

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EWING,

Respondent,

-and-

WILLIAM J. GANDY,

Docket Nos. CI-77-8-98 and
CI-77-9-99

Charging Party,

-and-

ROBERT A. LITZ,

Charging Party.

SYNOPSIS

The Commission, in its Decision and Order, adopts the findings of fact and conclusions of law of the Hearing Examiner in an unfair practice proceeding and finds the exceptions filed by the Township to be without merit. More specifically, the Commission affirmed that, absent extraordinary circumstances not present here, it is inappropriate for a Hearing Examiner to advise either party on the strategems to be employed in presenting their case or to take it upon him or herself to develop the record in such a way as to aid the cause of either party. The Township's request to reopen the record is denied. Additionally, the Commission affirms the Chairman's denial of the Township's request to argue orally before the full Commission.

The Commission, in agreement with the Hearing Examiner, concludes that the Township of Ewing had engaged in unfair practices, proscribed by N.J.S.A. 34:13A-5.4(a)(3), by discriminatorily transferring William J. Gandy from the Detective Bureau and Robert A. Litz from the Traffic Bureau because of their assertion of rights protected by the Act. The Commission in addition concludes that the Township's violation of N.J.S.A. 34:13A-5.4(a)(3) has necessarily interfered with, restrained and coerced its Police Department employees in the exercise of rights protected under the Act and therefore finds that the Township violated N.J.S.A. 34:13A-5.4(a)(1). The Commission further orders, in agreement with the Hearing Examiner, that those parts of the complaints which allege that the Township violated N.J.S.A. 34:13A-5.4(a)(2), (4) and (7) be dismissed.

The Commission orders that the Township cease and desist from discriminating in regard to hire or tenure of employment or

any terms and conditions of employment of any employee within the Police Department to discourage said employees in the exercise of protected rights under the Act; and affirmatively orders the Township to offer Gandy reinstatement to the Detective Bureau and reinstate Litz to the Traffic Bureau from which they were unlawfully transferred, without prejudice to any rights or privileges enjoyed by them; to make them whole for any loss of pay they may have suffered as a result of the Township's improper conduct; to post appropriate notices and to notify the Commission, in writing, of the steps taken to comply with the Commission's order.

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Docket Nos. CI-77-8-98
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-and-

ROBERT A. LITZ,

Charging Party.

Appearances:

For the Respondent, Dietrich, Allen and St. John, Esqs.
(Mr. Charles P. Allen, Jr., Of Counsel)

For the Charging Parties, Ruhlman and Butrym, Esqs.
(Mr. Paul T. Koenig, Jr., Of Counsel)

DECISION AND ORDER

Unfair Practice Charges were filed by William J. Gandy and Robert A. Litz (hereinafter the "Charging Parties" when referred to collectively) on January 17 and 24, 1977, respectively, with the Public Employment Relations Commission alleging that the Township of Ewing (hereinafter the "Township") had committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (hereinafter the "Act"). Specifically, charging parties alleged that the Township discriminatorily transferred Gandy from the Detective to the Patrol Division and Litz from the Traffic Bureau to the Patrol Division of the Township's Police Department, because the charging parties had engaged in protected

activities within the meaning of the Act. Gandy alleged that the Township violated N.J.S.A. 34:13A-5.4(a) (1), (2), (3), (4) and (7), and Litz alleged violations of N.J.S.A. 34:13A-5.4(a) (1), (2), (3), and (7).^{1/}

It appearing that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, Complaints and Notices of Hearing were issued on March 17, 1977, along with an Order Consolidating Cases.

Pursuant to the Complaints and Notices of Hearing, hearings were held before Joan Kane Josephson, Hearing Examiner of the Commission, on April 25 and 29, 1977 and May 20 and 27, 1977, and June 6, 1977, at which time parties were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. In lieu of filing written briefs, and at the request of both counsel, oral argument on the disputed matters was presented to the Hearing Examiner on July 27, 1977.

On November 16, 1977, the Hearing Examiner issued her Recommend Report and Decision, which report included findings of

^{1/} These subsections prohibit employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the act. (2) Dominating or interfering with the formation, existence or administration of any employee organizations. (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. (7) Violating any of the rules and regulations established by the Commission.

fact, conclusions of law, and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.^{2/}

On November 30, 1977, respondent filed Exceptions and Supporting Brief to the Recommended Report and Decision, along with a request to argue orally before the Commission and to re-open the record in this matter. The charging parties submitted a letter opposing respondent's exceptions and a re-opening of the record on December 12, 1977. After careful consideration of respondent's request, the Chairman of the Commission denied the request by letter, on February 2, 1977, to argue orally. This denial was predicated upon the discretionary authority under N.J.A.C. 19:14-8.2 and was based on the fact that the parties had five hearing dates in which to develop a full and complete factual record. As previously noted, the parties requested and were granted an opportunity to argue orally at the close of hearings on July 27, 1977. Additionally, we observe that the right, granted to parties by the Commission's Rules, to file exceptions to the recommended report and decision, in addition to the aforementioned factors, provides us with a complete legal and factual record upon which we can base our decision in this matter. Accordingly, we affirm the Chairman's denial of the request for oral argument and, for substantially the same reasons, the Township's request to reopen the record is denied.

^{2/} H.E. No. 78-14, 3 NJPER ____ (1977).

The Hearing Examiner concluded that the Township violated both N.J.S.A. 34:13A-5.4(a)(1) and (3) by discriminatorily transferring Gandy, the President of P.B.A. Local 111, from the Detective Bureau to the Patrol Division effective January 17, 1977 and by discriminatorily transferring Litz, the Vice-President of P.B.A. Local 111, from the Traffic Bureau to the Patrol Division effective February 2, 1977. She found those transfers, which do affect working conditions, were made because in Gandy's case he presented a claim for overtime pursuant to the contract and in Litz's case he had an argument with the Captain concerning overtime. She found that neither transfers was performance related nor was it justified on any other ground.

We have considered the exceptions and supporting brief filed by the respondent, and find them to be without merit. While it is unnecessary to recount each of the several exceptions filed in the body of this decision, we wish to make the several observations in support of our determination in this matter.

The Township suggests in its exceptions that the Commission's Hearing Examiner should have solicited or asked for certain information regarding transfers of personnel. Any such behavior would have been totally inappropriate.

A Commission Hearing Examiner is a quasi-judicial administrative officer presiding in hearings alleging violations of the Act. Such hearings require that a charging party meet a burden of proof with regard to the allegations contained in the Complaint.

(See N.J.A.C. 19:14-6.8)

Parties are afforded a full opportunity to be represented by legal counsel, to present evidence, examine and cross-examine witnesses, to argue orally, and to submit written briefs. Given the nature of the proceeding it would serve neither the cause of justice nor the purposes of the Act for a Hearing Examiner, absent extraordinary circumstances not present here, to advise either party on the appropriate strategems to be employed in presenting its case or to take it upon him or her self to develop the record in such a way as to aid the cause of either charging party or respondent. This is most obviously true, although not limited to such situations, where, as here, both parties are represented by experienced and competent legal counsel. The Commission's Rules specifically and intentionally limit the authority to a Hearing Examiner to "hear fully the facts" (N.J.A.C. 19:14-6.3) in a quasi-judicial unfair practice proceeding. A Hearing Officer in a representation proceeding, which is a quasi-legislative, fact-finding proceeding in which there is no burden of proof and in which the Hearing Officer holds the ultimate responsibility for developing a full and complete factual record, is to "inquire fully into the facts." (N.J.A.C. 19:11-6.3).

