

P.E.R.C. NO. 89-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF TINTON FALLS,

Respondent,

-and-

Docket No. CI-H-88-41

GERALD TURNING,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Tinton Falls violated the New Jersey Employer-Employee Relations Act when it denied Gerald Turning a promotion to sergeant because of his activities on behalf of the Tinton Falls PBA.

STATE OF NEW JERSEY
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Charging Party.

Appearances:

For the Respondent, Mark S. Ruderman, Esq.

For the Charging Party, Klatsky & Klatsky, Esqs.
(Fred M. Klatsky, of counsel)

DECISION AND ORDER

On February 4, 1988, police officer Gerald Turning filed an unfair practice charge against his employer, the Borough of Tinton Falls. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1), (3) and (4),^{1/} when it denied Turning a promotion to sergeant, allegedly because of his activity on behalf of the police officers' majority representative, the Tinton Falls PBA ("PBA").

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

On April 15, 1988, a Complaint and Notice of Hearing issued. The employer filed an earlier statement of position as its Answer. That statement denied that the police chief's decision to promote two other officers was tainted by a sergeant's memorandum criticizing Turning's PBA activity and asserted that the other two officers would have been promoted even absent that activity.

On July 13, 15, and 19 and August 1, 10, 11, and 31, 1988, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. On September 1, the PBA moved to reopen the record. This motion was denied. The parties filed post-hearing briefs by November 28.

On February 1, 1989, the Hearing Examiner issued his report. H.E. No. 89-21, 15 NJPER 129 (¶20058 1989). He concluded that the employer had discriminated against Turning because of his PBA activity. He recommended an order requiring the employer to promote Turning, with back pay at the sergeant's rate from the date - January 6, 1988 - he would have been promoted absent the discrimination.

On February 27, 1989, after an extension of time, the employer filed exceptions. It asserts that the Hearing Examiner misapplied the standards which In re Bridgewater Tp., 95 N.J. 235 (1985), establishes for assessing allegations of anti-union discrimination; that he improperly relied on a pre-Bridgewater Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd and enf'd App. Div. Dkt. No. A-3230-79 (1/23/81), and that he should

have found that the other two officers would have been promoted even absent Turning's protected activity.

On March 13, 1989, after receiving an extension of time, Turning filed his response. He asks that we adopt the recommended decision and order.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-22) are essentially accurate. We incorporate them with these additions and changes.

Finding no. 4 addresses the negotiations with the PBA for a 1987-88 contract. Merit pay was the stumbling block. The employer offered rank-and-file police officers a 3 1/2% increase plus a merit pay system, but the PBA rejected this offer. An interest arbitrator eventually ruled for the PBA. Meanwhile the Superior Officers Association, affiliated with the PBA, negotiated merit pay plus an 18% increase. This disparity bred hostility between rank-and-file officers and superior officers. Turning confronted Captain McKeller with a copy of the superior officers' contract during the meeting described in finding no. 7 (See, e.g., 3T76-3T77; 6T32-6T35, 6T126-6T127).

Finding nos. 6 and 23a discuss the Jared Stevens grievance. Stevens filed an individual grievance seeking overtime compensation for police academy time. The chief was upset at Stevens (7T86). He asked Turning if Turning had directed Stevens (5T48). After getting PBA support, Turning, as grievance chairperson, filed an organizational grievance. This grievance demanded that officers be given a choice between overtime pay and

compensatory time off. Turning sent this grievance to the chief. The chief denied the PBA grievance the same day (CP-31). The Hearing Examiner credited Turning's testimony that the chief was "extremely hot" and "pissed off" and told then Sergeant Jan-Tausch that "if Turning wanted to file a grievance, [the chief] will show him." The Hearing Examiner did not credit the chief's denial of this statement. The business administrator (also the Director of Public Safety) rescinded the chief's memorandum on overtime (6T69). This ruling upset the chief (5T122; 7T86-7T87).

Finding no. 7 concerns the August 1987 meeting at which Chief White, Captain McKeller and Turning discussed "PBA business" and Turning handed McKeller the superior officers' contract. The accreditation program also related to Turning's PBA activity. That program had a labor relations component which Captain Sueffert had recommended be written by Turning, head of the PBA's Pay Negotiating Committee and Grievance Committee. The Chief adamantly refused (6T59).

Finding no. 11 concerns deviations from the promotional procedures outlined in CP-6. Besides the cancellation of the interviews with the lieutenants, these changes occurred: the lieutenants and captains did not review any personnel files,^{2/} the departmental committee did not make a joint recommendation, and the Director of Public Safety did not interview any candidates.

^{2/} The Chief contradicted himself on whether he had. Contrast 2T40 and 2T66 with 5T23.

Finding no. 15 concerns Lieutenant White's recommendation (CP-3) about promoting Turning. White questioned only one aspect of Turning's productivity: enforcing motor vehicle laws.

Finding no. 16 concerns Lieutenant Jan-Tausch's recommendations about promoting Peterson (CP-18), Gonzalez (CP-19), Turning (CP-20), and two others. Jan-Tausch wrote that Turning was "well-qualified" for sergeant and his "only tarnished area" was his prior office in the PBA "which was in constant challenge to the Administration." He added that Turning would still be qualified if those traits "were not genuine feelings." By contrast, Jan-Tausch praised Petersen and Gonzalez for loyalty and supporting department policy. When the chief wrote his memorandum (CP-13) recommending Petersen and Gonzalez, he stated that Petersen "has always supported departmental policy" and that Gonzalez "has always supported and encouraged the support of departmental policy."

Finding no. 22 concerns the dark room meeting at which McKeller told Turning why he was not promoted. This finding hinges on a credibility determination which we will not displace.^{3/} With respect to Turning's attitude towards other officers when Turning returned from the county prosecutor's office, Turning "buried the hatchet" with these officers, not with McKeller (7T124).

^{3/} We do not agree that Turning's alleged conversations with Councilmen Deutscher and Cohen would not have been probative. McKeller and Turning led opposing employee camps on the merit pay issue and McKeller may have resented Turning's confronting him on that issue or making it public.

Finding no. 23b credits the chief's denial that he told Lieutenant Vitale in 1984 or 1985 that he was aggravated with the PBA and would not make Turning, its then president, a sergeant. We accept that credibility determination. We reject the assertion that there was no "logical" reason for the chief to be irritated with the PBA then. The PBA and Turning had pressed a dispute over shift assignments (1T52-1T54).

Finding no. 23d concerns a PBA meeting in May 1983. The meeting was called to oust the chief (2T92), but that didn't happen. Petersen was then PBA president, but he accepted Jan-Tausch's advice not to run for reelection if he wanted his career to progress (2T91-2T92).

To decide whether the employer discriminatorily denied Turning a promotion, we must apply the Bridgewater tests.^{4/} 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 towards protected activity. Id. at 246. If the charging party meets this burden, a violation will be found unless the employer

^{4/} We dismiss the allegation that subsection 5.4(a)(4) was violated. The evidence does not show that Turning was punished for participating in Commission proceedings.

proves, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. Conflicting proofs concerning the employer's motives are for us to resolve and each case ultimately rests on its own facts. See also UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

We reject the contention that the Hearing Examiner improperly relied upon Tr. of Clark, a pre-Bridgewater case. Bridgewater's first test has always been the law: under Clark as well as under Bridgewater the charging party must prove that protected activity was a substantial or motivating factor in the adverse personnel action. Accord Seattle Seahawks, 292 NLRB No. 110, 130 LRRM 1249 (1989). The Hearing Examiner cited Clark in applying Bridgewater's first test.^{5/} Where Clark and Bridgewater part company is Bridgewater's second test. Under Clark, once an illegal motive was proved, a violation would have been found. Any legitimate motives the employer could prove would affect only the remedy. Under Bridgewater, an unfair practice will not be found at all if the employer can prove that it would have done the same thing absent the illegal motive. When Clark and Bridgewater parted company, the Hearing Examiner stayed with Bridgewater.

