

P.E.R.C. NO. 98-99

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Respondent,

-and-

Docket No. CO-H-94-403

MILLVILLE POLICE SUPERVISORS  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the City of Millville. The Complaint, based on an unfair practice charge filed by the Millville Police Supervisors Association, alleges that the City violated the New Jersey Employer-Employee Relations Act when it restructured the police department and altered the promotional policies to deny a sergeant a promotion in retaliation for his protected activity. The Complaint further alleges that the City retaliated against the sergeant by refusing to reimburse him for authorized work expenses. The Commission finds that protected activity was not a substantial or motivating factor in the City's decision to reorganize the police department and to promote another employee to the one lieutenant position. The Commission adopts the Hearing Examiner's finding that the City did not unlawfully deny any reimbursement requests or act unlawfully with respect to assignments, training courses, or any other term and condition of employment.

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

P.E.R.C. NO. 98-99

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Respondent,

-and-

Docket No. CO-H-94-403

MILLVILLE POLICE SUPERVISORS  
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gruccio, Pepper, Giovinazzi, De Santo  
& Farnoly, attorneys (Stephen D. Barse, of counsel)

For the Charging Party, John T. Barbour, P.A., attorney

DECISION

On June 29, 1994 and September 15, 1995, the Millville  
Police Supervisors Association filed an unfair practice charge and  
amended charge against the City of Millville. The Association  
alleges that the City violated the New Jersey Employer-Employee  
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1),  
(2), (3), (4), (5), (6), and (7).<sup>1/</sup>

---

<sup>1/</sup> These provisions prohibit public employers, their  
representatives or agents from: "(1) Interfering with,  
restraining or coercing employees in the exercise of the  
rights guaranteed to them by this act. (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

Footnote Continued on Next Page

On May 6, 1996, a Complaint and Notice of Hearing issued with respect to paragraphs (b), (c) and (d) of Count 9 of the amended charge. These paragraphs allege that the City restructured its police department and altered its promotional policies to deny Sergeant Norman Franckle, Jr. a promotion in retaliation for his protected activity. They also allege that the City retaliated against Franckle by refusing to reimburse him for authorized work expenses. The remaining allegations of the Complaint were dismissed.

On June 3, 1996, the City filed an Answer denying that it had altered its promotional policies. It also maintained that it had reimbursed all unit members for authorized expenses.

On October 15, 16, and 17, 1996 and January 15 and 16, 1997, Hearing Examiner Regina A. Muccifori conducted a hearing. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

---

1/ Footnote Continued From Previous Page

exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission.

On May 15, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-31, 23 NJPER 419 (¶28196 1997). She found that the City was not hostile to Franckle's protected activity and that the Association had not presented any evidence in support of its 5.4a(2), (4), (5), (6) and (7) allegations. She concluded that the restructuring of the police department -- which eliminated a lieutenant position which might have gone to Franckle -- was not motivated by anti-union animus but was based on a legitimate business reason. She also found that there was no anti-union animus in the promotion of Sergeant Thomas Riley, rather than Franckle, to the one lieutenant vacancy which did exist. She further found that the City did not unlawfully deny any of Franckle's reimbursement requests or act unlawfully with respect to his assignments, training courses, or any other term and condition of employment.

While the Hearing Examiner concluded that a memorandum by Director of Public Safety David Vanaman could constitute an independent 5.4a(1) violation, she did not so find because it was not so pled or presented by the Association.

On June 23, 1997, the Association filed exceptions. It objects to, or proposes to supplement, several factual findings. It also contends that the Hearing Examiner erred in concluding that the City was not motivated by anti-union animus in restructuring the department and in promoting Riley rather than Franckle to lieutenant. On July 9, the City filed an answering

brief supporting the Hearing Examiner's findings of fact and conclusions of law. It filed a cross-exception objecting to one finding of fact.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (23 NJPER at 420-424) with this modification.

We modify finding no. 16 to state that the Hearing Examiner found that Chief William Herman was qualified as an expert in police administration.

The Association made objections and comments regarding these findings: 8, 9, 11-14, 15, 16, 18-21, 22-24, 27, 28, and 30. The City excepts to finding no. 31. Except as stated earlier, we reject these exceptions. Where the Association or the City has asserted facts at variance with those found by the Hearing Examiner or disputed her credibility determinations, we explain our reasons for rejecting the exceptions in the course of this decision. Unless otherwise stated, the Association's factual exceptions are rejected because they restate the Hearing Examiner's findings, propose to add unnecessary information, or incorporate legal conclusions. We begin with a summary of facts and chronology.

Franckle, a member of the police force since 1976 and a sergeant since 1989, is president of the Association. Vanaman was elected City Commissioner in May 1993, after several years as a

member of the Millville Concerned Taxpayers Association. Campaigning on a ticket of fiscal responsibility, he had highlighted the escalating salaries of top managers and had pledged to use City monies efficiently. Vanaman was designated Director of Public Safety, see N.J.S.A. 40:72-6, the Commissioner charged with oversight and policy responsibility for the police and fire departments. He and Chief Herman, a friend of Franckle's, do not have a good working relationship. While Herman recognizes that Vanaman has responsibility for making policy decisions concerning the police department, he believes that Vanaman intrudes in day-to-day operations.

In September 1994, Franckle spoke at a public meeting of the City Commission. On behalf of the Association and the PBA, which represents the rank-and-file police officers, Franckle opposed what those organizations perceived as Vanaman's interference with the Chief's responsibilities.