Second, the statutory scheme for the adjudication of unfair practices as defined in the Act requires that a charging party shall prosecute the case and "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." (N.J.A.C. 19:14-6.8). The Hearing Examiner concluded, and we agree, that the charging parties met their burden in this

case. The Township did not successfully rebut the case made by the charging parties.

Third, the Hearing Examiner recommended that Gandy receive additional compensation afforded to detectives under the contractual agreement then in effect between the parties. The Township contends, citing Galloway Township Board of Education v. Galloway Educational Secretaries Assn., 149 N.J. Super. 346 (App. Div. 1977), cert. granted 75 N.J. 29 (1977), that such payment would constitute payment for services not rendered and would thus be ultra vires. We agree with the Hearing Examiner that this case is distinguishable. Aside from the fact that the Supreme Court has granted certification in Galloway, the instant case concerns the remedy for a N.J.S.A. 34:13A-5.4(a)(3) violation whereas in Galloway, it was an N.J.S.A. 34:13A-5.4(a)(5) violation. We believe that the back pay award is necessary to make Gandy whole for the fact that he was discriminatorily and illegally transferred. The additional two-hundred dollars paid to patrolmen working in the Detective Bureau arises under a specific clause in the parties' 1976-1977 collective negotiations agreement [Exhibit Ch-3 in evid.] which states at Article IX, Sec. 9.01, (b), "All patrolmen appointed detective shall receive an additional compensation from the date of said appointment in the amount of \$200100 per annum prorated." There is no indication that the additional sum is merely a clothing allowance.

Based on the aforementioned facts and after a careful consideration of the entire record herein, the Commission adopts

the findings of fact and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by her.

ORDER

Accordingly, for the reasons set forth above, the Public Employment Relations Commission hereby ORDERS that the Township of Ewing shall:

(1) Cease and desist from

(a) Discriminating in regard to hire and tenure of employment or any term or condition of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

(b) In any manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

(2) Take the following affirmative action

(a) Offer to William J. Gandy reinstatement into the Detective Bureau from which he was unlawfully transferred on January 17, 1977, without prejudice to any rights or privileges enjoyed by him, and to make him whole for any loss of pay he may have suffered as a result of the discriminatory transfer by the Township of Ewing by paying to William J. Gandy the additional compensation he would have received as a Detective from January 17, 1977, the date in which he was unlawfully transferred to date of his reinstatement into the Detective Bureau.

(b) Offer to Robert A. Litz reinstatement to the Traffic Bureau from which he was unlawfully transferred on January 22, 1977, without any prejudice to any rights or privileges enjoyed by him.

(c) Post at the Municipal Building in Ewing Township, New Jersey, copies of the attached notice marked "Appendix A". Copies of such notice on forms to be provided by the Public Employment Relations Commission shall, after being duly signed by respondent's representative, be posted by respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by respondent to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify the Chairman in writing within twenty (20) days of receipt of this Order what steps respondent has taken to comply herewith.

(3) It is further ORDERED that those parts of the Complaints which charge the Township with violations of Sections 5.4(a) (2), (4) and (7) be dismissed.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett, Hipp and Hurwitz voted for this decision. None opposed.

DATED: Trenton, New Jersey
February 16, 1978

ISSUED: February 17, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act including the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer William J. Gandy reinstatement in the Detective Bureau from which he was unlawfully transferred on January 17, 1977, without any prejudice to any rights or privileges enjoyed by him.

WE WILL make William J. Gandy whole for any loss of pay he may have suffered by paying him the sum of money he would have received as Detective from the date he was unlawfully transferred to the date of an offer of return to the Detective Bureau.

WE WILL offer to Robert A. Litz reinstatement in the Traffic Bureau from which he was unlawfully transferred on January 22, 1977 without any prejudice to any rights or privileges enjoyed by him.

TOWNSHIP OF EWING

(Public Employer)

Dated _____

By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

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ROBERT A. LITZ,

Charging Party.

Docket No. CI-77-9-99

SYNOPSIS

A Commission Hearing Examiner issues her Recommended Report and Decision in two consolidated cases of unfair practice proceedings. The Charging Parties alleged that Ewing Township had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act by discriminatorily demoting William J. Gandy from Detective Bureau to the Patrol Division and Robert A. Litz from the Traffic Bureau to the Patrol Division because of their active roles as officers of the P.B.A. and because they presented overtime claims under the collective negotiations agreement.

The Hearing Examiner concludes that the transfers were not routine transfers as the Township argued but that they were because the Charging Parties presented claims under the negotiated agreement and were discriminatory and motivated in part by an intent to discourage the exercise of protected rights in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3).

The Hearing Examiner recommends that the Commission order the Respondents to cease and desist from such activity, offer Gandy reinstatement to the Detective Bureau from which he was unlawfully transferred on January 17, 1977 without prejudice to any rights and privileges enjoyed by him, to make him whole for any loss of pay he may have suffered as a result of the Township's improper conduct and to offer Litz reinstatement to the Traffic Bureau from which he was unlawfully transferred on January 22, 1977 without prejudice to any rights or privileges enjoyed by him, to post appropriate notices and to advise it employees of the steps taken to comply with the order.

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 conclusions of law.

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Appearances:

For the Charging Parties

Ruhlman and Butrym, Esqs.
(Mr. Paul T. Koenig, Jr., of Counsel)

For the Respondent

Dietrich, Allen and St. John, Esqs.
(Mr. Charles P. Allen, Jr., of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

Unfair Practice charges were filed by William J. Gandy and Robert A. Litz (hereinafter Charging Parties whenever referred to collectively) on January 17, 1977 (Gandy's charge) and January 24, 1977 (Litz's charge). The Charging Parties allege that the Township of Ewing (hereinafter the Township) had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the Act) in that

the Township discriminatorily transferred Gandy from the Detective Bureau to the Patrol Division of the Police Department and Litz from the Traffic Bureau to the Patrol Division of the Police Department because of the Charging Parties' engaging in protected activities on behalf of the Ewing P.B.A., Local No. 111 within the meaning of the Act.^{1/}

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, Complaints and Notices of Hearing were issued on March 17, 1977, along with an Order Consolidating Cases.

Pursuant to the Complaint and Notice of Hearing, hearings were held on April 25, 1977, April 29, 1977, May 20, 1977, May 27, 1977, and June 6, 1977 at which time parties were given an opportunity to examine witnesses, to present evidence and to argue orally. The Hearing Examiner granted a motion of the charging parties that witnesses be sequestered. A request that the Respondent be allowed one resource person was granted. (Chief of Police Calvin R. Steepy served as that resource person.) Counsel for the Charging Parties and the Township requested an opportunity to argue orally at the close of the hearings

^{1/} Gandy specifically alleged that the Township violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7). Litz specifically alleged that the Township violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3), and (7). These subsections provide that an employer, its representatives or agents are prohibited from:

- "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
- "(2) Dominating or interfering with the formation, existence or administration of any employee organization.
- "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act.
- "(4) Discharging or otherwise discriminating against any employee because he had signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.
- "(7) Violating any of the rules and regulations established by the commission."

rather than submit written briefs. Oral summation was on July 27, 1977.^{2/} Upon the entire record in this proceeding, the Hearing Examiner finds:

(1) The Township of Ewing is a Public Employer within the meaning of the Act and is subject to its provisions.