^{5/} Since discrimination cases turn on their facts, one case is not a paradigm for another. But factual comparisons may be made.

Applying Bridgewater's first test, the Hearing Examiner found that anti-union animus was a motivating factor in Turning's not being promoted. The employer has not excepted to that finding. Based on our independent review of the entire record, we agree with the Hearing Examiner.

The overtime compensation grievance "pissed off" the chief. He was upset at the police officer who initiated it, the PBA official -- Turning -- who pressed it, and the business administrator who sustained it. The chief told Jan-Tausch that "if Turning wanted to file a grievance, I will show him." Soon after, the promotion process began. Turning was second in seniority and second in the tests given by the Monmouth County Police Chief's Association. But he dropped to the chief's third choice based on the chief's subjective impressions and the recommendations of the other superior officers. The chief relied mainly on the recommendations of McKeller and Jan-Tausch, the two officers who supervised Turning in the patrol division. Jan-Tausch praised Petersen and Gonzalez for loyalty to department policy,^{6/} but criticized Turning for the PBA's constant challenges when Turning was a PBA official. In choosing Petersen and Gonzalez over Turning, the chief echoed Jan-Tausch's praise of their loyalty. While he denied holding Turning's "disloyalty" against him, the Hearing

^{6/} Petersen had accepted Jan-Tausch's advice to withdraw from the PBA leadership and Gonzalez had abandoned his request that the PBA seek changes in shift scheduling.

Examiner did not credit this denial. Under all these circumstances, we are convinced that anti-union animus motivated the chief's promotion recommendations.^{7/}

We now consider whether the employer proved that absent the illegal motive, Turning still would not have been promoted to one of the two sergeant positions. Balancing the employer's proof against the employee's strong showing of anti-union animus, we conclude that the employer has not met its burden of proof.

Of the three officers, Turning was the second most senior (behind Petersen) and the second highest scorer on the combined oral and written tests (behind Gonzalez). The lieutenants and captains recommended Petersen as their first choice and split between Gonzalez and Turning as their second. Jan-Tausch's recommendations were tainted by criticism of Turning's PBA activity. Given the closeness of the candidates, we do not believe that the employer has proved that Turning would not have been promoted if the chief had not been biased. The chief asserted that he picked Petersen and Gonzalez because they were strong leaders, but it was Turning's very leadership skills in rallying PBA support that were held against him. The chief contradicted himself on what materials he considered

^{7/} While we base this finding on evidence of the chief's hostility and Jan-Tausch's recommendations, we are not prepared to say that McKeller was free from hostility towards Turning's PBA activities. See our additions to findings of fact nos. 4 and 22. There is no evidence that the business administrator, Captain Sueffert or Lieutenant White had any anti-union animus.

and whose recommendations he most relied upon; these shifts undercut his explanation of why Turning was not promoted. At the hearing (but not in an earlier letter to Turning's attorney), the chief cited Turning's alleged lack of supervisory experience; but Turning had successfully supervised a shift before. By contrast, McKeller conceded that Petersen had been rigid and overbearing with subordinates and had had problems communicating with them. Given these circumstances and others cited by the Hearing Examiner, we are not convinced that Turning would have been the officer denied a promotion absent the chief's preference for those supporting departmental policy and his distaste for the one who had challenged it.^{8/}

Absent exceptions, we adopt the Hearing Examiner's recommended remedy.

ORDER

The Borough of Tinton Falls is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, by not promoting Gerald Turning because of his PBA activities; and

^{8/} Our decision does not challenge the employer's determination that Peterson and Gonzalez were qualified for promotion. It simply finds that the employer failed to prove that it would not have promoted Turning absent his protected activity.

B. 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, by not promoting Gerald Turning because of his PBA activities.

II. Take this action:

A. Promote Gerald Turning to sergeant, effective January 6, 1988.

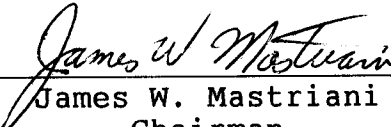
B. Pay Gerald Turning the difference between his rate of pay as a patrol officer from January 6, 1988 to present and the rate of pay he would have received as a sergeant, together with interest in accordance with R. 4:42-11(a)(ii).

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

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

The allegation that the Borough violated N.J.S.A.
34:13A-5.4(a)(4) is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid,
Ruggiero, Smith and Wenzler voted in favor of this decision. None
opposed.

DATED: Trenton, New Jersey
April 28, 1989
ISSUED: May 1, 1989

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, by not promoting Gerald Turning because of his PBA activities.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, by not promoting Gerald Turning because of his PBA activities.

WE WILL promote Gerald Turning to sergeant, effective January 6, 1988.

WE WILL pay Gerald Turning the difference between his rate of pay as a patrol officer from January 6, 1988 to present and the rate of pay he would have received as a sergeant, together with interest in accordance with R. 4:42-11(a)(ii).

Docket No. CI-H-88-41

BOROUGH OF TINTON FALLS

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 89-21

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

In the Matter of

BOROUGH OF TINTON FALLS,

Respondent,

-and-

Docket No. CI-H-88-41

GERALD TURNING,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Borough violated §§5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it failed to promote the Charging Party, Gerald Turning, from Patrolman to Sergeant on January 6, 1988. The Hearing Examiner found that the Borough, principally through its Chief of Police, was motivated by anti-union animus in refusing to recommend the promotion of Turning, in retaliation for Turning's exercise of protected activities, principally the filing of a grievance on behalf of an employee in May 1987. Within two months thereafter, the Chief of Police uttered a hostile and retaliatory statement to another Superior Officer, who later repeated this statement to Turning. It was principally upon this conduct of the Chief of Police that the Hearing Examiner found that the promotional process was tainted against the Charging Party.

The Hearing Examiner used as his paradigm the Commission's decision in Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd by the Appellate Division where a patrolman, who had been active on behalf of the PBA, was passed over twice for promotion to sergeant and this Hearing Examiner, affirmed by the Commission, ordered that the patrolman be promoted with backpay and with interest.

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.

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

In the Matter of

BOROUGH OF TINTON FALLS,

Respondent,

-and-

Docket No. CI-H-88-41

GERALD TURNING,

Charging Party.

Appearances:

For the Respondent, Mark S. Ruderman, Esq. & James P. Hurley, Esq.

For the Charging Party, Klatsky & Klatsky, Esqs.
(Fred M. Klatsky, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 4, 1988 by Gerald Turning ("Charging Party" or "Turning") alleging that the Borough of Tinton Falls^{1/} ("Respondent" or "Borough") has 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. ("Act"), in that on January 6, 1988, the Borough's Business Administrator promoted two of the three patrolmen who were candidates for promotion to sergeant, Turning being one of the

1/ As amended at the hearing from the initial identification of the Respondent as "Tinton Falls Borough Police Department."

three, who was not promoted; Turning has for several years been active on behalf of the Tinton Falls PBA, serving as its President during the negotiations for the 1986-87 collective negotiations agreement, and, additionally, having filed grievances for members of the collective negotiations unit; Turning alleges that he was not promoted to sergeant because of his prior exercise of protected activities; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act.^{2/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 15, 1988. Pursuant to the Complaint and Notice of Hearing, seven days of hearing were held on July 13, 15, 19 and August 1, 10, 11 and 31, 1988,^{3/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant

^{2/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

^{3/} The citations to the transcripts of hearing shall be as follows: July 13, 1988 (1 Tr __); July 15, 1988 (2 Tr __) and thereafter seriatam.

evidence and argue orally.^{4/} Oral argument was waived and the parties filed post-hearing briefs by November 28, 1988.^{5/}

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Borough of Tinton Falls is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Gerald Turning is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Turning has been a Patrolman in the Borough's Police Department since 1981 and has been assigned primarily to the Patrol Division. Beginning in June 1983, he worked for one year with the

^{4/} The delay in the commencing of the hearing was due to conflicts in the schedules between counsel for the parties and the Hearing Examiner.