From late fall 1994 through February 1995, Vanaman held a series of meetings with, and solicited recommendations from, the Mayor, City administrator and City solicitor concerning the department's managerial structure. Chief Herman participated in two of the meetings.<sup>2/</sup> Aside from the Chief, these officials

---

<sup>2/</sup> The Association asks us to reject the Hearing Examiner's determination that at the time of a February 27 meeting concerning department structure, Vanaman was not sure who was next in line to be promoted to lieutenant. It offers no particularized reasons for rejecting the Hearing Examiner's determination and we decline to do so.

agreed that the best structure was one chief, a captain, and three lieutenants, instead of one chief, no captain, and five lieutenants.<sup>3/</sup> On March 7, 1995, the City adopted an ordinance giving the Director authority to prescribe the internal organization of the police department and Vanaman implemented the one captain, three-lieutenant structure.<sup>4/</sup> Lt. Ronald Harvey was appointed Captain on March 20, 1995 and, based on the Chief's recommendation, Vanaman appointed Riley to fill the lieutenant vacancy created by Harvey's promotion. Riley was listed first on the Civil Service list for lieutenant, although Franckle had a

---

<sup>3/</sup> We reject the Association's proposed finding that, at the hearing, Vanaman denied that the Chief had opposed the new structure. The record includes several acknowledgments by Vanaman that the Chief had opposed his reorganization.

<sup>4/</sup> We reject the Association's contention that, by statute, only the full City Commission has the authority to restructure the department. N.J.S.A. 40A:14-118, governing the establishment of police departments by municipalities, does not appear to preclude the City from adopting this ordinance and the Association points to no authority so construing the statute. CP-89, a memorandum to the City administrator from outside counsel, states only that N.J.S.A. 40A:14-118 makes the police chief responsible for day-to-day operations, including enforcement of rules and regulations and the disciplining of officers. It does not discuss who has the authority to change a police department's organization. Also unsupported is the Association's assertion that a municipality must always act "as a body" concerning police matters. N.J.S.A. 40A:14-118 states that, except as otherwise provided, "the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other than the governing body." However, "appropriate authority" may include a director of public safety or any designated member of the governing body.

higher Civil Service ranking.<sup>5/</sup> Lt. Michael McDonough and Lt. Charles Porch retired in late 1994 and early 1995, respectively. If it were not for the reorganization that eliminated the two lieutenant positions they had filled, Franckle and Sergeant Paul McIsaac would have been eligible for promotion to those positions.<sup>6/</sup>

---

<sup>5/</sup> We reject the Association's proposed findings that: (1) the City did not show that it complied with Civil Service rules in promoting Riley and (2) the promotional list on which Vanaman relied had expired when Riley was appointed lieutenant. We do not have jurisdiction to decide whether Riley's promotion complied with Civil Service rules. As discussed later, we find that hostility to protected activity was not the impetus for promoting Riley rather than Franckle. We also decline to accept the Association's proposed finding that Vanaman did not follow the Chief's March 13, 1995 recommendation to promote Franckle instead of Riley. Chief Herman's post-ordinance memorandum to Vanaman, dated March 13, 1995, unequivocally recommended that Riley, not Franckle, be promoted to fill the vacancy created by the promotion of Lt. Ronald Harvey to Captain. While Herman also recommended that Franckle be promoted to fill the vacancy created by Lt. Charles Porch's retirement, nothing in the memorandum reveals any intent to recommend Franckle for Harvey's former position when, consistent with the restructuring, the position held by Porch was eliminated.

<sup>6/</sup> The Association excepts to the Hearing Examiner's crediting of Vanaman's version of a conversation with McIsaac concerning promotional opportunities in the department. The Association offers no grounds to disturb that determination and we decline to do so. We also reject the City's cross-exception to finding no. 31, where the Hearing Examiner credited Patrol Officer Michael Lesser's version of a conversation he had with Vanaman, also about promotional opportunities. We need not decide whether, as the City contends, the Hearing Examiner made a typographical error and intended to credit Vanaman's version of the conversation. The Hearing Examiner did not rely on finding no. 31 in recommending that the Complaint be dismissed and the City was not harmed by any possible error.



We now address the Hearing Examiner's legal analysis and the Association's exceptions to that analysis. In re Tp. of Bridgewater, 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for having engaged in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner noted that the parties had stipulated to the first two Bridgewater elements -- that Franckle engaged in protected activity and that the City knew of it. However, she found no evidence that the department restructuring or the promotion of Riley rather than Franckle was motivated by hostility toward Franckle's protected activity. The Association challenges this conclusion, asserting that the testimony of Chief Herman, Mayor Van Hook, McIsaac and Lesser all established Vanaman's hostility toward Franckle. It also maintains that the Hearing Examiner erred in not inferring hostility from the timing of the restructuring, Vanaman's refusal to seek data or advice concerning the appropriate department organization, the lack of any budgetary reasons for the restructuring, and Vanaman's deviation from the long-established practice of promoting the top-ranked individual on a Civil Service list.

We find no cause to disturb the Hearing Examiner's analysis. With respect to the alleged direct evidence that the City acted out of hostility toward protected activity, the Association relies primarily on Van Hook's statement that Vanaman, like any public official, might have been "disappointed" with Franckle's public criticism at the September meeting. However, Van Hook also stated that he was "not so sure" there was any dispute between Franckle and Vanaman. Similarly, Chief Herman

stated that Vanaman never discussed with him the issue of whether or not Franckle should be promoted. We have accepted the Hearing Examiner's determination not to credit McIsaac's statement that Vanaman told him he did not want to see Franckle promoted. Against this background, we will not disturb the Hearing Examiner's conclusion that anti-union animus was not a motivating or substantial reason for not promoting Franckle.

