have his grievance presented through his majority representative, it may no longer be accurately viewed as solely his grievance. It is then also the grievance of his unit, brought on behalf of the entire membership of the unit in the name of their chosen majority representative.

*

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*

Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely "short circuit" the system of collectivity the Legislature sought to promote in the Act and weaken its benefits. An employee who views the potential consequences of presenting a grievance in his own name with great trepidation would be forced to endure a possible violation of his rights without redress if he is unable to have that grievance presented through his majority representative. Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would, if sanctioned, bring about a "prejudicial dilution"

of the basic right to organize secured by the Constitution. [Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 137, 138 (1978)]

In the absence of exceptions, we dismiss the remaining allegations.

ORDER

The Camden Free Public Library 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 permitting its acting director to transfer Barbara Park and Ethel Clay to the Main branch, change their work hours, and increase the severity of disciplinary action imposed on them because they exercised rights protected by the Act.

2. Discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by permitting its acting director to transfer Barbara Park and Ethel Clay to the Main branch, change their work hours, and increase the severity of disciplinary action imposed on them because they exercised rights protected by the Act.

B. Take this action:

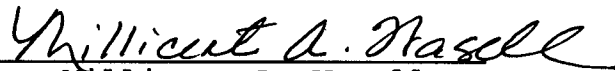
1. Offer Barbara Park the opportunity to transfer back to the Fairview branch immediately with substantially the same hours of work and employment responsibilities as she had immediately before the transfer.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Klagholz were not present.

DATED: November 20, 1997
Trenton, New Jersey
ISSUED: November 21, 1997



NOTICE TO 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 employees in the exercise of the rights guaranteed to them by the Act, particularly by permitting its acting director to transfer Barbara Park and Ethel Clay to the Main branch, change their work hours, and increase the severity of disciplinary action imposed on them because they exercised rights protected by the Act.

WE WILL cease and desist from discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by permitting its acting director to transfer Barbara Park and Ethel Clay to the Main branch, change their work hours, and increase the severity of disciplinary action imposed on them because they exercised rights protected by the Act.

WE WILL offer Barbara Park the opportunity to transfer back to the Fairview branch immediately with substantially the same hours of work and employment responsibilities as she had immediately before the transfer.

Docket No. CO-H-96-70

CAMDEN FREE PUBLIC LIBRARY

(Public Employer)

Date: _____

By: _____

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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

In the Matter of

CAMDEN FREE PUBLIC LIBRARY,

Respondent,

-and-

Docket No. CO-H-96-70

CAMDEN COUNCIL NO. 10, N.J.C.S.A.,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds and recommends that the Camden Free Public Library violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1) and (3), when it increased the severity of disciplinary actions imposed on two Council 10 unit members and transferred them to the Main library branch. The Hearing Examiner inferred from the timing and context of the Library's decision to increase the employees' disciplinary suspensions that the Library was hostile toward their having filed grievances. She rejected as pretextual the Library's proffered business justification, and concluded that the Library's defenses did not rebut the inference of animus. The Hearing Examiner recommends that the evidence is insufficient to prove that the Library discriminated against employees because they had filed an affidavit, petition or complaint or given testimony under the Act, in violation of N.J.S.A. 34:13A-5.4(a)(4).

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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CAMDEN COUNCIL NO. 10, N.J.C.S.A.,

Charging Party.

Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys
(Yvonne D. Catley, of counsel)

For the Charging Party, Tomar, Simonoff, Adourian & O'Brien
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 12, 1995, Camden Council No. 10 ("Council 10") filed an unfair practice charge with the Public Employment Relations Commission, alleging that the Camden Free Public Library ("Library") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections (a)(1), (3) and (4)^{1/} when it transferred two employees from one

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

Footnote Continued on Next Page

library branch to another and increased proposed three-day suspensions to five days. These actions were allegedly taken in retaliation for grievances protesting the proposed three-day suspensions, and an unfair practice charge filed by Council 10 against the Library.