^{5/} The delay in the filing of the briefs resulted from the Charging Party having filed a Motion to Reopen the Record on September 12, 1988, which was not denied by the Hearing Examiner until October 7, 1988. Additionally, there was a request for an extension of time made by counsel for the Respondent.

Monmouth County Narcotics Strike Force, during which time he was involved in the arrest and indictment of 57 persons involved in narcotics. Also, Turning has been assigned three times to the Borough's Detective Bureau: first for two months in the spring of 1982; second from November 1984 through June 1985; and, finally, from December 1985 through March 1986.^{6/} Due to his workload, Turning consistently requested that another patrolman be assigned to the Detective Bureau but the Chief of Police, Wayne A. White, denied Turning's request, citing manpower shortages. After Turning was reassigned from the Detective Bureau for the third time in March 1986, he was replaced by two patrolmen. [6 Tr 4-6, 8, 10, 12-16, 20].

4. After joining the Tinton Falls PBA Local 251 ("PBA"), Turning was elected Treasurer in June 1983 and became its President in June 1984. Thereafter, in June 1985, Turning was reelected as the PBA's President. During the two years of his Presidency from June 1984 to June 1986, Turning was also the Chairman of the Pay Negotiation Committee ("PNC") and, thus, participated in negotiations for the 1987-88 collective negotiations agreement.^{7/} [6 Tr 22-25].

^{6/} From June 1985 through August 1985, Turning was assigned to supervise his shift because two senior officers in the chain of command were on disability leave (6 Tr 13, 14).

^{7/} The negotiations were protracted and ultimately required resolution through the Commission's interest arbitration procedures. After the Interest Arbitrator's award issued on June 17, 1987, problems continued between the parties in its implementation, which were not finally resolved until August or September 1987 (3 Tr 54, 55; 6 Tr 32, 35, 36).

5. Turning was succeeded as President of the PBA in June 1986 by Gerald Dolan, who immediately appointed Turning as Chairman of the Grievance Committee. Thus, Turning served as both Chairman of the PNC and of the Grievance Committee during 1986 and 1987. [6 Tr 25-27].

6. Jared Stevens, a Patrolman, filed a grievance on his own behalf in the spring of 1987, concerning overtime pay for attending the Monmouth County Police Academy. Thereafter, Stevens requested that Turning seek PBA approval for payment of the arbitration of his grievance. This procedure was necessary since Stevens was not yet a member of the PBA because he had not completed his six months' probationary period. After Turning obtained PBA approval, he filed a separate grievance on behalf of Stevens on May 25, 1987. On the same date, Chief White denied the grievance and suggested that the PBA address the overtime matter in the current collective negotiations. However, the grievance was ultimately sustained by Nicholas R. Smolney, the Borough's Business Administrator, on August 26, 1987. [6 Tr 65-69, 102, 103; CP-26, CP-30 & CP-31].^{8/}

7. Turning testified that in August 1987 he had requested a meeting with Chief White and Captain Melvin L. McKeller for the

^{8/} The Hearing Examiner declines at this point to make any credibility resolutions or to draw any negative inferences with respect to any discrepancies between the testimony of Chief White and that of Turning regarding the Stevens' grievance and the proceedings based upon it (compare 5 Tr 46-48; 7 Tr 86, 99 with 6 Tr 69, 70).

purpose of handing McKeller a copy of the Superior Officers' contract, which McKeller had previously claimed did not exist. According to Turning, the meeting "...was totally about PBA business..." (6 Tr 59). However, McKeller testified that the catalyst for the meeting was a problem involving Turning's participation in an accreditation program. [5 Tr 72-77, 110, 111; 6 Tr 55-59; 7 Tr 105-109, 134-136]. The Hearing Examiner finds that "PBA business" was a significant subject at the August 1987 meeting, granting that an accreditation problem might also have been involved.

* * * *

8. After the promotion of L. Robert Jan-Tausch from Sergeant to Lieutenant in September 1987, Chief White sent a memorandum to Smolney on December 21, 1987, stating that it was important that the vacancy for Sergeant be filled "quickly." (CP-10). Chief White also requested that a position for an additional Sergeant be created in order to provide additional necessary coverage in traffic and other areas.^{9/}

9. On October 2, 1987, Chief White sent a memorandum to Smolney wherein he recommended a policy for promotions of Patrolmen to Sergeant within the Borough's Police Department (CP-6). The ten stated criteria for promotion included the requirement that all Patrolmen with over three years of service be eligible; that the

^{9/} This memorandum from White to Smolney (CP-10) was retroactive in effect in that the promotion procedures for Patrolman to Sergeant were actually implemented by Chief White on October 2, 1987 (CP-6).

eligible Patrolmen take both a written and oral test to be given by the Monmouth County Police Chief's Association and be ranked according to their individual written and oral scores; that all eligible Patrolmen also be ranked according to seniority but that in the overall ranking, the written and oral rankings would be "worth twice as much as seniority"; that the first three Patrolmen according to ranking would be interviewed by a departmental committee consisting of the Chief, the two Captains and the two Lieutenants;^{10/} and that this committee would select the best qualified Patrolman for promotion, based upon the interview, the review of evaluations and personnel records and the supervisory ability of the applicant. The memorandum of Chief White further provided that the departmental committee was to make its recommendations in writing to Smolney, who would interview the recommended Patrolmen, and make the final decision as to who would be promoted. [CP-6].

10. Thereafter, on October 23, 1987, Chief White advised "all personnel" that the written and oral tests for promotion to Sergeant would be given by the Monmouth County Police Chief's Association on December 14 and December 19, 1987, respectively (CP-7). And on December 22, 1987, Chief White was advised by the Police Chief's Association that the written and oral examinations

^{10/} Captain Melvin L. McKeller, Captain William Sueffert, Lieutenant LaDean D. White and Lieutenant L. Robert Jan-Tausch.

had been conducted on these dates, supra (CP-8). On December 28, 1987, Chief White sent a memorandum to Smolney, in which he ranked the ten Patrolmen who had applied for promotion to Sergeant, based upon the written and oral examination results and the additional factor of seniority (CP-15). Since there were at that time two vacancies for promotion to the position of Sergeant, Chief White stated in his memorandum that "Any of the top five officers could fulfill the duties of a Sergeant." The first five candidates were ranked as follows:

David Gonzalez
Gerald Turning
Wayne Petersen
Gerald Dolan
Glenn Rogers

11. Although Chief White's memorandum to Smolney of October 2, 1987 (CP-6, supra), stated that a committee of the Police Department, consisting of the Chief, the two Captains and the two Lieutenants, supra, was to conduct interviews of the candidates for promotion to Sergeant, in point of fact these interviews were conducted without the participation of the two Lieutenants.^{11/}

^{11/} Though Chief White clearly deviated on the procedures outlined by him in Exhibit CP-6, supra, in not having the two Lieutenants participate in the interviewing process, the Hearing Examiner perceives no illegal taint in the promotional process by this omission. The fact is, that for whatever reason, the Chief elected to proceed with the interviewing process without the inclusion of the two Lieutenants. Thus, the apparent conflicts in the testimony of Chief White and that of Lieutenants White and Jan-Tausch is irrelevant to the resolution of the issues raised in this proceeding. [For reference, compare 2 Tr 36, 37, 39, 50; 5 Tr 7-9, 12, 15 with 1 Tr 74; 2 Tr 74, 76-79].