(2) William J. Gandy and Robert A. Litz are public employees within the meaning of the Act and are subject to its provisions.

(3) The Ewing P.B.A. Local #111 is an employee representative within the meaning of the Act and is subject to its provisions.

(4) An Unfair Practice Charge having been filed with the Commission alleging that Ewing Township has engaged or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

BACKGROUND

The Ewing Township Police Department consists of 53 police officers.^{3/} The Department is divided into different bureaus or divisions which serve different police functions. They are the **Patrol** Division, which is the largest division, the Detective Bureau, the Juvenile Bureau, the Traffic Bureau and the Records

^{2/} References to transcript in this report will be as follows: April 25, 1977 will be cited as Tr. I-page reference, April 29, 1977 will be cited as Tr. II-page reference, May 20, 1977 will be cited as Tr. III-page reference, May 27, 1977 will be cited as Tr. IV-page reference, June 6, 1977 will be cited as Tr. V-page reference, June 27, 1977 will be cited as VI-page reference and July 27, 1977 will be cited as Tr. VII-page reference.

^{3/} Tr. I-43.

and Identification Bureau. The chief administrative officer of the Ewing Township Police Department is Chief of Police Calvin R. Steepy. The second in command is Captain Robert Plagg. In the chain of command under the captain are lieutenants and sergeants who are assigned to the different bureaus and divisions referred to.

The Charge of William J. Gandy

William J. Gandy was appointed a patrolman in the Township of Ewing on March 25, 1968. As is the practice for new officers in Ewing Township, he was first appointed to the Patrol Division. He served as a patrolman in that division until March 1, 1971, at which time he was transferred into the Detective Bureau.

Officer Gandy served the customary six month probationary period in the Detective Bureau. At the end of this period Detective Gandy received the \$200.00 increase in salary that all detectives in Ewing Township receive after having satisfactorily served the six month probationary period in that bureau.^{4/} This increase in salary was implemented by the Township of Ewing filing a "Request for Personnel Action" form with the New Jersey Department of Civil Service. The form was filed on September 5, 1971.^{5/}

4/ The collective negotiations agreement between the Ewing P.B.A., Local 111 and the Township of Ewing provides that patrolmen appointed as detectives receive \$200.00 additional compensation. Exhibit CH-3, Art. IX §9.01.

5/ Exhibit C-11

While in the Detective Bureau, Detective Gandy received specialized training in detective-related fields. Attendance at special schools was approved by the Chief of Police. The specific training he received included classes in organized crime, narcotics, Identikit, child abuse and surveillance.^{6/}

The Detective Bureau in Ewing Township consists of six detectives, one sergeant and one lieutenant. The sergeant assigned to the Detective Bureau is Edward M. Schaller and the lieutenant assigned to the bureau is Clarence Morris. Detective Gandy served continuously in the Detective Bureau from March 1, 1971 until January 17, 1977. On January 4, 1977, Detective Gandy was informed by Captain Robert Plagg that he would be transferred back to the Patrol Division effective January 17, 1977.^{7/} On January 17, 1977 Officer Gandy filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Township transferred Gandy because of Gandy's exercise of rights guaranteed him by the Act.

P.B.A., Local 111 is the majority representative for all patrolmen employed by the Township of Ewing.^{8/} William J. Gandy was elected President of the Ewing Township P.B.A., Local No. 111 in June of 1976 for a one-year term. At the time of the transfer he was serving his term as president.

^{6/} Tr. V-37, 38.

^{7/} An appropriate Civil Service form was filed requesting a title change for Gandy from Detective Patrolman and a salary change to eliminate the additional \$200.00. It was signed by Plagg on January 7, 1977 and by Gandy and was effective on January 17, 1977. Exhibit C-10.

^{8/} Included in the unit are patrolmen and patrolmen-detectives. (See collective negotiations agreement Exhibit CH-3, Art. 1, §1.01 and 1.02) sergeants, lieutenants, the captain and the chief are not included in this unit.

The collective negotiations agreement between the Township of Ewing and the Ewing P.B.A., Local No. 111, provides that the President or his designee is allowed a reasonable amount of time to adjust grievances for members during regular working hours.^{9/}

There is a five step grievance procedure and the President of the P.B.A. has the responsibility to present grievances through the five steps of the procedure. According to the testimony, there were occasions when police officers approached Gandy, while on duty in the Detective Bureau, to discuss grievances.^{10/}

On December 26, 1976, Detective Gandy was called in to work overtime. While police officers assigned to the Patrol Division work three shifts, i.e., they are on duty around the clock, officers assigned to the Detective Bureau and the Traffic Bureau work only two shifts. They work either 8 a.m. to 4 p.m. or 4 p.m. to 12 midnight--they do not work a shift from 12 midnight to 8 a.m., a shift that is commonly referred to as "midnights." He worked about one hour.^{11/}

The following day Detective Gandy put in a request for overtime pursuant to the contract.^{12/} The contract provides under the Article VII Section 7.03 Overtime:

"Any member called back to duty after being dismissed

^{9/} Tr. V-76, CH-3, Art. III, §3.01

^{10/} Tr. IV-104, III-17, II-81

^{11/} Tr. IV-98

^{12/} The contract was signed November 15, 1976 and was retroactive to January 1, 1976.

therefrom for any purpose whatsoever, other than his normal regular tour of duty, shall be compensated on an overtime basis, with a minimum of two hours."

Detective Gandy presented the request for two hours overtime compensation pursuant to the contract to Lieutenant Morris in order for the Lieutenant to present it to the Chief for payment. All overtime compensation in the Ewing Township Police Department must be approved by the Chief.^{13/} When this request was presented to the Lieutenant by Gandy he said to Gandy,

"If you keep shoving the contract at Chief Steepy, you're going to P.B.A. yourself right out the door.^{14/}

When the request was presented to the Chief, the Chief told Morris that Gandy would get paid this time but that it would never happen again.^{15/} Lieutenant Morris explained that what the Chief meant by this comment was that Morris was to work up a schedule for all detectives so that they would work shift work around the clock, that is 24 hours a day including a midnight shift. This would eliminate overtime since there would always be a detective working. Lieutenant Morris developed a 24 hour work schedule, but it was never implemented.^{16/}

While Chief Steepy could not recall this conversation with Lieutenant Morris,^{17/} Gandy testified that Morris came back to Gandy and told him what the Chief said when the overtime request was made.^{18/} I credit Captain Morris' and Officer Gandy's recollections of the incident. One week after the incident, Gandy was notified he was to be transferred

13/ Tr. IV-98, II-128
14/ Tr. II-128
15/ Tr. II-129
16/ Tr. II-129, IV-100
17/ Tr. I-58
18/ Tr. IV-99

from the Detective to the Patrol Division. He maintained the transfer was punitive for his having exercised a protected right under the Act.