On January 8, 1996, a Complaint and Notice of Hearing issued (C-1).^{2/} On January 25, the Library filed an Answer denying the allegations and maintaining that the transfers and the five-day suspensions were lawful (C-2). On May 15, 1996, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by July 19, 1996.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Council 10 is the majority representative for the Library's librarians, library assistants and clerical and

^{1/} Footnote Continued From Previous Page

condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any testimony under this Act."

^{2/} The transcript citations "T-" refers to the transcript developed on May 15, 1996. Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" and "R" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J" refer to joint exhibits.

maintenance workers (J-1). The parties entered into a negotiated agreement effective January 1, through December 1, 1993, which was in effect during the summer and fall of 1995 (J-1, T54).

2. The Library operates several branches in the City of Camden: the Main branch, in the center city business section of Camden, and the Fairview, Cooper, Isabel Miller, Martin Luther King and Fairview branches (T24, T181-T182).

3. Barbara Park is a senior library assistant who has worked for the Library for 31 years (T23-T24). In July 1995, she had been assigned to the Fairview branch for five years (T25). Her hours were Monday to Wednesday, 10 a.m. to 6 p.m., and Thursday and Friday, 9 a.m. to 5 p.m. (T26). In addition, she worked the first Saturday of every month (T26). Prior to the transfer at issue, Park had been transferred from one branch to another as a result of branch closings (T42).

4. Ethel Clay is a library assistant who, in July 1995, had worked at Fairview for two years (T25). Her hours were the same as Park's except that she worked the third Saturday of every month (T26).

5. Park and Clay are supervised by William Garenia who, since March 1994, has been the Director of the Library (T40, T68). From 1991 until his promotion to Director, Garenia was the head of the circulation department at the Main branch (T68).

6. In July 1995, Garenia issued letters of reprimand to both Park and Clay and initially recommended that they be suspended for three days (J-2, J-3, J-4, J-5, J-6, J-7).^{3/}

7. On July 14, 1995, Garenia issued a letter of reprimand to Park admonishing her for: (1) failing to follow his directive to close the Fairview branch and report to the Main branch during a heat emergency on July 12 and July 13, and (2) taking a full day of sick leave on July 14 without permission (J-2).

8. On July 17, Garenia issued a Department of Civil Service "Preliminary Notice of Disciplinary Action" to Park (J-4). The Notice charged Park with insubordination, stating that she did not report to her place of employment when directed to do so, and that she missed work without permission (J-4). The Notice indicated that she was suspended for three days, "effective August 1-3, 1995" and provided information about requesting a departmental hearing (J-4). In a final section of the form, which provided a checklist of the types of disciplinary action "which may be taken against you," the penalty of "suspension" was checked off, with the notation that Park was suspended from August 1 through August 3 (J-4). A separate letter from Garenia to Park advised that "[b]ecause of your documented acts of insubordination, you will receive a three-day suspension from August 1-3, 1995" (J-5).

^{3/} These disciplinary actions are not the subject of this proceeding.

9. On July 15, 1995, Garenia sent Clay a letter of reprimand for: (1) not reporting to work at the Main branch on that date, as he had directed, and (2) not reporting her absence due to illness on July 15 until well after work began at 9:00 a.m. (J-3). On July 17, Garenia sent Clay a Preliminary Notice of Disciplinary Action identical to that sent to Park, except that her three-day suspension was to run from August 8 through August 10 (J-6). A July 17 letter from Garenia advised Clay that she would be suspended for three days because of her documented acts of insubordination (J-7).

10. On July 21, 1995, Council 10 filed grievances alleging that Park and Clay had been reprimanded and suspended without just cause (J-8 through J-11).

11. In connection with the investigation of the grievances, Henry Dunn, President of Council 10, and the Charging Party's attorney requested the attendance records of other library employees (T53, J-18). The Library initially declined to release them, based on the city attorney's position that Council 10 was not entitled to unrestricted access to employee records (J-18).^{4/} On August 17, 1995, Council 10 filed an unfair practice charge, Docket No. 96-49, alleging that the Library had

^{4/} Dunn also indicated that he had received a petition from Council 10 members stating that they did not want their records released (T62). Dunn believed that employees were concerned that their medical records might be disclosed (T62).

violated subsection 5.4(a)(1) and (5) Of the Act by refusing to release the records (T54, J-18).^{5/} The Library released the records following a settlement conference, and Council 10 withdrew the charge (T54). I credit Dunn's testimony that, when Garenia refused Dunn's initial request for the records, he did so in a "non-hostile" manner and because he was not sure their release was authorized (T54).