We also agree with the Hearing Examiner that neither the timing of the re-structuring, nor the decision-making process leading up to it, supports an inference of anti-union animus. We recognize that Vanaman and other City officials began to consider a reorganization shortly after Franckle's September appearance before the City Commission. However, Vanaman first started reviewing the department's organizational structure when he took office in May 1993. He had informal conversations with Van Hook -- who was Director of Public Safety in the 1980s -- about the three-lieutenant structure which existed during his tenure. Vanaman was also concerned, prior to November 1994, that McDonough and Porch were not performing the high-level responsibilities appropriate for a lieutenant position and were too far removed from actual police work.<sup>7/</sup> After reviewing all the evidence, the Hearing Examiner concluded that Vanaman initiated formal discussions about the reorganization because McDonough's November

---

<sup>7/</sup> McDonough's primary duty was processing requisitions; one officer reported to him. Porch was in charge of the DARE drug prevention program and had no officers under him.

1994 retirement and the possibility of Porch's retirement in early 1995 made it an opportune time to review the department's structure. We have no cause to disturb that determination.

Similarly, we are not persuaded that the restructuring was pretextual because, as stipulated by the parties, it was not based on budgetary considerations. The record supports the Hearing Examiner's conclusion that Vanaman wanted to assign lieutenants to command the department's three divisions, create an additional sergeant position, and fill the long-vacant captain slot in order to have a second-in-command within the department. Hostility toward protected activity is not established because a reorganization is motivated by a desire to deploy personnel differently instead of a desire to cut costs.

The Association next contends that the decision to reorganize the department without obtaining an independent study, or seeking additional advice or data, supports an inference of anti-union animus. Vanaman consulted with the Mayor, the City solicitor and the City administrator -- as well as the Chief. Other than the Chief, these officials agreed that a captain, three-lieutenant organization was appropriate in view of the structure which had been in place during the 1980s, the managerial structure in other City departments, and the duties performed by the two lieutenants whose positions were ultimately abolished. We find nothing suspect about this decision-making process and note that, other than Vanaman, none of these officials had a motive to retaliate against Franckle.

We also agree with the Hearing Examiner that the Association did not demonstrate that Vanaman retaliated against Franckle by promoting Riley, rather than Franckle, to the one lieutenant vacancy which existed after the restructuring. Vanaman followed Chief Herman's recommendation to promote Riley. He believed that he was adhering to the longstanding City practice of promoting "the top person" on the Civil Service list rather than exercising the option to use the "rule of three." While the City does not dispute that Franckle actually had a higher ranking than Riley, the Association did not show that Vanaman so interpreted the list, on which Riley's name appeared first. Further, because Vanaman was following the recommendations of the Chief, who was Franckle's friend, we are persuaded that Vanaman's decision to promote Riley rather than Franckle was not motivated by hostility toward protected activity.

Finally, the Association contends that, in considering whether the City violated 5.4a(3) in not promoting Franckle, the Hearing Examiner gave insufficient weight to a December 21, 1994 memorandum from Vanaman which she found could have constituted an independent 5.4a(1) violation.<sup>8/</sup> The Hearing Examiner reviewed all the evidence in this rather lengthy record, including the December 21 memorandum, and concluded that the City did not alter its department structure or promotional practices to deny Franckle

---

<sup>8/</sup> The Association does not except to the determination not to recommend an independent 5.4a(1) violation.

a promotion. We will not question the weight she gave the memorandum.<sup>9/</sup>

For all these reasons, we find that protected activity was not a substantial or motivating factor in the decisions to reorganize the police department and promote Riley. The Association does not except to the Hearing Examiner's conclusion that the City did not retaliate against Franckle with respect to reimbursement requests and we adopt her recommendations in this regard. We therefore dismiss the 5.4a(1) and (3) allegations. The Association has not filed exceptions to the Hearing Examiner's decision regarding the 5.4a(2), (4), (5), (6) and (7) allegations. We adopt the Hearing Examiner's recommendations that those allegations should be dismissed.

---

<sup>9/</sup> The memorandum was addressed to the Chief, with a copy to Franckle, and did not bear on either the reorganization or Riley's promotion. It concerned the merits of applying for a federal grant, Franckle's allegedly inappropriate comments to the press on the subject, and what Vanaman thought was the Chief's misjudgment in allowing Franckle to speak for the department.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

*Millicent A. Wasell*

Millicent A. Wasell  
Chair

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

DATED: January 29, 1998  
Trenton, New Jersey  
ISSUED: January 30, 1998

H.E. NO. 97-31

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

In the Matter of

CITY OF MILLVILLE,

Respondent,

-and-

Docket No. CO-H-94-403

MILLVILLE POLICE SUPERVISORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends the Commission dismiss the amended unfair practice charge filed by the Millville Police Supervisors Association against the City of Millville. The Hearing Examiner finds that the City did not have union animus towards Union President, Sergeant Norman Franckle, and that the City had a legitimate business reason for the restructuring of the police department which resulted in the elimination of a lieutenant vacancy that Franckle expected to be promoted to. Also, the Hearing Examiner finds that the City did not act unlawfully with respect to Franckle's reimbursement requests or any other term and condition of employment.

Finally, the Hearing Examiner notes that an independent (a)(1) violation could be found with respect to a remark made by the City to Sergeant Franckle; however, the Hearing Examiner declines to find such a violation because the Association did not so plead or present the independent (a)(1) violation.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.



H.E. NO. 97-31

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

In the Matter of  
CITY OF MILLVILLE,

Respondent,

-and-

Docket No. CO-H-94-403

MILLVILLE POLICE SUPERVISORS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gruccio, Pepper, Giovinazzi, DeSanto  
& Farnoly  
(Stephen D. Barse, of counsel)

For the Charging Party, John T. Barbour, P.A.  
(John T. Barbour, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On June 29, 1994, the Millville Police Supervisors Association filed an unfair practice charge (C-1)<sup>1/</sup> with the Public Employment Relations Commission, amending it on September 15, 1995, alleging that the City of Millville violated certain subsections of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

---

<sup>1/</sup> "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearings are referred to as "1T", "2T", "3T", "4T" and "5T".