On January 4, 1977, when Captain Plagg advised Gandy that he was to be transferred, Gandy asked the Captain if the reassignment had anything to do with his position as P.B.A. President. The Captain replied that it did not and informed him that it was just a change in scheduling. On direct examination, Captain Plagg was very uncertain as to whether he had had a conversation with Gandy or exactly what the conversation was about.^{19/} However, after his recollection was refreshed he did remember the conversation.

On January 6, 1977, Detective Gandy requested by letter an appointment with the Chief to discuss the transfer. Gandy stated in the letter that he felt that his transfer was because of his position as P.B.A. President, because he was exercising his contractual right to overtime, because he adjusted grievances as P.B.A. President which placed him in a conflict situation with both the Chief and the Captain, and because supervisory personnel had recently been expelled from membership in the PBA Local. On January 11, 1977 Gandy met with the Chief of Police to discuss the transfer. At the meeting the Chief told Gandy that the transfer had "no relationship with his activities on his position in the P.B.A."^{20/} On January 17, 1977, Gandy was

^{19/} See Exhibit C-2, a letter dated January 6, 1977 from Detective Gandy to Chief Steepy wherein Gandy refers to the conversation of January 4, 1977 with Plagg that occurred two days prior to the day the letter was written.

^{20/} Tr. I-105

transferred.

Gandy alleges that his transfer was violative of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) because it was motivated in whole or in part by the Township's anti-union animus. He argues that the transfer was a demotion.

The Charge of Robert A. Litz

Robert A. Litz was appointed a police officer in the Township of Ewing in 1971 and initially served in the patrol division. In May of 1974 he was transferred into the Traffic Bureau. He served in Traffic until January of 1977 when he was returned to the Patrol Bureau. While in the Traffic Bureau, officer Litz received certain special training. He attended a Special Accident Investigation School and received emergency medical technician training. He is a certified radar instructor.

The functions of the Traffic Bureau include investigation of accidents, investigation of motor vehicle violations, including the issuance of summonses, general traffic flow duties and court appearances when required as a result of these duties. There are four officers assigned to the Traffic Bureau. Officers in a Traffic Bureau, like those in a Detective Bureau work only two shifts--they do not work the "midnight" shift.

On January 18, Captain Plagg informed Litz that he was to be transferred out of traffic effective February 2, 1977. Litz had been in the Traffic Bureau since May 27, 1974. When Plagg called Litz in to advise him of the transfer, he congratulated Litz on a good job he had done in the Traffic Bureau.

Litz was elected Vice-President of the Ewing Township P.B.A. Local No. 111 in June 1976, the same election in which Gandy was elected President. Both Chief Steepy and Captain Plagg deny that they were

aware that Litz was vice-president of the P.B.A. They acknowledge that they knew elections had taken place and that they had probably received letters informing them of the officers of the P.B.A.; however, both testified that they could not recall that Litz was P.B.A. vice-president when the decision was made to transfer him.^{21/} Prior to Litz's election as vice-president, he served as chairman of the Judiciary Committee.^{22/}

Captain Plagg testified "I was not aware of the fact that Litz was vice-president. I had no idea. It was a complete surprise to me."^{23/} The Chief testified "I should have known that Patrolman Litz was an officer of the P.B.A. way back when I received a letter for the new officers, but I honestly did not know that he was an

- ^{21/} Litz testified that he attended several disciplinary hearings as an officer of the P.B.A. and that both the Chief and the Captain were aware of his presence (Tr. III-109). Other officers attended these hearings. The Hearing Examiner was requested to take administrative notice of the fact that a number of officers had attended the hearings in the instant matter. I am not convinced that because of Litz's attendance at these hearings, the Township was aware that he was engaging in protected activities.
- ^{22/} Superior officers (excluding the Chief) were expelled from membership in the Local because of a dispute over dues payment. As Judiciary Committee Chairman Litz wrote to all Superior Officers on March 3, 1976 asking that they either pay their dues or they would be expelled from membership. (Exhibit C-6) The Chief was excluded because as a life member of the P.B.A. he did not pay dues. He apparently did resign, however, along with others who resigned or were expelled. The Township argued that this was a dispute between superior officers and policemen which should not lead the undersigned to find that a climate of anti-union animus was fostered by the Township. (Tr. VII-59) It seems to the undersigned that this was offered to show that the Township was aware that Litz was active in P.B.A. affairs and that the respondent had notice thereof. My decision is not based on this conflict.
- ^{23/} Tr. II-83

officer of the P.B.A. even when he was transferred, nor would it have made any difference in my decision to transfer him.^{24/}

Officer Litz points to the following cronology of events leading up to this transfer.

On December 27, Officer Gandy made a request for overtime under the contract.

On January 4, 1977, Officer Gandy was informed by Captain Robert G. Plagg that he would be transferred effective January 17, 1977.

On January 6, 1977, Gandy wrote to the Chief protesting the transfer and the Captain was aware Gandy was protesting the transfer.^{25/}

On January 17, 1977, Gandy personally served a copy of the unfair practice charge on Plagg.^{26/}

On January 18, Patrolman Litz testified that he had a dispute with Captain Plagg concerning overtime. He testified as follows:

"A. I was advised that I was being transferred in the afternoon of January 18. Prior to that the Captain and I had a discussion.

Q. Alright, where did the discussion that you just referred to take place?

A. It took place in the hallway.

Q. When?

A. In the morning. There was a notice that came out in the absence of Patrolman Gandy who was the president, since I was vice-president. There was an order that came out from the Township Committee stating that overtime pay for officers in excess of 1920 hours will not be paid and since I was a member of the negotiating team and I was up there when we negotiated with the Township Committee and they promised us

^{24/} Tr. I-103

^{25/} Tr. II-92

^{26/} Plagg remembered being served but he could not recall when he read the charge. (Tr. II-93) He stated he did not read the charge when it was served but could not recall when he read the charge, "I think I glanced at it then... I may have read it later on that day, even the next day."

that they would pay us as soon as we documented any officer over 1920 hours without question. And the Township reneged on their promise and they gave it to us in the form of writing. I spoke with Captain about it. I told the Captain, I says, if need be, we'll throw a law suit and we will publicly expose them as lying to the police officers. The Captain got very outraged with it. The Captain then told me that I better check into the facts before I jumped the gun and I didn't know what I was talking about. Approximately four hours later I was transferred out of the Traffic Division. 27/

The Captain could not recall having had this discussion with Litz. 28/
The discussion with Litz was not refuted and I credit Litz's recollection. 29/

Litz alleges that his transfer was violative of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7) because it was motivated in whole or in part by the Township's anti-union animus. He argues that this transfer was a demotion.

27/ Tr. III-118

28/ Tr. II-109

29/ There were other occasions when Captain Plagg was confronted with instances that he could not recall. For example, he initially could not recall the reason why one of the other officers (Lieutenant Houghton) was transferred. When his memory was refreshed he stated it was performance related--this reason was disputed by two other witnesses. (Tr. II-87) He could not recall any other transfers out of bureaus or into bureaus that occurred the first week of January. (Tr. II-91) He could not recall when, he first learned that Gandy was complaining of his transfer. (Tr. II-92) He could not recall when he dictated a letter to Litz of the transfer. (Tr. II-93) He could not recall whether or not he had seen Gandy's letter of the sixth to the Chief. (Tr. II-92) He could not recall if Gandy delivered the charge to him on January 17. (Tr. II-93) He did admit it was personally delivered.