12. On July 26, 1995, Garenia denied the grievances, but agreed to hold the suspensions in abeyance pending a departmental hearing (J-8, J-9, J-12). On August 8, 1995, Lt. Joseph Richardson of the Camden Police Department conducted the departmental hearing (J-13). On August 18, Richardson upheld the three-day suspensions and reprimands (J-13). Both Council 10 and Garenia received the decision on August 29, 1995 (C-1, T71, T90).

13. On August 29, 1995, Garenia issued Final Notices of Disciplinary Action to Park and Clay and suspended them for five instead of three days (J-14, J-15). Park's suspension was to be served from September 7 through September 13, and Clay's from September 14 through September 20 (J-14, J-15). The Final Notices did not state why the suspensions were increased. At the hearing, Garenia indicated that the July 17 Notices proposing three-day suspensions were only preliminary (T71). He explained that he

^{5/} The charge also alleged that the Library had failed to release certain budget documents requested by Council 10 in connection with negotiations (J-18).

later decided to impose a more severe penalty because Park's and Clay's conduct was so egregious that three-day suspensions would be no more than "a slap on the wrist" (T71). The Department of Personnel advised him that he could increase the suspensions (T71).

14. After Park and Clay received the Final Notices, Dunn contacted Mr. McKernan, a member of the Library Board of Trustees, to protest the five-day suspension (T56). McKernan directed Dunn to bring the matter to the full Board (T56). Dunn made a presentation before the Board, and on December 7, 1995, the Board acted to maintain the original three-day suspensions (T15). Park and Clay had already served the five-day suspensions and they were reimbursed for two days pay on January 9, 1996 (T15).^{6/}

15. Although her gross pay for the two days was \$132.96, Park received a separate reimbursement check for \$5.14 because \$125 had been deducted for federal taxes (T36, R-8). In 1992, Park had completed a W-4 directing that a minimum of \$125 be deducted from her paycheck for federal taxes (T146, T176). Park's W-4 form was kept in her personnel file, and a copy was sent to the Library's payroll company (T144, T146, T176). Lorraine Greene, Garenia's administrative assistant, explained that the payroll company automatically made the \$125 deduction after she had informed the company as to the amount of time for which Park

^{6/} Park has continued to contest the three-day suspension. At the time of the hearing, an arbitration hearing had been scheduled on the grievance (T29).

and Clay were to be paid (T177). Greene told Park and Clay that they would each receive a separate check for two days pay, but she did not discuss deductions with them (T173). When Park complained that she had not wanted the \$125 deducted, Greene said that she responded: "I cannot change that once I call it into the payroll company unless I'm made aware that you want a change" (T172).

16. When Park received her annual statement of accumulated vacation, sick and personal time in early 1996, she noticed that she had two fewer vacation days than she believed she had earned (94 days instead of 96) (T36-T37). I credit her testimony that, when she questioned Greene about the discrepancy, Greene told her that: she was docked two days "because of the suspension," and Board of Trustees' action was necessary to restore the days (T37, T170). Dunn wrote a letter to the Board and Park was credited with the two days after the Board's March 7 meeting (R-11, T150). Greene told Park of that fact in April and sent her a note to that effect in May (T150).^{7/}

^{7/} I find Park's explanation for the discrepancy more probable than Greene's. Greene maintained that the discrepancy arose because, prior to the suspension, Park had requested vacation time on September 14 and 15, 1995 (the two days following the five-day suspension) (T150). Greene assumed that Park had taken those vacation days when she calculated Park's accumulated vacation days, even though she had not received Park's time sheets (T150, T169). Greene maintained that Park would have had only 94 vacation days if she had taken September 14 and 15 off, and denied that she deducted two of Park's vacation days after Park was reimbursed for