12. On December 21, 1987, the top five candidates for promotion to Sergeant, supra, were directed to report for a promotion interview on December 23rd (CP-14; 5 Tr 13). After the interviews were conducted, Chief White requested recommendations for promotion from the two Captains and the two Lieutenants even though the two Lieutenants had not participated in the interviewing process.

13. On December 29, 1987, McKeller recommended in writing only Petersen and Gonzalez for promotion, omitting any recommendation as to Turning, Dolan or Rogers (CP-17; 2 Tr 53).^{12/} McKeller's written recommendation on behalf of Petersen and Gonzalez depicted them as Patrolmen who were knowledgeable in their duties and responsibilities and had performed well (CP-17, supra). McKeller did not include Turning in his written recommendation to Chief White on December 29, 1987, because he had been instructed to recommend only the two top candidates. McKeller testified that he had no negative feelings toward Turning, adding, however, that Turning was too "easy going." [7 Tr 128-130]. The Chief testified that McKeller told him on December 29th that Turning needed to improve his supervisory skills/ability, that he lacked productivity insofar as motor vehicle summons were concerned and,

^{12/} The Charging Party suggested at the hearing that because of the fact that McKeller's written recommendation to Chief White on December 29th (CP-17, supra) was unsigned, there might have been an additional page referring to Turning or the other two candidates. The Hearing Examiner is satisfied that, based upon the record, McKeller's written recommendation to the Chief consisted of only one page, which referred only to Petersen and Gonzalez (2 Tr 56; 7 Tr 128).

finally, that Turning was not setting a good example for the junior men (5 Tr 103, 105).

14. Sueffert did not testify at the hearing and, thus, the evidence as to his recommendation is limited solely to his written submission to Chief White on December 29, 1987 (CP-16). Sueffert stated that his recommendation was limited solely to the interview of the candidates on December 23, 1987. He eliminated Dolan and Rogers because of their lack of supervisory experience. Of the remaining three candidates, Sueffert ranked Petersen number one and Turning number two. As to Petersen, Sueffert found him the logical choice because of a demonstrated willingness to apply himself to any assignment with positive results. In designating Turning as his second choice, Sueffert found that Turning's experience on the job was about equal to the others and that he received the "highest score to the questions" Sueffert asked him.

15. Lt. White, who is in charge of records and, therefore, has no direct contact with or knowledge of the Patrol Division, submitted three written recommendations to Chief White on December 29, 1987 (CP-3, CP-4, CP-5; 1 Tr 71, 78; 4 Tr 3-5, 7). White recommended Petersen and Gonzalez for promotion to the two vacancies for Sergeant (4 Tr 28-30). In refusing to recommend Turning for promotion, White concluded that Turning's productivity was low and that he needed to grow and gain in overall knowledge (CP-3; 4 Tr 24-28).

16. Jan-Tausch submitted written recommendations as to each of the five top candidates for promotion (CP-18 through CP-22). He recommended Petersen as the "most qualified candidate" (CP-18) and found Gonzalez to be a "very strong candidate" (CP-19). As to Turning, Jan-Tausch observed that Turning had "many capabilities as a supervisor and is well qualified for the position of Sergeant" (CP-20). He went on to note that Turning's "only tarnished area" was that he had previously "held office in the PBA which was in constant challenge to the Administration" of the Police Department. Jan-Tausch testified that his reference to Turning's having held office in the PBA was based upon hearsay and not upon any factual statements made by Chief White, McKeller, Lt. White, Sueffert or Smolney (3 Tr 16-19, 53, 54, 56). Otherwise, Jan-Tausch found Turning a "qualified candidate" for Sergeant. As to Rogers and Dolan, Jan-Tausch found them to be lacking in supervisory experience (CP-21 & CP-22).^{13/} [2 Tr 101; 3 Tr 49, 50; 4 Tr 42, 43; 7 Tr 139].

17. Chief White reviewed the written recommendations submitted by Sueffert, McKeller, White and Jan-Tausch on

^{13/} The Hearing Examiner, unlike the Charging Party, perceives no significant deficiency in the promotional process by reason of the fact that the four superior officers elected to ignore that part of the provision in ¶8 of Chief White's October 2, 1987, memorandum to Smolney (CP-6) that the "personnel records" of the candidates for promotion to Sergeant be reviewed prior to the making of recommendations.

December 29, 1987.^{14/} Prior to receiving the written recommendations of the four superior officers, Chief White had requested that Captains Sueffert and McKeller recommend candidates with strong supervisory strengths. The Chief also testified that he gave added weight to the recommendations of McKeller and Jan-Tausch because they were in the direct supervisory chain of command of the Patrol Division. In fact, the Chief gave McKeller's evaluation the most weight (5 Tr 115). Chief White stated at the hearing that he discounted the recommendations of Sueffert and Lt. White because they did not have direct supervisory responsibility or contact with Petersen, Gonzalez and Turning.^{15/} The Chief testified that Lt. White had been Turning's supervisor for 18 months in the Detective Bureau where White had experienced problems with Turning's attitude and his following directions. In October 1986, McKeller took charge of the Detective Bureau and he, too, had had problems with Turning's attitude and work performance. [2 Tr 38, 39; 5 Tr 16, 18-20, 30, 31, 102, 115].

18. Chief White testified that after receiving the written recommendations from the four superior officers during the morning

^{14/} Chief White testified, consistent with the four superior officers, that he too did not review the personnel files of the candidates (2 Tr 39, 67; 5 Tr 34).

^{15/} It is noted that Chief White, in a letter of January 29, 1988 to counsel for the Charging Party (CP-12), stated that he considered the recommendations of Lt. White and McKeller as having greater relevance in regard to Turning's job performance.

of December 29, 1987, he made his decision to recommend to Smolney that Petersen and Gonzalez be promoted to Sergeant. The Chief then reduced his recommendations to writing on the same date in a memorandum to Smolney (CP-13). This memorandum was delivered to Smolney either on December 29th or the next day together with the written recommendations of the four superior officers for Smolney's consideration. [5 Tr 31-33].

19. In Chief White's promotion memorandum to Smolney (CP-13, supra) he named Petersen and Gonzalez as his first and second choices with supporting reasons, noting that the four superior officers had highly recommended Petersen for promotion and had also recommended Gonzalez. The Chief also noted in CP-13 that Petersen had shown leadership ability when he had been in charge of a shift and, likewise, that Gonzalez had demonstrated supervisory ability when in charge of a shift. In failing to recommend Turning for promotion, Chief White testified that when he read Jan-Tausch's recommendation as to Turning (CP-20), he disregarded as irrelevant the statement of Jan-Tausch that the "only tarnished area" of Turning's "current position has been his previously held office in the PBA which was in constant challenge to the Administration of this Department." Chief White repeated this disclaimer in his letter of January 29, 1988, to counsel for the Charging Party (CP-12). In amplifying upon his reasons for not recommending Turning, Chief White also testified that it was his "feeling" that after Turning was reassigned from the Detective Bureau "...he more

or less came up with an attitude he was only going to do what he had to do and no more, no less. He had the capability of whether in the Detective Bureau or not of performing other duties or coming up with other information which seemed like it was obviously lacking during that period of time..." (7 Tr 96).^{16/} [5 Tr 94, 95, 112, 113]

20. On, or shortly after December 29, 1987, Smolney received from Chief White the latter's recommendations for promotions to Sergeant (CP-13, supra), following which Smolney requested that the Chief supply him with the written recommendations of the four superior officers. Smolney was not totally satisfied with what he had by then received and decided to discuss all of the recommendations with Chief White. In speaking with the Chief during a one-half hour meeting, he focused on three areas, the first of which was the comments of Jan-Tausch "with regard to union activities..." (7 Tr 11). Smolney questioned the Chief as to whether or not his recommendation was based upon the criteria used by Jan-Tausch. The Chief replied that "union activities" were not a reason for his recommending against Turning (7 Tr 12).