The Position of the Township

The Township maintains that transfers from the Patrol Bureau to the Detective Bureau or Traffic Bureau are not a promotion and further that transfers to Traffic Bureaus or Detective Bureaus are not permanent, that there is no tenure as a detective or traffic officer. They maintain that officers can be transferred out of the Bureaus at any time and are routinely so transferred. The Township also maintains that transfers in to and out of the Detective Bureaus and the Traffic Bureau are a prerogative of management and not a term and condition of employment and are frequently made by the Chief of Police solely in the interest of good police administration and that such transfers are not made for punitive reasons.

The Township argues that many of the officers who have gone into the Traffic Bureau and the Detective Bureau were members and/or officers of the PBA. (It should be noted that every police officer in Township except for superior officers, sergeants, lieutenants, captains and chief are members of the P.B.A. Therefore all patrolmen who are transferred in any way are members of the local.)

The Township denied that it committed any unfair practices within the meaning of the New Jersey Employer-Employee Relations Act. The Township argues that the charging parties have not met their burden of proof by a preponderance of the evidence that the Township has violated the Act and moves that the charges be dismissed.

The Township contends that it was unaware that Litz was engaging in protected activities and that Litz was temporarily assigned to the Traffic Bureau and transferred out of that bureau within the discretion of the Chief of Police.

The Township emphasized that the Chief's decision to transfer Gandy was consistent with the Chief's, recognized and accepted philosophy of running the Ewing Township Police Department by rotating police officers to round out their experiences.

ANALYSIS

There are certain differences between being a patrol officer and serving in the Traffic Bureau or the Detective Bureau. All police officers are assigned to the Patrol Division when they are first appointed to the force.^{30/} The Chief of Police decides who is to be selected to go into the Detective Bureau.^{31/} When an officer is transferred to the Detective Bureau, they no longer work in uniform--they work in plain clothes. As noted above, after serving the six month probationary period, detectives receive an additional \$200.00.

They do not work "midnights" and they also carry a gold badge indicating they are a detective rather than the silver badge which patrolmen carry. The Chief also selects which officers are to be assigned to the Traffic Bureau. There are only four traffic officers. Traffic officers work two shifts--they do not work "midnights". Many ~~witnesses testified as to whether or not they felt a~~ transfer into the Traffic Bureau or the Detective Bureau is considered a promotion in Ewing Township. The Chief testified that a transfer from the Patrol Bureau to the Detective Bureau or the Traffic Bureau is not a promotion in his mind. The Chief testified that transfers from patrol into the specialized Bureaus gives officers varied police experiences and makes them better patrol officers ultimately. The

30/ There was one very unusual exception to this normal course of conduct that has no relevance to the instant matter.

31/ Tr. I-45

Chief recognized that there was a desire of patrolmen to be assigned to these specialized bureaus. In discussing the rotation in and out of these bureaus and to patrol he noted that "I,m looking for the overall effect of the knowledge gained for the department and you don't take one individual, if you can help it and move him from one bureau to another because men that haven't had a chance to get into any of them will say, my God, he's the fair haired boy. So, you put him back into the patrol and you see what he's going to do back in patrol again."^{32/} The Chief also noted in discussing Gandy's term in the Detective Bureau that "I think that he is very fortunate to have been in the Detective Bureau that long and hopefully what he's learned there will an asset to the work in the patrol."^{33/}

Most of the witnesses indicated that in their minds there was no question but that a transfer to the Detective Bureau is a promotion. Witnesses had the same general feeling about selection for Traffic Bureau. Captain Plagg testified "Being promoted into the Detective Bureau is an ego thing, if anything else."^{34/} Sergeant Schaller testified as to being placed into the Detective Bureau himself

"A. I would say I thought it was more responsible. Whether the department felt the same way, I don't know."

Q. They thought enough of you to trust you?

A. I had an ego feeling that I had some self-esteem out of that because I felt that at least they thought enough of me."
(Tr. III-23)

Patrolman Kucker testified as follows when asked about transfers:

"Q. As a police officer do you recall (sic) the transfer from Detective Bureau to Road Patrol as punitive?

^{32/} Tr. I-115

^{33/} Tr. II-39

^{34/} Tr. II-114

A. Yes, I do, It's a demotion.

Q. It's a demotion in your opinion?

A. Sure.

Q. In what respect?

A. Well, everybody strives to become--well to advance in their job--I mean, I didn't come on the job to become a patrolman twenty years and detective is like a step up. Everybody likes it--everybody wants it." 35/

On cross-examination Kucker testified:

"A. I think it's a general attitude that it's a promotion, no matter what department you go into, Juvenile, Regular Detective or Traffic. I believe all the men consider it to be a promotion to be elevated like that into a speciality job." 36/

Officer David Morgan testified when discussing transfer into the Detective Bureau.

"A. Well, it's like a promotion. It's the same as traffic, you work two shifts." 37/

Detective Gandy testified as follows:

"Q. Going back to the time when you were selected for the Detective Bureau did you feel that that was an advancement or promotion?

A. Certainly did.

Q. Would you tell me the reason why you felt that it was an advancement or a promotion?

A. Well, Detective Bureau in this department as well as any other one is an achievement, that the men look upon as being something special, that not everyone is considered for, asked to be or is put into the Detective Bureau. It's more or less an honor to be selected to be put into the Detective Bureau.

It more or less singles you out as an above the average patrolmen, because you're doing that much better a job that they want you in a more specialized area. Many of the men are envious of the position. While in Detective Bureau I've had occasion where men came to me and asked me if I could put in a good word if an opening ever became available. I assured them that I couldn't because

35/ Tr. V.-105

36/ Tr. V-123

37/ Tr. III-90

I have no say in the matter of who gets selected into the Detective Bureau. But the men as a whole look upon it as an advancement." 38/

While the Township maintains that transfer from patrol to Detective Bureau or to Traffic Bureau is nothing more than a routine assignment and not a demotion affecting a term and condition of employment, the undersigned is convinced from all of the testimony that a transfer from Detective or Traffic Bureau to patrol status in the Ewing Township Police Department is in the minds of all concerned a demotion. This makes the transfer a change in a condition of employment and accordingly, if motivated even in part by an intent to discourage protected union activity would constitute an unfair practice. (In re Township of Wayne, P.E.R.C. No. 78-10, 3 N.J.P.E.R. (1977)).

The Chief testified that the transfers of Gandy and Litz were to round them out as police officers. He maintained that transfers to the patrol division were consistent with his philosophy that the patrol is the backbone of the Police Department. The chief's philosophy was not disputed by other witnesses; however, neither the Chief nor the Captain were able to enumerate the routine transfers that occurred in the Ewing Township Police Department.

As an indication that in the Ewing Township Police Department transfers into and out of the Detective Bureau are just routine transfers, the Chief said that "There have been about 17 officers that have been in and out of the Detective Bureau since 1967 that I put in, taken out. (sic) 40/ The Chief did not name the 17 people who had been

38/ Tr. IV-119, 120

39/ In re Township of Wayne, P.E.R.C. No. 78-10-N.J.P.E.R. (1977)

40/ Tr. I-47

transferred in and out of the Detective Bureau routinely. In discussing the 17 men the Chief said were routinely transferred in and out of the Dective Bureau the Chief asked:

"Q. The 17 then, you were able to name three. Of the other 14, do you recall any of the other 14 names and the reasons why they were transferred out of the Detective Bureau?