17. On August 31, 1995, Garenia notified Park and Clay that they were both transferred from Fairview to the Main branch, effective September 25, 1996 (J-16, J-17). (The parties' agreement required at least one week notice of a change in work hours or location (J-1, p. 5)). Jewell Johnson and Francisco Nieves were transferred from the Main branch to Fairview, effective September 25 (R-2). Four other employees in the Main branch also received transfer notices on August 31, but they were transferred from one department at the Main branch to a different department at that location (R-2). Nieves and Johnson worked the same hours at Fairview as Park and Clay had (T111). However, while Nieves had worked 8:00 a.m. to 4:00 p.m. at the Main branch, Park's and Clay's hours were 11:00 a.m. to 7:00 p.m., because that was the shift to which they were assigned (T132, J-16, J-17).

18. Greene indicated that, in her experience as administrative assistant to the Director, it was not unusual for employees to be transferred between departments, or from one branch to another (T156-T157). Six transfer notices, dated from

7/ Footnote Continued From Previous Page

the two days of suspension (T170, T176). However, since Park acknowledged that she did take the vacation days, Greene's version of events does not account for why the Board eventually restored two vacation days (T167). In addition, if the discrepancy were attributable to a confusion over what days had been taken, I find it improbable that Greene and/or Garenia would not have tried to clarify the matter administratively rather than proceeding to the Board of Trustees.

1985 through 1993, were admitted into evidence solely to indicate that they were maintained in Library personnel files (R-10, T156). The notices were dated February, May, July, October, November and December (R-10). Two of the notices indicated that the transfers were necessary to address staff shortages, and the remainder identified no reason for the transfer (R-10). Greene indicated that these were only some of the transfer notices maintained in Library files (T153).

19. Garenia explained that employee transfers are usually made in September, when school resumes and the library goes back to its regular schedule (T72-T73). Garenia denied that he had transferred Clay and Park because they had filed grievances (T77). Rather, he determined that because they had been at Fairview for "an aggregate" of approximately nine years it was time for them to rotate to new assignments (T77). Garenia wanted all employees to be trained in all aspects of library work (T77). He indicated that his predecessor, Shirley Butler West, had also believed in the desirability of periodically moving employees to different branches to "cross-train" them (T89). However, the library had no formal written policy on cross-training, and Garenia acknowledged that Park's duties at the Main branch were no different from her duties at Fairview (T78, T88).

20. I do not credit Garenia's testimony that the Library had an informal, unwritten policy of cross-training employees. His testimony to this effect was unconvincing, contradictory and

conclusory. For example, when Garenia was asked what other employees had been cross-trained, he identified Tamica Worlds, a "brand new employee" (T113-T114). It is not believable that a brand new employee would be cross-trained in her first assignment. Similarly, Garenia testified that he transferred Roland Parks from Cooper to the Main branch because he believed Judy Johnson could do a better job at Cooper (T103). He then stated that Parks received cross-training as a "coincidence" of that transfer (T137). These statements suggest that "cross-training" was the ad hoc result of transfers effected for other reasons. In the same vein, while Garenia maintained that, in the last few years, Jewell Johnson, Gaynell Burch, Sulata Jose, and Nelson Estrella had all been transferred from one department in the Main branch to another for cross-training, (T113, T137, T140-T141), he did not explain how or why those employees in particular were chosen for cross-training or what the cross-training consisted of.

While the record establishes that employees were transferred between departments at the Main branch and, less frequently, from one branch to another, I conclude that the Library had no general policy of transferring employees for cross-training and that Park was not transferred for that purpose.

21. Park indicated that her transfer to the Main branch was a hardship, in part because she does not own a car (T33). The Main branch is five miles from her home and she cannot walk there

(T33). In contrast, she lived only one mile from Fairview and could sometimes walk to work (T33). In addition, Park stated that she cares for her invalid mother-in-law and, when she was at Fairview, she had time to go home every day at lunch to care for her (T33). Now, it is more difficult for her to go home to check on her mother-in-law and still return to work on time (T33). Finally, because her hours have changed, she has had to hire people to care for her mother-in-law (T34).