On May 6, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to paragraphs (b), (c) and (d) of Count 9 of the amended charge and dismissed the remaining allegations (C-2). Paragraphs (b), (c) and (d) of Count 9 allege that the City violated subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7) of the Act.<sup>2/</sup> The Association alleges that the City retaliated against Association President, Sergeant Norman Franckle, Jr., for engaging in protected activities. Specifically, the Association alleges that the City unlawfully altered its promotional practices, procedures, and structure in order to deny Franckle a promotion, and by unlawfully denying Franckle reimbursement for authorized work expenses incurred.

On June 3, 1996, the City filed an Answer (C-3) denying it violated the Act. It specifically denies discriminating

---

<sup>2/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

against any Association members, or unlawfully altering its promotional practices, procedures, or structure. It asserts that the promotions the Association complains of were made in accordance with the City's unaltered promotional policy. The City also claims that it has consistently reimbursed Association members for authorized work expenses.

Hearings were held on October 15, 16 and 17, 1996 and on January 15 and 16, 1997. The parties filed post-hearing briefs by March 18, 1997; reply briefs were filed by April 7, 1997. Based upon the record in this case, I make the following:

#### FINDINGS OF FACT

1. The City and the Association stipulated that: a) the restructuring of the Millville Police Department was not based on budget considerations, and that "budget considerations were not a factor in determining whether or not to restructure the department in terms of salaries for police officers" (1T11-1T12; 2T184-2T185) and b) the City knew Franckle was the union representative and engaged in protected activities (1T11-1T12).

2. Franckle has been employed by the City since January 1976. He was a patrol officer until 1989, when he was promoted to his current position of sergeant (1T18-1T19).

THE DIRECTOR OF PUBLIC SAFETY

3. The Director of Public Safety is a part-time position. By statute, the Police Chief, not the Director, is involved in the daily operations and assignment of personnel within the police department (1T100-1T101; 3T56). However, the Director makes final promotion decisions within the department (1T102-1T103; 3T75).

4. David Vanaman became the Director of Public Safety in May 1993 (1T31; 2T35-2T36). Vanaman has a college education in accounting and finance (4T95-4T96). With the exception of a three year period, his entire work experience from 1966 through the present has been accounting, finances and budgeting for several companies, including Wheaton Industries. In addition to his duties as Director, Vanaman owns and operates a store in Millville (4T95-4T108).

Vanaman's campaign ticket was fiscal responsibility. He promised to make sure the City used its monies efficiently (2T36; 4T117-4T119; R-11). In his campaign literature, he highlighted the escalating salaries of City managers, pointing out that 15 of them made over \$50,000 (R-11). Upon being elected, he stressed to the Chief of Police, William Herman, that he wanted to learn everything about the police department and that he intended to be a hands-on Commissioner. He desired to be part of the budget review process and intended to review the administrative reports (4T120-4T122).

From 1986-1989, Vanaman had been a member of the Millville Concerned Taxpayers Association (4T109). As part of this organization, he would attend Commission and School Board meetings to express concerns about tax increases and municipal issues (4T113-4T115; R-22, R-23, R-24, R-25, R-28, R-29, R-31, R-32, R-33, R-34, R-35, R-36, R-37, R-38, R-39). Because of his finance background, he would often go to City Hall and review invoices and requisitions that had been processed (4T109-4T112). He would do this to gain experience in municipal accounting and would use his findings to develop recommendations for the next City budget (4T112-4T113). He has never had any formal training in municipal finance (5T62-5T63).

5. The Chief and Vanaman do not have a good working relationship or any social relationship, while Franckle and the Chief are good friends. Vanaman and the Chief communicate poorly (3T70-3T72, 3T74-3T75, 3T141; 4T94). The Chief has a professional objection to Vanaman's efforts to exercise daily control of the department (3T73-3T74, 3T141). Chief Herman spoke to the Prosecutor and the Attorney General about Vanaman's interference with the daily activities of the department (3T73-3T74, 3T126-3T127).

In August 1993, the Chief immediately sought an Attorney General opinion regarding Vanaman's request to review police officers' personnel files, rather than talk to Vanaman first about the issue (3T136-3T138, 3T142, 3T159; 4T123-4T124; R-4; CP-97).

Vanaman had asked to see the files in the context of considering individuals for promotion to a vacant lieutenant's position (5T64).

6. In September 1993, Vanaman questioned the Chief's practice of submitting overtime slips for himself without Vanaman's approval and changed the practice so that the slips had to be submitted to Vanaman first (5T19-5T20; R-16).

Also, in September 1993, Vanaman expressed concerns and questions to the Chief about a neighborhood watch program, specifically concerns about manpower and resources (CP-82).

THE SEPTEMBER 1994 COMMISSION MEETING APPEARANCE BY FRANCKLE

7. In September 1994, as President of the Association, Franckle, and his fellow unit members, along with members of PBA Local 213, appeared before the City Commission, because of the ongoing dispute between Vanaman and Chief Herman (1T26-1T27; 2T84; CP-1).

Franckle spoke about Vanaman's interference with the daily operations of the Police Department, including the Chief's job (1T26-1T29; 2T32, 2T84-2T85; 4T128; CP-3). The purpose of Franckle's action was to have the problem with Vanaman addressed (2T87-2T88).