A. There's no reason. It's part of the philosophy that I have based on reading various books that are known in police circles as a proper way to manage and administer a small to medium sized Department." 41/

Some, like Sergeant Schaller, were transferred out of the Detective Bureau while serving as detective-patrolmen when promoted to sergeant and assigned to a patrol platoon. Another officer was transferred out of the Detective Bureau after he had worked in the Detective Bureau only one day and after he asked to be transferred because he did not like work.^{42/} Another one of the 17 was Detective Gandy.^{43/}

The Chief testified that there was a detective who had been removed out of the Detective Bureau after having served there for 12 years. The Chief noted that that was Lieutenant Houghton.^{44/} This transfer occurred in 1971. The Chief maintained that it was a routine transfer although the reason for the transfer was disputed by others. Captain Plagg testified as to Lieutenant Houghton's transfer as follows:

"Q. What was the reason? (of Lieutenant Houghton's transfer)

A. Lieutenant Houghton I don't believe was doing a good job at that time. I was his immediate supervisor and I thought it was about time we made the transfer and put somebody else in there.

41/ Tr. I-96
42/ Tr. I-50
43/ Tr. I-50
44/ Tr. I-99

A. So it was performance related?

Q. Yes, in his particular case, yes." 45/

Lieutenant Houghton testified as to his transfer. He felt the reason for his transfer was as follows:

"Q. Now directing your attention specifically to the time when you were relieved of duties as the detective sergeant, could you tell me how that came about, if you know, whether there was any reason or was it a routine or what actually occurred?

A. Well, what happened, I came to work one afternoon and the Captain and I had some words over some clothing that was issued to me.

Q. Which Captain would that be?

A. Captain Plagg.

Q. Who was the Chief at that time?

A. Chief Steepy.

Q. O.K.

A. Immediately after the argument between myself and the Captain with the clothing (sic), I was relieved of my duties in the Detective Bureau. I was told to report on duty in uniform." 46/

The undersigned is not convinced that the transfer of Lieutenant Houghton was just a "routine transfer".47/ The only transfer out of the Detective Bureau that Sergeant Shaller could recall since Schaller was appointed as a sergeant in 1973 was that of Detective Gandy. Sergeant Shaller could not recall anyone else being transferred out.48/

45/ Tr. II-87

46/ Tr. III-72

47/ The undersigned need not make a credibility judgement on the purpose of the transfer to reach a decision in the instant case. It is sufficient that I do not find this to be a routine transfer.

48/ Tr. III-41

Sergeant William Chmielewski was transferred out of the Detective Bureau when he passed a promotional examination and was made a Patrol Sergeant.^{49/} Lieutenant Morris was temporarily transferred out of the Detective Bureau to serve as acting captain in the captain absence.^{50/} Captain's absence.^{51/}

Captain Plagg testified that there were 23 men who had been transferred in and out of the Detective Bureau and that 17 of them had held some PBA office.^{51/} Captain Plagg testified that Officer Joseph Canulli was transferred out of the Detective Bureau in the normal course of events. He noted that he went from Patrol Bureau to Detective Bureau to Patrol Bureau into Juvenile Bureau and currently is in the Traffic Bureau. The Captain was uncertain as to exactly how long he had been in the Detective Bureau whether or not he was an officer of the PBA.^{52/}

Witnesses were unable to enumerate routine transfers that occurred in spite of the fact that the Chief testified that there were 17 transfers since he had been Chief and the Captain testified that there were 23 transfers, 17 of which were PBA officers that had been made in the Ewing Township Police Department.

In the Ewing Township Police Department transfers from platoon to platoon within the Patrol Division are made annually. The contract provides:^{53/}

"The tours of duty shall continue as they are currently in force except as the Township may from time to time, reasonably alter, ~~except and change same, providing~~ however, reasonable notice be given to members affected, except in cases of emergency." The plan of transfers which were effective January 1, 1977 were reported to a meeting held to all police present at from Captain Plagg dated January 23, 1976. ^{54/}

49/ Tr. III-33

50/ Tr. III-38

51/ Tr. II-84

52/ Tr. II-89

53/ Exhibit C-3, Article VIII, §7.04 Tours of Duty

The platoon transfers which were effective January 3, 1977 were sent out in a memorandum to all police personnel from Captain Plagg dated November 29, 1976.^{54/} This memorandum lists the names of all of the patrolmen and sergeants and what their platoon assignments were as of the beginning of January.^{55/}

The Chief testified he had intended to move Patrolman Gandy out of the Detective Bureau "approximately one year before I moved him."^{56/} "I don't recall the date but at that time I was moving Sergeant Shaller into Detective Bureau and Sergeant Shaller asked me if I would hold off on that until he got acclimated and knew more about the proceedings in the Detective Bureau. Other than that Gandy would have been out of Detective Bureau a year before."^{57/}

Actually, this conversation did not take place--in 1976 but took place either in late 1973 or early 1974 which was the time that Shaller was assigned as a supervisor in the Detective Bureau.^{58/} This was at least three full years prior to Gandy's transfer. The Chief alone made the decision to transfer Gandy. The Chief testified that the transfer was not performance related. He testified it was strictly a routine transfer. He maintains that he had made the decision three years earlier and for some reason waited three years in order to implement it. All the evidence indicates that transfers out of bureaus like Detective and Traffic are made very quickly and on the spot and not after long delays.

^{54/} Exhibit C-4

^{55/} The Charging parties have not alleged that the Township has violated N.J.S.A. 34:13A-5.4(a)(5) (refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment) The undersigned will not therefore consider whether or not these charges constitute a refusal to bargain under the Act because reasonable notice was not given to them pursuant to §7.04 of the contract.

^{56/} Tr. I-72

^{57/} Tr. I-73

^{58/} Tr. III-4

Sergeant John Hutchinson who is the sergeant in charge of the Traffic Bureau testified there have been 11 or twelve different men in traffic since it was established. Hutchinson maintains the transfers in and out of the Traffic Bureaus like the Detective Bureau are routine transfers. After a careful examination of all the testimony given in this case, the undersigned has been unable to determine the names of the 11 or 12 people who were "routinely" transferred out of the Traffic Bureau.

The Chief testified that Patrolman Baran was routinely transferred out of Traffic. The Chief noted that while Baran had gone to traffic investigator's school at Northwestern University, this did not deter the Chief from transferring Baran.^{59/} "This is only a very simple routine transfer that I have done many many times in the past with other officers and I will do in the future."^{60/} When the Chief was asked whether or not Patrolman Baran had requested to be transferred out of Traffic, the Chief responded that he could not remember nor could the Chief recall when Baran was transferred.^{61/}

Another patrolman that was transferred out of Traffic was Officer John P. Monte, Jr. Officer Monte was charged with having taken an unauthorized absence from work. When Officer Monte was questioned as to the action that was taken against him as a result of this trip he testified:

"A. On my arrival back into the City of Trenton, I was informed that I had been taken out of traffic and there were charges lodged against me, eight charges, and that I was back on road patrol."