22. Park maintained that Garenia was aware of her responsibilities to her mother-in-law, because she had spoken to him about them when she called in sick (T34). Garenia stated that Park had never spoken to him about her personal responsibilities, and he was not aware of them (T116). If Park had requested a transfer back to Fairview because of personal hardship, he would have viewed the request favorably. However, at this juncture, he would prefer to wait for the result of the hearing (T118).

23. On September 30, 1995, Clay wrote Judy Johnson, a Council 10 representative, stating that, "I would like to drop all matters concerning my five day suspension due to stress and hardship to me and my family" (R-1).

24. Garenia stated that, in January 1996, Clay came to him and said that the Main branch assignment was a hardship because she did not have a car and could better supervise her son if she were assigned to Fairview, which was close to her home (T80-T81). An undated letter to Garenia from Clay set forth these

concerns and requested a transfer back to Fairview (R-5). Garenia granted the transfer because he felt Clay had a compelling need -- not because she had dropped her grievance (T81, T88). A January 22, 1996 letter from Garenia to Clay confirms their conversation earlier that day, including Clay's agreement to waive the contractual notice period for transfers (R-6). It assigned her to Fairview, effective January 23, 1996 (R-6).

ANALYSIS

Council 10 argues that the Library's transfer of Park and Clay and its increase in their three-day suspensions were in retaliation for their having filed grievances and participated in the filing of an unfair practice charge against the Library. The Library argues that it was not motivated by animus toward anyone's protected activities and that the issue is moot since the Library Board reduced the suspensions to their original three days. It further asserts it had a managerial prerogative and substantial business justification, cross training, for transferring Park and Clay. Because I infer that the Library was motivated by animus toward the protected activity and find the asserted business justification is pretext, I conclude that the Library violated the Act.

In re Tp. of Bridgewater, 95 N.J. 235 (1984) articulates

the standards for evaluating whether subsection 5.4(a)(3) has been violated.^{8/} A charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer does not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

^{8/} The charging party does not allege an independent subsection 5.4(a)(1) violation.

Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498 (¶18183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In many cases where the timing of a personnel action establishes hostility toward protected activity, the personnel action is unanticipated and takes place at a time or in a manner inconsistent with the ordinary course of business. In Bridgewater, a recently promoted employee was transferred and demoted, without advance notice, soon after he protested a unilateral change in wages. In Downe Tp. Bd. of Ed., the employer improved benefits for unrepresented employees just after a contentious negotiations session with the majority representative of another employee unit.

The Charging Party has established that Park engaged in protected activity and that the Library was aware of that activity. There is no dispute that Park filed a grievance protesting her reprimand and proposed suspension -- action which constitutes protected activity. Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986). The Library, through Garenia, was aware of the activity since the grievance was filed with him.

There is no direct evidence that Garenia transferred Park and increased her suspension because she filed a grievance against him. Nor is there direct evidence that Garenia was angry or hostile because Park and Clay filed grievances. However, the record here contains sufficient circumstantial evidence from which an inference may be drawn that union animus was a substantial or motivating factor in the decision to transfer Park and increase her suspension.

The timing and context of Garenia's decision to impose a five-day suspension gives rise to an inference of hostility. While the three-day suspension was set forth in a "Preliminary" Notice of Discipline, the tenor of that document was that this was the discipline which would be imposed unless the employee was successful in reducing the penalty and/or overturning the reprimand. This is evident from the statement in the Notice that the suspension would be effective for three particular days (J-4, J-5). The inference of hostility is not rebutted by Garenia's statement that he decided to impose the five-day suspension because, upon reflection, their actions were "egregious," and a three-day suspension would be a mere "slap on the wrist" (T71). Garenia identified no new information which had come to light which would cause him to re-evaluate the penalty. The increase was imposed without any notice to the employees, by the same supervisor who had recommended a lesser penalty immediately after

the incident.^{9/} Thus, this unanticipated personnel action, coming immediately after Park and Clay engaged in protected activity, justifies a finding of union animus. Accord, Bridgewater; Downe Tp. Bd. of Ed.^{10/}