^{16/} The Hearing Examiner attaches no weight to the fact that Chief White, in recommending Petersen and Gonzalez for promotion to Sergeant, acknowledged that he had had no personal contact or supervision over Gonzalez nor to the Chief's admission that Petersen had exercised no supervisory authority while in the Traffic Division. Also, no weight is attached to Chief White's admission that he had never checked or compared the personnel files or arrest records of the top three candidates in order to determine who among them was the most productive. [5 Tr 40-43, 117, 118].

Rather, the Chief stated that he had had difficulties with Turnings's performance and did not feel that he was the best qualified officer. Smolney's second area of inquiry with Chief White concerned Turnings's treatment of cases differently, which was indicated by his enthusiasm for narcotics work while in the Detective Bureau versus Turnings's lesser enthusiasm for other types of cases. Finally, in the third area of Smolney's inquiry, he discussed with Chief White the comparative abilities of Turning on the one hand and Petersen and Gonzalez on the other hand as to how they dealt with their subordinate staff when they were senior Patrolmen, i.e., the time taken to impart to the less senior Patrolmen the areas of experience of the more senior Patrolmen. This also led to a discussion between Smolney and the Chief as to the leadership qualities of the three top candidates. In this final area of inquiry the Chief opted strongly for Petersen and Gonzalez over Turning.^{17/} [7 Tr 8-14, 22, 49, 59-65].

21. On January 6, 1988, Smolney sent a letter to Turning, in which he advised him that the Borough had appointed Petersen and Gonzalez to the position of Sergeant and that the remaining candidates would have opportunities to advance in the future (CP-27). On this same date, January 6th, Smolney met with Turning

^{17/} Smolney acknowledged that his decision on whom to promote to Sergeant was based upon the written recommendations of Chief White and the other four superior officers, adding that he had spoken personally only with Chief White (7 Tr 22, 38, 39, 81, 82).

for about ten or 15 minutes. Smolney explained to Turning, in general terms, the reasons for his non-appointment to Sergeant, telling him that he had the potential in the future to become a Sergeant. [7 Tr 68-70].

22. After Turning had met with Smolney, he immediately sought a meeting with Chief White, who was not available. However, Turning was able to meet with McKeller at about 2:30 p.m. on the same day, January 6th. This meeting took place in the "darkroom" in Police Headquarters which, according to McKeller, offered privacy. [6 Tr 44-49; 7 Tr 119]. The testimony of Turning and McKeller as to what was said between them at this meeting is divergent:

a. Turning testified that McKeller gave him two reasons as to why he, McKeller, did not recommend Turning for promotion: first, that McKeller had heard that Turning was going to the Monmouth County Prosecutor's Office and report that McKeller had used a Borough "chipper" to clear his property and; second, because Turning had spoken with Wayne Deutscher in August 1987, when Deutscher was running for Borough Council, at which time Turning had requested that Deutscher make every possible effort to settle the outstanding problems in implementing the Interest Arbitrator's award without a further hearing. Turning disclaimed any knowledge about going to the Prosecutor's Office regarding the "chipper." Turning insisted that the reference by McKeller to Deutscher was directed toward Turnings's activities on behalf of the PBA. [6 Tr 49-54].

b. McKeller testified that the "chipper" incident had occurred two years earlier and yet he had heard about it again within two weeks prior to the "darkroom" meeting with Turning. McKeller saw this as an example of Turning's failure to have approached him if something was wrong and that, because of this fact, he was upset with Turning "to a point." McKeller acknowledged that when he brought up the "chipper" incident, Turning stated that he did not know what McKeller was talking about.^{18/} McKeller denied that Deutscher was ever the subject of discussion between Turning and himself and, therefore, he denied that Deutscher was the alleged "second reason" for his not recommending Turning for promotion. However, McKeller then testified that "...we did have a talk" about a Borough Councilman, Irv Cohen, regarding an incident which had occurred three months prior to the "darkroom" meeting on January 6th. In the discussion involving Cohen, Turning stated to McKeller that he thought that the Superior Officers' contract was a "public record" and that he, Turning, had spoken to Cohen about it. McKeller disagreed with Turning, stating that the contract was not a "public record." McKeller also denied that any part of his discussions with Turning related to Turning's PBA activities. [7 Tr 119-123]. McKeller's "second reason" for not recommending Turning

^{18/} A fair reading of McKeller's testimony indicates that: (1) he acknowledged that the "chipper" incident was the "first reason" given by him to Turning for not having recommended Turning's promotion; and (2) he did not deny Turning's testimony that McKeller stated that he had heard that Turning was going to the Prosecutor's Office (7 Tr 119-121).

for promotion "...was his attitude toward the other officers when he got back from the Monmouth County Prosecutor's Office..." (7 Tr 121). McKeller then amplified upon this reason by testifying that when Turning returned from the Prosecutor's Office "...his feeling was that there were some officers in the Department that he felt were not going to make good cops..." (7 Tr 123).^{19/} Finally, McKeller testified that during the short period of time that Turning had worked for him in the Detective Bureau he had been "...an aggressive young cop..." and that he had never harbored any negative feelings toward Turning. [7 Tr 119-128].

CREDIBILITY RESOLUTION:

Turning v. McKeller--Finding of Fact No. 22

Given the fact that McKeller acknowledged that the "chipper" incident was his "first reason" for recommending against Turning's promotion and that McKeller failed to deny Turning's testimony that he had heard that Turning was going to the Prosecutor's Office, the Hearing Examiner credits Turning's version of what McKeller had said to Turning at that point. However, the Hearing Examiner credits McKeller's denial that any part of his discussion with Turning on January 6, 1988, related to Turning's PBA activities, notwithstanding that Turning's conversation with then candidate Deutscher in August 1987 may have concerned the PBA's

^{19/} It is noted that McKeller also testified that after Turning returned from the Prosecutor's Office assignment in 1983 or 1984, he and Turning "buried the hatchet" and eventually "...everything was smoothed over..." (7 Tr 124).

interest arbitration or that his conversation with Councilman Cohen may have concerned the question of whether or not the Superior Officers' contract was a "public record." These two conversations, if true, occurred in undisclosed settings and were too remote to Turning's employment relationship to be probative. Finally, the Hearing Examiner credits McKeller's testimony regarding the "second reason" given to Turning on January 6th, namely, Turning's "attitude" toward other officers when he returned from the Prosecutor's Office in 1983 or 1984. The weight of this finding is diminished by McKeller's subsequent testimony that he and Turning had later "buried the hatchet" and that he had harbored no negative feelings toward Turning.

23. The Hearing Examiner's further findings regarding the proofs adduced as to anti-union animus by the Borough toward Turning are:

a. On or about August 20, 1987, Turning met with Jan-Tausch and Jan-Tausch stated, in connection with the Jared Stevens' grievance, that Chief White had informed him that he "...was extremely hot, he was pissed off...", adding that the Chief then stated that "...if Turning wants to file a grievance, I will show him." [6 Tr 69-71]. The Hearing Examiner credits Turning's testimony as to what Chief White is alleged to have to have said to

Jan-Tausch on August 20, 1987, based upon the absence of a clear denial by the Chief that he made such a statement.^{20/}

b. Louis V. Vitale, a retired Lieutenant from the Borough's Police Department since 1985, testified that when Turning was President of the PBA [sometime between June 1984 and Vitale's retirement in 1985] he had occasion to speak with Chief White about Turning's career possibilities and that "...The only thing that was said was that Jerry wouldn't become a Sergeant...Because of aggravation with the PBA..." (1 Tr 53, 54). Chief White flatly denied making such a statement to Vitale (5 Tr 92, 93). The Hearing Examiner credits the Chief's denial on the basis of his demeanor and the fact that he did not have any logical reason for making such a statement in the time frame of June 1984 through 1985, i.e., no triggering event had occurred.

c. Lt. White acknowledged that "...Within the last month" prior to his testimony on July 13, 1988, he jokingly made a comment to Joseph E. Boeltram, who had recently become President of the PBA, that since Boeltram was now the President he would not get promoted to Sergeant or would have a difficult time (1 Tr 66). This statement by White, if true, was made many months after the refusal of Smolney to promote Turning to Sergeant on January 6, 1988.