^{59/} Charging Parties proffered that because they had received specialized training, they felt they would remain in their respective bureaus. Approximately 12 other officers attended a traffic investigation extension course given by Northwestern University at a location in Hamilton Township, New Jersey.

^{60/} Tr. II-45

^{61/} Tr. II-46

"Q. Who advised you that you were back on road patrol?

A. Our Captain.

Q. Did he tell you -- Did you know whose order it was that you be returned?

A. From the Chief.

Q. And did he indicate that this was a punitive measure taken against you because of your conduct, because of what you did?

A. Yes.

Q. Who told you it was punitive?

A. The Captain did.

Q. Did he use the word "punitive," or did he say that--What did he say?

A. He said that being the fact that charges were lodged against me, he felt I wasn't being fair to him or the Department I was taken out of Traffic." 62/

Patrolman John Kucker corroborated the testimony of Patrolman Monty and indicated that Monty was assigned to Traffic Bureau because he took the unauthorized leave and that when he came back he was assigned to Road Patrol. 63/ Sergeant Hutchinson disputed this testimony, he indicated that he was uncertain as to exactly when Monty was transferred out of the Traffic Bureau. He was on vacation at the time of Monty's transfer. He said the transfer was around the time that Monty took his trip. When asked if Monty's trip was the reason for his transfer, he responded "I don't know. He went on to testify.

"Q. Had it ever been discussed why he was transferred in in your presence.

A. No, not actually, no. There are certain things that Patrolman Monty, in his work, didn't stand up to everything and he was warned many times, not been transferred, but by

being corrected on some of his stuff." 64/

The Chief denied that Patrolman Monty's transfer from Traffic to Patrol was as punishment. The Chief testified:

"A. Patrolman Monty's punishment was the five day suspension without pay that he received. Patrolman Monty was transferred immediately into a unit where they had days off and he didn't show up for work, he moved where that crew was off, and in that way I have no loss of manpower. But I can assure you with Patrolman Monty that he wholeheartly agreed with the five-day suspension that he received in that particular case.

Q. So then what you are saying is that the transfer from Traffic to Patrol was to cover a manpower shortage?

A. No, we always have a manpower shortage in the Police Department. He didn't show up for work. We moved him, it was his day off anyway." 65/

The Chief did testify however that at the end of the five day suspension which was his punishment he was not returned to Traffic. 66/ It seems to the undersigned that the placement of Monty in a particular patrol platoon with days off was a criteria used in deciding where to place Monty more than a reason to remove him from the Traffic Bureau. The undersigned is not convinced that the transfer was performance related as Sergeant Hutchinson testified, or that it was for scheduling purposes. It seems to the undersigned that it was to punish him.

CONCLUSION

The issue before the undersigned, however, is not whether or not the chief has the authority to make transfers within the Traffic Bureau or the Detective Bureau or the Patrol Division, but rather if the transfers were motivated even in part because of the Charging Parties' exercising protected activities under the New Jersey Employer-Employee Relations Act, whether that would constitute a violation of the Act.

64/ Tr. III-53

65/ Tr. VI-40, 41

66/ Tr. VI-42

The Chief of Police is delegated by the Township committee to run the Police Department and the Commission has recognized that a public employer may be bound by the actions or decisions of that public employers' designated agents or representatives in accordance with the principals of the law of agency and certain applicable sections of New Jersey Employer-Employee Relations Act.^{67/}

Futhermore, the issue before the undersigned is not whether or not a transfer into the Detective Bureau or Traffic Bureau is a permanent transfer out of which someone can never be transferred, but rather again if the transfers were motivated even in part because of exercising protected activities under the Act, whether that would constitute a violation of the Act. The Township does not dispute that the Act bars discrimination for the purpose of discouraging employees in the exercise of rights protected by the Act.^{68/}

Throughout the hearing the Township maintained that the transfers were nothing but routine assignments that are commonly made and they were not demotions.

The evidence does not support the proposition that transfers like Litz's and Gandy's are commonly made. . . . Some transfers have been made when officers in the bureaus were promoted to sergeants and became sergeants in the Patrol Division to fill a vacancies. Transfers are made on a temporary basis fo fill in for vacationing or ill officers in the other bureaus or the Patrol Division. There have been transfers because people requested transfers. There apparently have been transfers for performance reasons and there have apparently been transfers for punitive reasons.

^{67/} See, e.g., City of Hackensack and Richard Winner, et al., P.E.R.C. No. 77-49 2 N.J.P.E.R. 232 (1976), appeal pending Docket No. A-2546-76 and In re Bergenfield Board of Education, P.E.R.C. No. 90 1 N.J.P.E.R. 44 (1975). See also N.J.S.A. 34:13A-3(e).

^{68/} Tr. V-10, Tr. VII-49.

After careful review of all of the testimony, including that of the Chief's, the undersigned is convinced that in the eyes all members of the Ewing Township Police Department, there is an element of pride and satisfaction in being selected for the Detective Bureau or the Traffic Bureau. I find therefore, that a transfer in or out of Detective Bureau or the Traffic Bureau affects the work situation sufficiently that if the transfer is motivated by a discriminatory consideration it would constitute a prohibited practice under the Act.^{69/}

The Commission has adopted a standard to be used in alleged violations of N.J.S.A. 34:13A-5.4(a)(3). The Commission will find that the Act has been violated if it determines that a public employer's discrimination "in regard to hire or tenure of employment or any terms and condition of employment" (1) was motivated in whole or in part by a desire to encourage or discourage an employee in exercise of the rights guaranteed to him or her by the Act (one of the motivating factors test) or (2) had the attendant effect of so encouraging or discouraging employees in the exercise of those protected rights" (the inherently destructive of employees rights test). In the inherently destructive test, if the act has established, then the improper motive on the part of the employer may be presumed; however, this presumption may be rebutted by evidence that the employer was not motivated by anti-union animus and did have a legitimate reason for his or her act.^{70/}

^{69/} N.J.S.A. 34:13A-5.4 (a)(3). See also Township of Wayne and Wayne PBA Local No. 136, PERC 78-10 3 N.J.P.E.R. _____ (1977).

^{70/} In re Haddonfield Board of Education PERC No. 77-36, 2 N.J.P.E.R. _____ 71 (1977), and In re City of Hackensack PERC No. 77-49, 3 N.J.P.E.R. 143, appeal pending, Docket No. A-2546-76.

Gandy maintains that because he put in a claim for overtime to which he was entitled under a negotiated agreement, he was discriminated against concerning a term and condition of employment by being transferred out of the Bureau.

Litz maintains that because he confronted Captain Plagg with a dispute concerning overtime, he too was discriminated against concerning a term and condition of employment by being transferred out of the Traffic Bureau.

No one would dispute that the level of compensation--wages and hours worked--are terms and conditions of employment. This obviously includes overtime. The PBA and the Township Committee in their negotiations reached an agreement on certain contractual overtime provisions and embodied them in a contract signed by the authorized representatives of the public employer and the majority representative pursuant to N.J.S.A. 34:13A-5.3. Gandy presented a claim under the contract for overtime.