The controversy over Park's vacation days also indicates hostility towards Park's challenge to the five-day suspension. I have credited Park's testimony that Greene informed her that, as of January 1996, Park had only 94 accumulated vacation days because two days had been deducted because of the suspension. I find that Greene and/or Garenia's decision to charge Park with two

^{9/} N.J.A.C. 4A:2-2.5, requires a Preliminary Notice of Disciplinary Action only with respect to major discipline which is defined as, among other things, a suspension of five or more days. While the Notice appears not to have been required for a three-day suspension, that circumstance does not undercut the significance of Garenia's decision to increase the original penalty. N.J.A.C. 4A:4-2.5 does not state whether or not a Final Notice of Disciplinary Action may impose a more severe penalty than that initially proposed. Cf. N.J.S.A. 11A:2-19 (Merit Systems Appeal Board can increase or decrease penalty imposed by appointing authority) and N.J.A.C. 4A:2-2.7 (employee indicted on criminal charges may be given Final Notice of indefinite suspension pending resolution of criminal charges, but must receive new Preliminary Notice concerning any charges remaining after disposition of criminal charges).

^{10/} I reject the Library's argument that Garenia's decision to increase the suspension should not be imputed to it, because the Board of Trustees reinstated the three-day suspension. While the board action negates the need for an order directing reimbursement if a violation is found, Garenia is the Library's agent and the Library is responsible for unfair practices attributable to him. See Old Bridge Tp., P.E.R.C. No. 90-102, 16 NJPER 307 (¶21127 1990), aff'd NJPER Supp.2d 283 (¶228 App. Div. 1992) (Township responsible for unfair practice committed by police chief).

vacation days is also evidence of the Library administration's resistance toward implementing the Board's decision to reimburse Park, and, by logical implication, Park's action in challenging the five-day suspension. The record contains no evidence that the Board directed this result as part of its reimbursement decision.

The timing of Park's and Clay's transfer is also suspect since the notice was issued within two weeks of the departmental hearing officer's decision on the grievance and about six weeks after the grievance was filed. This inference is not overcome by Garenia's statement that most transfers occurred in September, when the Library resumed its regular schedule, since Garenia did not connect the transfers to changes in the Library schedule. And, the Library's own documentary evidence contradicts that September is the preferred transfer period (R-3, R-4, R-10). In the same vein, an inference of union animus can be drawn from the fact that Park was required to work the 11:00 a.m. to 7:00 p.m. shift -- despite the fact that the employee whom she replaced worked 8:00 to 4:00 p.m. While Garenia stated that that was simply the shift Park got, this conclusory statement, in conjunction with the other circumstances surrounding the transfers, supports an inference of union animus (T132). Finally, Garenia's transfer of both Clay and Park supports an inference that the transfers were tied to the grievances especially since they -- and the two employees with whom they exchanged positions -- were the only employees who changed job locations in 1995.

While the Library maintains that it had legitimate business reasons to transfer Park and Clay, I find that the proffered reasons are pretextual.

Garenia stated that he transferred Park and Clay to the Main branch because they had been at Fairview an "aggregate" of nine years and it was time for them to be rotated to new assignments, consistent with his and his predecessor's policy that all employees should be cross-trained in all aspects of library work. However, since Garenia acknowledged that Park's duties at the Main branch were no different from her duties at Fairview (T78) there is no basis for concluding that Park's transfer was designed to cross-train her.

Moreover, Garenia indicated there was no formal Library policy on cross-training and, as discussed above, I do not credit his testimony that the Library had an unwritten policy of regularly cross-training employees: his testimony to this effect was unconvincing and conclusory.

While I recognize, as the Library emphasizes, that an employer has a prerogative to transfer employees, it may not do so if its managerial discretion is illegally motivated. Bridgewater Tp. The burden shifts to an employer once the Charging Party, as here, has proven that an illegal motive contributed to the challenged personnel actions. Garenia's unconvincing testimony on cross-training, especially his concession on cross-examination that Park's duties were no different after her transfer,

strengthens the circumstantial evidence of hostility. See Holo-Krome Co. v. NLRB, 954 F.2d 108, 138 LRRM 2353, 2357 (2d Cir. 1992), clarifying, 907 F.2d 1343, 134 LRRM 2686 (2d Cir. 1990).