^{20/} Chief White's testimony that he did not "recall" making this statement to Jan-Tausch carries significantly less weight than a specific denial (7 Tr 83).

d. In May 1983, Jan-Tausch, who was then a Sergeant, stated to Petersen, who was then the President of the PBA, that if Petersen wanted to consider a career in police work then "...he might not consider running for president..." (2 Tr 91). Jan-Tausch testified that this statement to Petersen was his "opinion," based upon conversations with other Superior Officers and "...other people of authority in the Police Department..." (3 Tr 43). Jan-Tausch also repeated this statement of opinion to Patrolman Joseph R. Milano. Milano testified that Petersen had since cut his ties with the PBA, giving as an example of Petersen's refusal to become involved in the interest arbitration proceedings during 1987 when he stated to Milano "...You have to understand that a person in my position can't get involved in these issues..." (3 Tr 79). [2 Tr 87-89, 91-93; 3 Tr 40-44, 79-82, 97, 98].

e. Sometime in 1987, Turning requested of McKeller that he be placed on the 8:00 p.m. to 4:00 a.m. shift, which was the shift to which Gonzalez had been assigned since 1984. Because of Turning's seniority he was to have displaced Gonzalez on this shift. Gonzalez was so upset by the impending change of shifts that he asked Boeltram and Milano to schedule a special PBA meeting in an attempt to change the shift hours or obtain rotations so that he would not have to make a shift change. At Gonzalez's request a special PBA meeting was scheduled but, however, one hour before the meeting McKeller spoke to Gonzalez in his office and told him that he would not have to change shifts. Since that date, Gonzalez has

taken no part in PBA activities and, according to Milano, Gonzalez has "...cut himself free..." (3 Tr 90). However, Gonzalez did subsequently serve as Chairman of the PNC during the contract negotiations for the 1988-89 collective negotiations agreement but, unlike the previous negotiations when Turning was Chairman of the PNC, there was no animosity between the parties in the negotiations and the Borough obtained from the PBA the merit pay provision that it had sought previously. [3 Tr 87-91; 6 Tr 121-123, 133-135].

DISCUSSION AND ANALYSIS

The Respondent Borough Violated §§5.4(a)(1) And (3) Of The Act When It Failed To Promote Gerald Turning To The Position Of Sergeant On January 6, 1988, Because Of His Prior Exercise Of Activities On Behalf Of The PBA.^{21/}

This case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)^{22/} in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.^{23/} In such

^{21/} The Charging Party failed to adduce any evidence whatsoever that the Respondent Borough violated Section 5.4(a)(4) of the Act, there being no evidence that Turning was discriminated against because he signed or filed an affidavit, petition or complaint or had given any information or testimony under the Act other than that which occurred in the instant proceeding.

^{22/} The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

^{23/} These provisions of the NLRA are directly analogous to Sections 5.4(a)(1) and (3) of our Act.

cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision, in this case the Borough's failure to promote Turning on January 6, 1988; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242), i.e., the employer must establish a legitimate business justification for its action.

The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (see 95 N.J. at 246).^{24/} Finally, as in any case involving alleged discrimination, the Charging Party must establish a causal connection or nexus between the exercise of the protected activity and the employer's conduct in response thereto: see Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

^{24/} The Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action" (95 N.J. at 242).

The Borough acknowledges that Turning has satisfied the first part of the Bridgewater test, i.e., having engaged in extensive protected activities under the Act, beginning with his having been elected Treasurer of the PBA in June 1983. Thereafter, Turning served as its President from June 1984 through June 1986. Also, it is undisputed that after leaving the presidency of the PBA in June 1986, Turning became Chairman of both the Grievance Committee and the PNC, serving in these capacities in 1986 and 1987. As PNC Chairman he participated in the negotiations for the 1987-88 collective negotiations agreement. These negotiations were of extended duration and ultimately required the services of an Interest Arbitrator, whose award issued on June 17, 1987. Thereafter, the implementation of the award was not settled until August or September 1987. While serving as Grievance Chairman, Turning filed a grievance on behalf of Jared Stevens on May 25, 1987, which concerned overtime pay for Stevens when he attended the Monmouth Police Academy.^{25/} Although Chief White denied the Stevens grievance on the date of its filing, May 25th, the grievance was ultimately sustained by Smolney on August 26, 1987. Finally, Turning met with Chief White and McKeller in August 1987 where

^{25/} The Commission has on many occasions found that the filing of grievances is a protected activity under the Act: See Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); and Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986).

Turning handed McKeller a copy of the Superior Officers' contract. While there was some dispute about the purpose of the meeting, the Hearing Examiner has found that "PBA business" was a significant subject. [See Findings of Fact Nos. 4-7, supra].

There being no dispute either by way of admission or proof that Turning engaged in the above protected activities on behalf of the PBA from 1983 through 1987, a priori the Borough had knowledge of Turning's exercise by of these activities within the meaning of the second part of the Bridgewater test. Hence, the remaining question is whether or not there is prima facie evidence that the Borough manifested hostility or anti-union animus toward Turning sufficient to satisfy the Bridgewater caveat, supra, that the "Mere presence of anti-union animus is not enough..." The Charging Party must also establish that "...anti-union animus was a motivating force or a substantial reason..." for the Borough's decision not to promote Turning to the position of Sergeant on January 6, 1988.

The Hearing Examiner finds and concludes that the Charging Party's proofs as to hostility and/or animus more than satisfy the prima facie requisite of Bridgewater, supra. For example, on August 20, 1987, six days prior to the date that Smolney sustained the Jared Stevens' grievance, Turning met with Jan-Tausch who stated, in connection with this grievance, that Chief White had informed him that he "...was extremely hot, he was pissed off...", adding that "...if Turning wants to file a grievance, I will show him..." The Hearing Examiner has credited Turning's testimony as to what Chief

White is alleged to have said, according to Jan-Tausch. [See Findings of Fact Nos. 6, 23a, supra]. This evidence as to animus is most damaging to the Borough inasmuch as it occurred in the processing of the Stevens' grievance, which Chief White originally denied on May 25, 1987. Of added import is the fact that Chief White's statement to Jan-Tausch occurred only a few days prior to Smolney's sustaining of the grievance in favor of the PBA. Finally, the Chief's statement occurred shortly before he and Smolney initiated the promotion process for Sergeant in the early part of October 1987.

The Commission has held on more than one occasion that "timing" is an important factor in determining whether hostility or anti-union animus may be inferred: University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 8 (¶17002 1985); and Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988). Relying upon the factor of timing in the above events, especially from May 25, 1987 through August 1987, the Hearing Examiner draws an inference that animus toward Turning in the promotion process had its genesis, at least in part, during this time period.