Franckle disliked Vanaman's actions as Director. He thought Vanaman intrusive and as undermining his authority when in May 1994, Vanaman gave orders to Franckle's community policing unit to attend a meeting without first consulting Franckle

(2T33-2T35; CP-86; R-17). Franckle complained about this to the chief by July 18, 1994 memo (R-17). However, Franckle believes Vanaman is trying to do the best job he can as Director (2T32).

#### THE RESTRUCTURING OF THE POLICE DEPARTMENT

8. From December 1965 until February 1, 1972, the structure of the Police Department was as follows: 1 Chief; 7 lieutenants and 16 patrol officers (3T18-3T19). In 1972, five sergeants were included in the structure (3T19). The structure changed again in 1975, due to a New Jersey State Police Commission Study conducted that year. The Study recommended a structure of 1 Chief, no captain, 3 lieutenants and 10 sergeants. Based on the document, two lieutenants were eliminated through attrition and some sergeants were added (3T20, 3T113; R-1).

9. From 1981 through 1989, the structure of the Department was as follows: 1 Chief; 1 captain; 3 lieutenants - specifically 1 uniformed Division Commander; 1 Services Division Commander and 1 Investigations Division Commander - and the sergeants and patrolmen (1T128; 3T97-3T98). Present Mayor Emil Van Hook served as Director of Public Safety during that time (1T100).

In April 1989, Van Hook promoted then Captain Herman to Chief Herman. He intended to fill the vacant captain's position after his reelection, but his reelection bid was unsuccessful (1T134-1T137; 4T45).

Lieutenants Frank Robinson and Charles Porch were the next in line to fill the vacant captain's position. However, the Chief had problems with them and did not recommend either for a promotion (1T79-1T83; 4T46).

The captain position was, thereafter, left vacant, but was not eliminated pursuant to a policy decision (1T30-1T31, 1T103-1T104; 3T85-3T87).

In late 1989, after discussion among the Chief, the Director of Public Safety and other Commissioners, the number of lieutenants increased from 3 to 5 (3T112-3T113).

10. In his first budget request of May 1994, Vanaman was not considering a restructuring of the Department, as he budgeted for 5 lieutenants and no captain (CP-93).

11. From the time he took office in May 1993, Vanaman talked to Van Hook and City Administrator Lewis Thompson about the structure that had operated during Van Hook's tenure as Director. He also spoke to Van Hook about the 1975 Police Training Commission Study and had some discussions with the Chief about who was performing what duties in the department (1T104, 1T124-1T125; 4T139-4T140; 5T91, 5T98-5T99).

Further, from May 1993 he analyzed the operations and concluded that Lieutenant McDonough's position in the Traffic Safety Bureau was unnecessary, as he performed basically clerical functions. Upon McDonough's retirement in November 1994, he concluded there could be a better utilization of personnel, rather



than fill McDonough's lieutenant position, which paid in excess of \$50,000 (4T140-4T142). Thus, in late 1994, with McDonough's retirement and the possible retirement of Lieutenant Porch, Vanaman began considering a reorganization of the department and began discussions with Van Hook and Thompson about taking the opportunity to streamline the structure and returning to the previous 1 captain, 3 lieutenant structure (4T145-4T146).

12. Thereafter, by January 27, 1995 memo with a current organizational chart attached, Vanaman solicited the opinions of Van Hook, Thompson and City Solicitor Richard McCarthy on the restructuring of the department (4T12-4T13, 4T145; R-6). Vanaman did not ask if McCarthy and Thompson had expertise in police department organization, but sought their opinions because they were top city officials who were knowledgeable in all aspects of the City (5T102-5T105, 5T138-5T139). Neither Vanaman nor McCarthy has educational background or training in the structure for a police department although at Wheaton Industries, Vanaman had experience in the structure of a large organization (4T69; 5T52-5T54).

13. McCarthy responded to Vanaman by January 31, 1995 memo. He recommended a structure which included 1 Chief, 1 captain and 3 lieutenants - one in charge of each Division-and recommended an increase in sergeants (4T14, 4T20-4T21; R-3). This was the first time he recommended a structure for a police department (4T73). He did not review any text or research

materials in preparing R-3, but simply looked at previous City organizational charts (4T73-4T74). He copied Van Hook, Thompson and Chief Herman on the memo (3T89; 4T14-4T17).

14. On February 3, 1995, Van Hook, McCarthy, Vanaman and Thompson met to discuss the structure of the police department, including the structure recommended by McCarthy (4T17-4T18, 4T146). McCarthy had experience with this structure from 1977 to 1984, when he was City Prosecutor, and thought the structure to be very logical (4T19-4T20, 4T148).

McCarthy did not recommend keeping the 5 lieutenant structure that was then in place, as he did not see the need for the other 2 lieutenants (4T20-4T21). He recommended an additional sergeant so that there would be more manpower on the streets (4T21-4T22). The consensus of McCarthy, Thompson, Van Hook and Vanaman was that a clearly delineated line of authority could be established by returning to the structure with a chief, a second in command captain, and 3 lieutenants, each in charge of a division (4T22, 4T148). Van Hook believed this structure had worked well during his tenure as Director (1T128-1T129). They also agreed on an additional sergeant (4T22). Vanaman spoke at this meeting, but he was primarily soliciting recommendations (4T22-4T23).

15. On February 10, 1995, Van Hook, Vanaman, Thompson, McCarthy, along with the Chief, met to discuss the possible reorganization (3T39; 4T24, 4T148-4T149). Lieutenant Harvey, who

was the number one candidate for captain, was also there for part of the meeting (3T88; 4T24).

It was clear to the Chief that Van Hook, Vanaman, Thompson and McCarthy had agreed to reduce the number of lieutenants and make a captain, which was the prior structure of the department (3T86-3T87). This was the first time Chief Herman learned of the proposed restructuring (3T88-3T89).