I conclude that the charging party has proven, by a preponderance of evidence on the record as a whole, that Park's grievance activity was a substantial and motivating factor in Garenia's decision to transfer her and increase her suspension. I base this determination on: (1) the timing of the suspension and transfer; (2) the fact that both Clay and Park were transferred from Fairview; (3) the pretextual nature of the Library's explanations for its decisions; and (4) the Library administration's deduction of two of Park's vacation days without explicit Board authorization. I therefore conclude that the Library violated subsections 5.4(a)(3) and, derivatively, 5.4(a)(1) of the Act.

However, I do not agree with the Charging Party that Garenia's decision to transfer Clay back to Fairview four months after she withdrew her grievance and unfair practice charge is evidence of union animus. Exhibit R-5 supports Garenia's statement that Clay approached him and requested a transfer because of personal hardship, whereas Park acknowledged that she never made such a written request (T46). Therefore, I cannot conclude that the different treatment of Clay and Park was attributable to union animus, rather than, because one employee

requested a transfer and the other did not. Further, the Charging Party has not established that the manner in which Park was reimbursed was indicative of union animus. There is no dispute that Park had requested that \$125 be deducted from her paychecks for federal taxes and I credit Greene's testimony that, once this information was conveyed to the payroll company, that amount would be deducted from all checks. The Charging Party did not demonstrate that Greene had an affirmative obligation to inquire whether Park wanted the same deductions taken from her reimbursement check. Moreover, Park could have raised this issue with Greene when she was informed that she would receive a separate reimbursement check.

Finally, the fact that Council 10 received the attendance records of other employees only after it filed an unfair practice charge does not support an inference of union animus or a violation of section 5.4(a)(4) of the Act. Garenia did not immediately release the records because the city attorney's position was that Council 10 was not entitled to "unrestricted access" to the records. Dunn acknowledged that employees had objected to their records being released. Based on these facts, I cannot conclude that the records were temporarily withheld because of union animus, as opposed to uncertainty as to whether Council 10 was entitled to them and/or uncertainty as to whether the rights of other employees would be infringed by their release.

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

CONCLUSIONS OF LAW

The Camden Public Library violated section 5.4(a) (1) and (3) of the Act when it increased the severity of disciplinary actions imposed on Barbara Park and Ethel Clay on August 29, 1995, and transferred Barbara Park to the Main library branch on August 31, 1995.

The Camden Public Library did not violate section 5.4(a) (4) of the Act when it increased the the severity of disciplinary actions imposed on Barbara Park and Ethel Clay on August 29, 1995, and transferred Barbara Park to the Main library branch on August 31, 1995.

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the Camden Public Library cease and desist from:

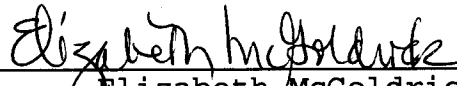
1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring Barbara Park to the Main branch and increasing the severity of disciplinary action imposed on her because she exercised rights protected by the Act.
2. Discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring Barbara Park to the Main branch and increasing the severity of disciplinary action imposed on her.

B. That the Library take the following action:

1. Transfer Barbara Park to the Fairview branch immediately with substantially the same hours of work and employment responsibilities as she had immediately prior to the transfer.

2. Post in all places where notices to employees are customarily posted, copies of the attached noticed marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.


Elizabeth McGoldrick
Hearing Examiner

Dated: May 16, 1997
Trenton, New Jersey

APPENDIX A
RECOMMENDED



NOTICE TO 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 their rights under the Act, particularly by transferring Barbara Park to the Main branch and increasing the severity of disciplinary action imposed on her because she exercised rights protected by the Act.

WE WILL NOT discriminate 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 the Act, particularly by transferring Barbara Park to the Main branch and increasing the severity of disciplinary action imposed on her.

WE WILL transfer Barbara Park to the Fairview branch immediately with substantially the same hours of work and employment responsibilities as she had immediately prior to the transfer.

Docket No. CO-H-96-70

CAMDEN FREE PUBLIC LIBRARY

(Public Employer)

Date: _____

By: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"