Although not directed at Turning personally, and admittedly remote in time^{26/}, the Hearing Examiner has found as a fact that

26/ Untimely background evidence is relevant to the drawing of inferences as to timely evidence: I.A.M. Loc. Lodge 1424 (Bryan Mfg. Co.) 362 U.S. 411, 45 LRRM 3212 (1960).

in May 1983, Jan-Tausch, who was then a Sergeant, stated to Petersen, who was then the President of the PBA, that if Petersen wanted to consider a career in police work then "...he might not consider running for president..." Although Jan-Tausch testified that this statement was his "opinion," based upon conversations with other Superior Officers and "...other people of authority in the Police Department...", he repeated it to Patrolman Milano. Milano testified that Petersen thereafter cut his ties with the PBA and refused to become involved, all of which indicates clearly to the Hearing Examiner that the statement of Jan-Tausch to Petersen, even though it occurred five years earlier, had a chilling affect upon Petersen's exercise of protected activities as then President of the PBA.^{27/} [See Finding of Fact No. 23d, supra]. However, the Hearing Examiner is not persuaded that the evidence adduced with respect to Gonzalez's change-of-shifts problem has established any anti-union animus on the part of the Borough since all that happened was that McKeller told him that he would not have to change shifts after it appeared that this would necessarily occur notwithstanding Turning's seniority. Thereafter, Gonzalez served as Chairman of the PNC for the 1988-89 collective negotiations agreement. [See Finding of Fact No. 23e, supra].

^{27/} This conduct of Jan-Tausch as an agent of the Borough would, if timely, have constituted an independent violation of Section 5.4(a)(1) under N.J. Sports & Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 550 fn. 1 (¶10285 1979). See also: Manville Bd. of Ed., P.E.R.C. No. 89-19, 14 NJPER 567 (¶19238 1988), adopting H.E. No. 88-14, 13 NJPER 777, 782-3 (¶18298 1987).

On December 29, 1987, Jan-Tausch submitted his recommendations as to each of the five top candidates, recommending Petersen as most qualified and Gonzalez as a very strong candidate. However, in finding that Turning has many capabilities as a supervisor and was well qualified for the position of Sergeant, Jan-Tausch went on to state that Turning's "only tarnished area" was his having previously held office in the PBA, "...which was in constant challenge to the Administration..." of the Police Department. Admittedly, Jan-Tausch stated that his reference to Turning's having held office in the PBA was based upon hearsay and not upon factual statements by the Chief, McKeller, Lt. White, Sueffert or Smolney. Jan-Tausch added that otherwise Turning was a "qualified candidate" for Sergeant.

This above "tarnished area" statement by Jan-Tausch obviously placed both Chief White and Smolney in a difficult situation. While they were obviously eager to disclaim it, Jan-Tausch, as a Lieutenant, was an agent of the Borough whose conduct could bind it. Notwithstanding the disclaimers of The Chief and Smolney that the statement of Jan-Tausch played no role in their decision not to promote Turning, the Hearing Examiner concludes that this statement of Jan-Tausch is additional proof that the Borough manifested animus toward Turning. [See Findings of Fact Nos. 16, 19 cf. 20, supra]. Chief White testified that he gave added weight to the recommendations of both McKeller and Jan-Tausch because they were in the direct supervisory chain of command of the Patrol

Division. Having acknowledged that additional weight was given to the recommendation of Jan-Tausch, the Hearing Examiner cannot credit the disclaimer of Chief White that Jan-Tausch's "tarnished area" statement in his recommendation of December 29th played no role in the Chief's and Smolney's decision to pass over Turning for promotion to Sergeant. [See Finding of Fact No. 17, supra].

An unfavorable inference as to the Borough's motivation may also be drawn from the fact that Chief White stated at the hearing that he had discounted the recommendation of Lt. White because he did not have direct supervisory responsibility for Petersen, Gonzalez and Turning whereas, in a letter of January 29, 1988, to counsel for the Charging Party, the Chief stated that he considered the recommendations of Lt. White and McKeller as having greater relevance in regard to Turning's job performance. Focusing only on Lt. White, the Chief testified that Lt. White had been Turning's supervisor for 18 months in the Detective Bureau where he had experienced problems with Turning's attitude and his following directions. Thus, Chief White was inconsistent in stating at the hearing that he had discounted Lt. White's recommendation as to Turning for lack of direct supervisory responsibility and then acknowledging shortly thereafter that Lt. White's recommendation had greater relevance in regard to Turning's job performance because he had been Turning's supervisor for 18 months in the Detective Bureau. [See Finding of Fact No. 17, supra]. Following federal precedent in the private sector, the Commission has found that when

an employer offers "shifting reasons" for its alleged discriminatory conduct this latter conduct is relevant to evaluating motivation. The Commission found "suspect" and rejected the administrative reasons proffered by the employer in Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985), citing Coca-Cola Bottling Co., 232 NLRB 794, 97 LRRM 1290 (1977). See, also: NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 100 LRRM 2303 (9th Cir. 1978) and Akron General Medical Center, 232 NLRB No. 140, 97 LRRM 1510 (1977).

Although not conclusive, the Hearing Examiner takes note of the fact that Chief White sent a memorandum to Smolney on December 28, 1987, in which he ranked the ten Patrolmen who had applied for promotion, based upon the written and oral examination and the additional factor of seniority. Chief White had stated on December 28th that any of the top five Patrolmen "could fulfill the duties of a Sergeant." In the ranking, Gonzalez was first, Turning was second and Petersen was third. [See Finding of Fact No. 10, supra].

Given the statement of Chief White on December 28th that any of the top five officers could fulfill the duties of a Sergeant, it is difficult to credit the Chief's many second thoughts as to Turning between December 28th and the date of his meeting with Smolney a day or two later, during which time the Chief stated that he had developed difficulties with Turning's performance and did not feel that he was the best qualified officer. As a result of this turnabout the Chief opted strongly for Petersen and Gonzalez over

Turning in his meeting with Smolney, notwithstanding that Turning was number two in the ranking of the ten officers (CP-15). Further, it strains credulity to believe that the Chief's turnaround on the matter of Turning's fitness and qualifications resulted from the impact of the recommendations of three of the four Superior Officers, which the Chief received on December 29, 1987. Once again, this conduct on the part of the Chief suggests to the Hearing Examiner that the "shifting reasons" decision of Dennis Tp., supra, is applicable, thus rendering the Chief's turnaround "suspect" and deserving of rejection.

The Hearing Examiner, having previously found and concluded that the Charging Party has established prima facie that Turning had engaged in extensive protected activities on behalf of the PBA since at least 1983, and that the Respondent Borough knew of these activities, the Hearing Examiner is also satisfied that the Charging Party has established prima facie [if not by a preponderance of the evidence] that the Borough manifested hostility or anti-union animus toward Turning in the exercise of his protected activities on behalf of the PBA.

* * * *

The paradigm in resolving the case at bar is Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd App. Div. Dkt. No. A-3230-79 (1981). In that case Officer Xifo, who was active on behalf of the PBA, was passed over twice for promotion to Sergeant, despite his qualifications, which included his lead in points on a

Civil Service list and his substantial productivity rating. Xifo had also performed as an Acting Sergeant for a six-month period. This Hearing Examiner found that the proffered reasons for not promoting Xifo, i.e., that he was irrational, rash and over-reactive, were pretextual and after-the-fact. The Commission affirmed the Hearing Examiner and the Appellate Division affirmed the Commission. The Commission concluded at one point that "...the question in a section (a)(3) charge of employer discrimination is not whether the employee promoted was qualified, but whether another qualified employee was passed over due, at least in part, to his engaging in protected union activity..." (6 NJPER at 188). This Hearing Examiner had concluded that from all of the evidence presented, the "...inference (was) so strong as to leave no doubt that the Charging Party's union activities were the primary, if not the sole reason, for his not being promoted to Sergeant in 1979..." (6 NJPER at 188). Tp. of Clark clearly fits the facts presented by the instant case.

The Charging Party herein has also cited the cases of N.J. Dept. of Human Services, P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); Tp. of Bloomfield, P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987); and Union Cty. Bd. of Social Services, P.E.R.C. No. 89-35, 14 NJPER 651 (¶19273 1988) in support of its position.

In Human Services the State was found to have unlawfully failed to promote a patrol officer. The Commission ordered the State to promote this individual to the position of Sergeant with

backpay and interest. This, of course, was the precise remedy ordered in Tp. of Clark.