The Chief was concerned about overtime. His feeling about overtime for detectives was established by various witnesses including himself.^{71/}

71/ In discussing the additional \$200.00 detectives receive, the Chief testified:

- "A. There was no overtime in the Ewing Township Police Department at one time and so detectives would get \$200.00 more...Since the advent of the contract and overtime, I've been trying to eliminated it because its not necessary.
- Q. And you say that as long as they get their overtime under the contract that they shouldn't be entitled to any increment as a result of their position?
- A. As far as I'm concerned, my experience of heading the Detective Bureau, as a Detective Captain, in being in a Detective Bureau as a Detective Sergeant, in being Detective Bureau as a Detective, we used to measure our overtime in weeks, not hours."

It was pointed out that the Chief must account to the Township Committee for his budget and report increases in overtime (VII-60). The Chief testified that he had written a memorandum to the Township Committee asking for a clarification of overtime payment for officers working over 1920 hours. (VI-50) The contract provides that employees will receive overtime pay for hours worked in excess of 1920 hours.

When the Chief was presented with Gandy's overtime request through lieutenant Morris, the Chief responded that it would never again. The Township Committee negotiated this agreement with the members of PBA and they were entitled to its provisions. The claim for overtime by Officer Gandy and the argument between Litz and Plagg both relate to overtime and both occurred within less than one month. The undersigned finds that exercising a claim under a negotiated agreement is a protected activity within the meaning of the Act.

I am convinced that the operating event that caused Litz's transfer from Traffic Bureau to Patrol Bureau was the unrefuted argument with Captain Plagg concerning overtime.^{72/} There is no testimony that the transfer was performance related. He was congratulated on his work in traffic.

I am also convinced that the operating event that led to Gandy's transfer was his presenting personal of claim for overtime. There is no testimony that his transfer was performance related.^{73/}

^{72/} The protected activity that Litz engaged in was discussing a contractual dispute concerning overtime to Captain Plagg as a member and officer of the PBA and as a member of the PBA negotiating team.

^{73/} There was testimony by both Gandy and Sergeant Schaller as to differences concerning work attitudes, but all the testimony indicates that the transfer was not work related.

There is no question but that the Township has a management right through the Chief of Police to transfer men within different bureaus and platoons. If the Township had been able to show that this indeed was the practice, I might find differently. However, it is not sufficient for the Township to proffer that they have the authority without proving that it is their practice to exercise that authority.

I find the Township's discouragement of employees from presenting claims for overtime under the contract amounts to "interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by this Act."^{74/}

I further find that by transferring Gandy and Litz after presenting claims for overtime is "discriminating in regard to hire or tenure of employment of any term and condition of employment to encourage or discourage employees in the exercise of their rights guaranteed to them by this Act."^{75/}

The respondent has requested that certain allegations of both charges be stricken and not considered because they are irrelevant. Suffice it to say that the Hearing Examiner has not considered any material she considered irrelevant in arriving at her decision.

The undersigned, on the basis of the foregoing and the record as a whole concludes that the PBA met its burden of proving by a preponderance of the evidence that the Township's action in transferring Officer Gandy from the Detective Bureau and Officer Litz from the Traffic Bureau to the Patrol Division was discriminatory and motivated

^{74/} N.J.S.A. 34:13A-5.4(a)(1)

^{75/} N.J.S.A. 34:13A-5.4(a)(3)

in part by a desire to discourage the exercise of protected rights and was, therefore, violative of N.J.S.A. 34:13A-5.4(a)(3).

I further conclude that the Township's discouragement of claims under the negotiated agreement had a restraining influence and coercive effect upon the free exercise of Gandy's and Litz's rights guaranteed to them by the Act and was violative of N.J.S.A. 34:13A-5.4(a)(1).

Evidence was not offered as to the Township's alleged violations of N.J.S.A. 34:13A-5.4(a)(2), (4), or (7) and the allegations of violations of those subsections of the Act contained in both charges are dismissed.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommendations.

RECOMMENDED ORDER

Accordingly, for the reasons set forth above, the undersigned hereby recommends the Commission issue an ORDER that the Township of Ewing shall

(1) Cease and desist from

(a) Discriminating in regard to hire and tenure of employment or any term or condition of employment of any employee to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

(b) In any manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

(2) Take the following affirmative action

(a) Offer to William J. Gandy reinstatement into the Detective Bureau from which he was unlawfully transferred on January 17, 1977, without prejudice to any rights or privileges enjoyed by him, and to make him whole for any loss of pay he may have suffered as a result of the discriminatory transfer by the Township of Ewing by paying to William J. Gandy the additional compensation he would have received as a Detective from January 17, 1977, the date in which he was unlawfully transferred to date of his reinstatement into the Detective Bureau.^{76/}

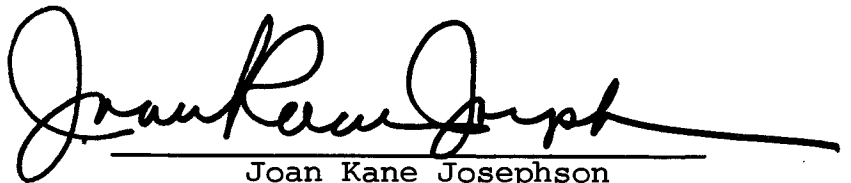
(b) Offer to Robert A. Litz reinstatement in the Traffic Bureau from which he was unlawfully transferred on January 22, 1977, without any prejudice to any rights or privileges enjoyed by him.

^{76/} In recommending this remedy to the Commission the Hearing Examiner is not unmindful of decision in In re Galloway Township Board of Education, PERC No. 76-31, aff'd in part rev'd in part sub. nom., Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 149 N.J. Super 346 (App. Div. (1971) wherein the court voided the Commission's order for a public employer to pay employees back pay where the public employer unilaterally reduced the work hours of said employees in violation of the employer's negotiation obligation under the Act, because such payments were ultra vires for services not rendered. In In re Township of Wayne, PERC No. 78-10 3 N.J.P.E.R. _____, the Commission ordered that a Detective who had been discriminatorily transferred from Detective Bureau to the Patrol Bureau be reinstated with back pay. The Commission distinguished the Wayne Case from the Galloway decision in that the Court in Galloway specifically reserved judgement concerning remedies for illegally dismissing employees. Because of the similarity of the instant case to the Wayne case, I therefore recommend back pay for Gandy.

(c) Post at the Municipal Building in Ewing Township, New Jersey, copies of the attached notice marked Appendix "A". Copies of such notice on forms to be provided by the Director of Unfair Practices of the Public Employment Relations Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify the Director of Unfair Practices in writing within twenty (20) days of receipt of this Order what steps respondent is taken to comply herewith.

(e) It is further recommended that the Commission order those parts of the Complaints which charge the Township with violation of §5.4(a)(2), (4) and (7) be dismissed.



Joan Kane Josephson
Hearing Examiner

DATED: November 16, 1977
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer William J. Gandy reinstatement in the Detective Bureau from which he was unlawfully transferred on January 17, 1977, without any prejudice to any rights or privileges enjoyed by him.

WE WILL make William J. Gandy whole for any loss of pay he may have suffered by paying him a sum of money he would have received as Detective from the date he was unlawfully transferred to the date of an offer of return to the Detective Bureau.

WE WILL offer to Robert A. Litz reinstatement in the Traffic Bureau from which he was unlawfully transferred on January 22, 1977 without any prejudice to any rights or privileges enjoyed by him.

Township of Ewing
(Public Employer)

Dated _____ By _____ (Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780