16. The Chief is considered an expert in the field of police administration and has received extensive training in the organizational structure of a police department (3T10-3T18).

The Chief expressed that he would rather have no captain, than a captain and a reduction in lieutenants (3T39-3T40, 3T75; 4T25, 4T88-4T89, 4T149). He was given the opportunity to present several proposals, none of which included just 3 lieutenants (3T116; 4T25).

The Chief recommended a fourth lieutenant to be in charge of the traffic safety section and a fifth lieutenant to be in charge of training. Neither of these lieutenants were to command a significant number of personnel (4T25-4T26).

The Chief explained why he thought the 2 additional lieutenants were justified, in response to questions by Thompson and McCarthy. There was also some discussion between the Mayor and Vanaman about the 1975 study that had been conducted (4T26-4T28; R-1). Further, Vanaman distributed a memo reflecting his thoughts on reorganization which proposed a captain, 3

lieutenants and additional sergeants (4T153-4T154; R-14).

Although he assumed the Chief had expertise in the area of police department structuring, McCarthy listened to the Chief's concerns but was not persuaded (4T74-4T75, 4T77-4T78).

17. The City had cut out a few middle management positions from 1991-1996 through attrition and had instituted a clear chain of authority in the Water and Sewer Utility Departments whereby there was one top person followed by a second (4T29-4T31, 4T81-4T83, 4T86). The structure change in the Water Department occurred in 1990-1991; the change in the Sewer Department came in 1996 (4T84-4T85).

McCarthy felt that he was carrying over this City-wide philosophy in making his police department recommendations. He and Van Hook felt a captain was necessary, so that there would be a clear replacement for the Chief in his absence. McCarthy believed 2 lieutenants, which are middle management, should be cut and that an additional sergeant made sense (1T132; 4T30-4T31).

18. A February 16, 1995 meeting was then held to see if there was any common ground between the Chief's recommendations and everyone else's. The same individuals, except Harvey, attended. Chief Herman again expressed his opinion that the five lieutenants should be preserved (3T42-3T44; 4T42-4T43, 4T150-4T151). Herman never recommended the current structure of the department (3T44, 3T75). Although Herman thinks the captain is a title the department needs, he was not totally pleased it was

included in the restructured department because he did not approve of the selection process for the position (3T77).

At that meeting, the Chief was advised that the captain, 3 lieutenant structure was the structure the City was adopting (4T151). The Chief then recommended that a professional study be conducted by an outside organization on the structure of the police department (3T39-3T40).

19. No specific individuals that would be impacted by the change in structure, including Franckle, were discussed at the February meetings, only concepts (4T44, 4T156-4T157). Vanaman was not sure who was next in line to become a lieutenant (5T157).

20. By memo dated March 2, 1995 to Vanaman, McCarthy, Van Hook and Thompson, Chief Herman memorialized his opinion that it would be a mistake to change the structure and offered the names of professional consultants who could review the structure of the police department (3T40-3T41, 3T151-3T152; CP-29).

No action was taken regarding the Chief's recommendations for a professional police survey because a consensus had been reached to adopt the 1 captain, 3 lieutenant structure (4T159).

21. On March 7, 1995, Ordinance No. 13-1995 was adopted which clearly defines the lines of authority between the Chief and the Director and which specifies that the Director has the power to prescribe the internal organization of the department (4T94, 4T151-4T152; CP-75). The Ordinance also included the adoption of the Rules and Regulations for the police department (1T107;

CP-76). The final Rules and Regulations were 90% based on a set previously submitted to McCarthy by the Chief (4T56-4T57). The Chief was never consulted before the Ordinance or the Rules and Regulations were adopted (3T42).

The Ordinance does not specify the number of lieutenants, sergeants, and captains (4T67; 5T95). It places the authority for the number with the Director (4T67). Thereafter, pursuant to the Ordinance, the structure of the department was changed by Vanaman (5T130-5T132). He eliminated 2 lieutenants through retirement and attrition (3T114-3T115; 5T132). The City Commission never took any formal action to change the structure, except adopt CP-75 (1T108; 5T95-5T96, 5T130-5T132).

22. The new structure has only 3 lieutenants - 1 Uniformed Division Commander, 1 Investigation Division Commander and 1 Service Division Commander, the same as the structure that existed from 1981-1989, except under the new structure, an additional sergeant was added (1T129, 1T133; 3T155; 4T87).

23. No information on the financial impact of the restructuring was sought by Vanaman or the City prior to the restructuring (2T171-2T172). The reduction in the number of management positions in the department was not based on any professional study or any statute (1T113, 1T119-1T120; 4T91). The 1975 study had some bearing on Vanaman's decision to change the number of lieutenants. He did not attempt to update the survey in 1994-95, although there had been significant changes in the City's police needs from 1975 to 1995 (1T121; 3T22-3T25; 5T90-5T91).

In Chief Herman's expert opinion, the change in structure was not warranted for any professional reasons and the old structure was a better working structure. He believes the current structure could be more efficient. He believes more lieutenants are needed for false alarms and training. However, he acknowledges the structure of the department is a policy decision (3T47-3T48, 3T56-3T57, 3T111-3T112, 3T118-3T124).

24. It was Vanaman's prerogative to change the structure, because pursuant to the Ordinance, he is responsible for the organizational structure of the department (1T118-1T119; 2T99; 4T93). The reason for the change was to streamline command and control (1T118). Vanaman declined to follow the Chief's structure recommendations because he was convinced the additional lieutenants were far removed from active police work (4T160-4T161). Vanaman was looking to put more police on the streets (4T160-4T161; 5T93).