In Tp. of Bloomfield, the discriminatee sought promotion to Deputy Chief in the Township's Fire Department but was held to have been denied this promotion because of his exercise of protected activities and an anti-union statement by the Fire Chief a year or two earlier. There, the Township failed to adduce any evidence in response to that of the Charging Party. The Commission ordered that the promotion be made with backpay and interest.

Finally, in Union County Bd. of Social Services the Commission affirmed its hearing examiner, who had found that an employee was denied promotion to the position of Training Technician because she also held the office of Union President. The evidence did not support the employer's contention that she was not qualified for the position, i.e., there was no evidence that her holding of union office would create a conflict of interest in the position to which she was to be promoted.

* * * *

The above decisions of the Commission, particularly Tp. of Clark, would appear to afford an ample basis for granting the relief sought by Turning in this case. This result can only be avoided if the Respondent Borough has established by a preponderance of the evidence that the same action, i.e., the non-promotion of Turning to Sergeant, would have taken place even in the absence of his protected activities on behalf of the PBA (95 N.J. at 242, supra).

In other words, has the Borough established a legitimate business justification for its action?

It is noted once again, that Chief White failed to mention any deficiencies in Turning's performance, or, for that matter, in any of those of the other nine candidates, when he sent his December 28th memorandum to Smolney (CP-15). Further, in CP-12, the Chief's letter to counsel for the Charging Party of January 29, 1988, the Chief failed to make any mention of the lack of supervisory experience on the part of Turning as a reason for not recommending his promotion. Further, there appears to be no documentation of the lack of supervisory experience on the part of Turning in his personnel file (CP-1).^{28/} Finally, Turning was assigned to supervise his shift when two senior officers in the chain of command were on disability leave between June 1985 and August 1985, which suggests recognition by the Chief or a Superior Officer that Turning possessed some supervisory capacity (see Finding of Fact No. 3, supra). It will be recalled that in Tp. of Clark, Xifo's having taken responsibility for the supervision of a shift was considered a significant factor in his qualification for promotion to Sergeant (6 NJPER at 187, 188).

In his December 29th recommendation as to Turning, Lt. White acknowledged a change in Turning's "interests" over the last

^{28/} Again, resort to Turning's personnel file tends to refute the testimony of the Chief, McKeller and Lt. White, regarding Turning's productivity (see Findings of Facts Nos. 13, 20, supra).

few months "reflective in his performance...", which appears to suggest that the "change" was positive. Lt. White concluded that Turning needs to "continue to grow and gain an overall knowledge" in his position. [See CP-3]. This can hardly be considered a negative evaluation as to Turning's attitude or productivity.

As to McKeller, his testimony was that while he had no negative feelings toward Turning, Turning was "too easy going," that he had told the Chief on December 29th that Turning needed to improve his supervisory skills/ability and that Turning lacked productivity insofar as motor vehicles summons were concerned, adding that Turning was not setting a good example for the junior men. [See Findings of Fact Nos. 13, 17, 22, supra].

At least up to this point, the Hearing Examiner is not persuaded by the evidence that Lt. White and McKeller had observed such deficiencies in Turning's performance as a Patrolman to warrant their recommending against his promotion to Sergeant as each did on December 29, 1987.

Chief White acknowledged that, given the split recommendations among his Superior Officers, the "final decision" came down to him (2 Tr 59). Smolney acknowledged that he relied only upon the written recommendations of the four Superior Officers, the written recommendations of the Chief and his one-half hour meeting with the Chief, after which he followed the recommendations of the Chief that Petersen and Gonzalez be promoted (7 Tr 42, 43, 49).

The Charging Party argues with merit that the respective qualifications for promotion to Sergeant as between Petersen and Gonzalez on the one hand, and Turning on the other hand, demonstrate that Turning's qualifications were such that, given his No. 2 ranking on CP-15 and the record evidence, supra, he should have been one of the two candidates promoted to Sergeant. For example, McKeller acknowledged on cross-examination that he was aware that Petersen had had serious problems in communicating with subordinates in 1983 and that he was overbearing. McKeller also acknowledged that he "may have" been familiar with an evaluation of Petersen in 1985, which stated that Petersen tended to be quite rigid when dealing with the men under him. Finally, McKeller stated as "true," that in other evaluations, Petersen had demonstrated a problem in communicating with the men under him. [7 Tr 140, 141]. The case of negatives as to Gonzalez appears to be less compelling than as to Petersen, Gonzalez's problem having been his unwillingness to change shifts. [3 Tr 88-90; 5 Tr 135; 7 Tr 131, 132].

Thus, when one considers all of the evidence adduced as to the qualifications and deficiencies of Petersen, Gonzalez and Turning, respectively, Turning's qualifications appear to be consistent with his having been ranked No. 2 on CP-15, based on the test scores and the seniority factor. Given the pervasive evidence of anti-union animus, as manifested by Chief White and Jan-Tausch, the Hearing Examiner finds and concludes that, as stated in TP. of Clark, supra, the question in a case of alleged discrimination

against an employee who was denied a promotion "...is not whether the employee promoted was qualified, but whether another qualified employee [here Turning] was passed over due, at least in part, to his engaging in protected activities..." (6 NJPER at 188)(emphasis supplied).

In the final analysis, the case at bar is governed by the Bridgewater analysis as set forth initially above, in addition to the factual parallels and the reasoning of the Commission in Tp. of Clark. This latter case, and the other authorities cited above, compel the conclusion that the Charging Party has proven by a preponderance of the evidence that Turning's protected activities were a substantial or a motivating factor in the Borough's decision to pass him over for promotion to Sergeant on January 6, 1988. The Borough's business justification defense has not been proven by a preponderance of the evidence as required by Bridgewater.

* * * *

Based upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Borough violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when on January 6, 1988, it failed to promote Gerald Turning to the position of Sergeant in its Police Department.
2. The Respondent Borough did not violate N.J.S.A. 34:13A-5.4(a)(4) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to promote employees such as Gerald Turning because of the exercise by him of protected activities on behalf of the PBA.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to promote Gerald Turning to the position of Sergeant in the Police Department.

B. That the Respondent Borough take the following affirmative action:

1. Forthwith promote Gerald Turning to the position of Sergeant in the Police Department, without prejudice to any rights or privileges that he may have enjoyed since January 6, 1988, with backpay, calculated by the difference between his pay as a Patrolman during the period since January 6, 1988 and the rate of pay that he would have received as a Sergeant if he had been promoted on January 6, 1988, together with interest at the rate of

6% per annum for the year 1988 and 7% per annum for the year 1989 in accordance with R.4:42-11(a)(ii).^{29/}

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

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

C. That the allegations that the Respondent violated N.J.S.A. 34:13A-5.4(a)(4) be dismissed.



Alan R. Howe
Hearing Examiner

Dated: February 1, 1989
Trenton, New Jersey

^{29/} The Appellate Division in Tp. of Clark, supra, specifically approved this portion of the Commission's remedy.

Recommended Posting

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to promote employees such as Gerald Turning because of the exercise by him of protected activities on behalf of the PBA.

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 failing to promote Gerald Turning to the position of Sergeant in the Police Department.

WE WILL forthwith promote Gerald Turning to the position of Sergeant in the Police Department, without prejudice to any rights or privileges that he may have enjoyed since January 6, 1988, with backpay, calculated by the difference between his pay as a Patrolman during the period since January 6, 1988 and the rate of pay that he would have received as a Sergeant if he had been promoted on January 6, 1988, together with interest at the rate of 6% per annum for the year 1988 and 7% per annum for the year 1989 in accordance with R.4:42-11(a)(ii).

Docket No. CI-H-88-41TINTON FALLS BOROUGH POLICE DEPARTMENT
(Public Employer)

Dated _____

By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.