25. By August 6, 1995 letter, Vanaman expressed his concern over the 13% crime rate increase in the City that had occurred the prior year (3T44-3T45; CP-87). Chief Herman, by memo of August 7, 1995, asked Vanaman about replacing the lost management positions and about the direction the restructuring was taking (3T45; CP-87). Herman wrote two subsequent memos to Vanaman asking that the two lieutenant positions be reinstated because the Chief believed management of the organization was becoming increasingly more difficult without them (3T45-3T47; CP-87). Vanaman never replied (3T47).

PROMOTIONS

26. In August 1993, Vanaman promoted John Olah to lieutenant, based upon the Chief's recommendation (1T33; 3T116; CP-33; J-4). In doing so, Vanaman followed the long-standing City practice of promoting the person on top of the Civil Service promotional list (5T112). At that time, the structure of the department still included 5 lieutenants, and Franckle was not eligible for promotion (1T33-1T35) .

27. In January 1995, because of Lieutenant McDonough's retirement, Vanaman wrote to Sergeants Franckle and Riley, about the possibility of promotion to lieutenant and wrote to Lieutenants Harvey and Porch about the possibility of promotion to captain. He asked them to provide information about their goals, philosophies, leadership abilities and highlights of their careers (4T157-4T158; CP-23; CP-24). Vanaman also asked for their opinions on the organizational structure of the department (CP-23). Both Riley and Franckle responded in writing to Vanaman's memo (CP-27; CP-28).

Franckle and Riley had both passed the Civil Service promotional test and were on Civil Service lists. Riley had taken the test prior to Franckle; thus he was on a list that expired prior to Franckle's, and was listed first on a combined list (1T36-1T37; 5T114; J-3; J-5/CP-31) .

Vanaman did not conduct any promotion interviews with Franckle or Riley because he knew Riley was on the top of the



list, and it was City practice to promote from the top of the list. Franckle and Vanaman never discussed promotion in person, while Riley and Vanaman did so at a chance meeting (1T38-1T39; 2T25, 2T151-2T152).

Vanaman asked Riley how long before his Civil Service list expired. Riley was concerned his list would expire and he had not passed the most recent lieutenant test (1T47-1T48; 2T152-2T153). Vanaman did not make any promises to Riley but discussed the possibility of making a captain and a lieutenant (2T154). Vanaman discussed with the Chief the possible promotion of Lieutenant Harvey to captain, but did not discuss possible promotions to lieutenant (3T49, 3T78).

28. By a March 13, 1995 memo to Vanaman, Chief Herman recommended that Lieutenant Harvey be promoted to captain; that Sergeant Riley be promoted to the vacant lieutenant position created by Harvey's promotion; and that Sergeants Franckle and Paul McIsaac be promoted to fill the vacant lieutenant positions left by the retirements of Lieutenants Porch and McDonough (3T153; 4T162-4T163; CP-30).

Vanaman promoted Harvey and Riley, based on the Chief's recommendation. He believed he was following City practice in promoting Riley over Franckle because Riley was on the top of the Civil Service List (1T37; 5T114-5T115, 5T137; J-5/CP-31). Although Riley's name appeared first on the Civil Service list relied on by Vanaman, his rank on the list is after Franckle's

(J-5/CP-31). Vanaman did not follow the Chief's recommendations to promote Franckle and McIsaac because the vacancies no longer existed, due to the restructuring of the department (4T161-4T164).

29. By an April 12, 1995 memo to Vanaman, Herman again recommended that Franckle and McIsaac be promoted, but Vanaman did not do so (1T49; CP-32).

30. In September-October 1995, McIsaac brought a package from the police department to Vanaman's store. After McIsaac handed Vanaman the package, he asked when he and Franckle were going to be promoted. McIsaac has been behind Franckle on the Civil Service list for lieutenant since September 1994. According to McIsaac, Vanaman said that he really wished he could promote McIsaac, but McIsaac was second behind Franckle (2T115-2T116).

McIsaac claims Vanaman then said to him, "If you were number one, I'd promote you." He then claims Vanaman talked about his dislike of Franckle and how he thought Franckle disliked him (2T115-2T116).

Vanaman disagrees with McIsaac's version. Vanaman claims that when McIsaac inquired about when he'd be promoted, Vanaman explained that McIsaac could not be promoted because the department had been restructured. Further, Vanaman reminded him that he was second on the list behind Franckle and thus, there would not be any movement on McIsaac until Franckle was promoted (5T32-5T33). According to Vanaman, he never opined that he would prefer to promote McIsaac over Franckle (5T33).

At the time of his conversation with Vanaman, McIsaac thought there were 2 openings. However, he admitted he knew of the March 1995 Ordinance which resulted in the 3 lieutenant structure, but inquired about the promotion anyway because he thought the Ordinance may change again, if City politics changed (2T118-2T119).

I credit Vanaman's version. McIsaac has his own interest at stake in this proceeding, as he has a promotion to gain if the Association is successful (2T119). Further, I find it highly unlikely that Vanaman would tell McIsaac that he would promote him if it was not for Franckle, in light of the fact he had been embroiled in the instant litigation for over a year prior to this conversation.

31. In early summer 1996, Patrolman Michael Lesser also had a conversation with Vanaman about promotions. He asked about them because department morale was low since no promotions of sergeants or patrolmen were being made, and since his friend, Sergeant McIsaac, was second on the lieutenant promotional list. Further, McIsaac thought there were still 2 openings for lieutenant (2T121-2T124, 2T126-2T127, 2T130-2T131).

Vanaman told McIsaac if he bypassed Franckle and promoted McIsaac, he would have a problem later on (2T123-2T124, 2T136). According to McIsaac, Vanaman told him he would prefer McIsaac over Franckle. Vanaman never said he did not want Franckle to become a lieutenant (2T130, 2T136-2T137). Finally, Vanaman

acknowledged the future possibility of having two more lieutenants in comment positions (2T130).

Vanaman denies saying that he would prefer to promote McIsaac over Franckle (5T37). According to Vanaman, Lesser asked him about his friend McIsaac; Vanaman reminded him that Franckle was first on the list and that there were no vacancies (5T35-5T37).

I credit Lesser's version. His friend, Sergeant McIsaac, could directly benefit if the Association is successful in the instant matter, as he could be awarded a promotion to lieutenant. Further, Lesser and his fellow patrol officers could also benefit if the Association is successful through possible future promotions to sergeant (2T131-2T132).

#### VANAMAN'S QUESTIONING OF FRANCKLE AFTER HIS SEPTEMBER 1994

##### COMMISSION APPEARANCE

32. In October 1994, Franckle requested 12 new bike uniforms for the community police officers assigned to him. The Chief forwarded the request to Vanaman, who posed several questions to it by November 4, 1994 memo (2T17; 5T17-5T18; CP-80). He questioned why 12 uniforms were requested, when there were only 4 community police officers who already had uniforms (5T17-5T19). While Franckle is not aware of Vanaman challenging requests made by other sergeants with regard to programs they supervise, Franckle did not think Vanaman's questions to be unreasonable (2T18, 2T39-2T40).

33. Several members of the police department were assigned to work a November 1994 visit by Vice President Gore, including Franckle. By November 1, 1994 memo, Vanaman questioned the Chief's assignment of Franckle (1T52-1T56; 2T103-2T104; 4T166-4T171; CP-34; CP-35). According to Franckle, this was the first time an assignment of his was challenged; further, his work for the Gore visit was the only one singled out (1T55-1T56; 2T15-2T16). However, by a November 1, 1994 memo, Vanaman also questioned the Chief with respect to overtime for an individual, Henry Taylor, who volunteered to drive the Gore motorcade (CP-34).

34. By November 4, 1994 memos, Vanaman questioned the Chief's request for three training courses for Franckle and several of the Chief's assignments for lieutenants and sergeants, not just ones involving Franckle (1T58-1T59; 2T13-2T14; CP-38; CP-78).

35. In November 1994, Franckle investigated a federal grant for additional manpower entitled "COPS FAST." (2T94; CP-66). The Chief completed an application for the grant, which would fund two officers (CP-67). However, Vanaman returned the application to the Chief unsigned, citing his concerns that the grant only provided 75% of the cost of the additional officers for three years and that subsequently the City would have to fund the officers (1T90-1T92; 4T171-4T174; CP-68). Franckle and the Chief knew this about the grant and Franckle acknowledged that Vanaman's concerns were legitimate (2T94-2T96; 3T148).

36. Franckle was interviewed by the Vineland Daily Journal about the grant application. The December 20, 1994 article quoted Franckle as saying, "The paperwork was filled out but when it was forwarded to the director's level, he (Vanaman) didn't want to apply for it." (1T93; CP-70).

Vanaman sent a December 21, 1994 memo to the Chief, with a copy to Franckle, stating that he felt the Daily Journal article was offensive to him, the Mayor and the City Commission and was a distortion of true facts. He also felt that "Franckle's comment was totally inappropriate since he did not deal with all the facts...and is in no position to speak for the department." He ended the memo with a sentence in boldface stating, "Please be advised any further comments which are intended to distort the full facts, or be misleading to the public will be dealt with accordingly." (1T97; 4T176; CP-71)

Vanaman had budget concerns about the program, for which he never received answers (4T176-4T177). He thought the article distorted the facts by not clarifying that the City had already received funding under another federal grant the prior year. However, he admitted that there was nothing untruthful or inaccurate in the article (5T115-5T117).

37. Franckle had made comments to a newspaper in 1993 without being told by Vanaman that it was inappropriate to do so, or that his information would have to be cleared first, or that he would be dealt with accordingly for such comments (1T98-1T99;

2T19-2T20; CP-84). The Chief thought Franckle was acting within his assigned responsibilities in discussing the matter with the newspaper (3T58-3T59). Franckle and the Chief acknowledge that the decision as to whether to accept the grant was a policy decision which rested with Vanaman (2T48; 3T147).

#### FRANCKLE'S REIMBURSEMENT REQUESTS

38. Franckle and the Chief claim that since September 1994, Franckle's reimbursement requests have been delayed (1T69; 3T51-3T53, 3T134). However, Franckle admits that since September 1994 to present, he has had some expenses reimbursed without delay. Currently, he is not owed any money from the police department (2T67-2T68).

39. As a Commissioner, Vanaman is given approved vouchers and purchase orders for the police department for his review. Once approved, he signs off on them; a check is then issued (1T146, 1T151; 2T138-2T139, 2T147-2T148; 5T8). If a voucher is not properly filled out or if he has a question about it, it would not be signed but would be pulled out (2T148; 5T8-5T9).

Per his campaign promises, Vanaman has questioned all finances since May 1993 (4T129-4T130). Franckle believes Vanaman has the right to question expenditures that exceed the budget (2T39).

40. Upon taking office in 1993, Chief Financial Officer Ron Charlesworth gave Vanaman a packet involving a May 1992 \$800 seminar reimbursement request for Franckle. Charlesworth had concerns about the request and relayed that to Vanaman. This packet made Vanaman want to scrutinize seminar reimbursement requests during his tenure (4T135-4T139; 5T81-5T82; R-13). Vanaman took no action with regard to Franckle, based on R-13 (5T82). Vanaman first questioned a requisition for Franckle in September 1993. Vanaman asked questions and got answers, so payment was not delayed (4T131-4T133; 5T74; R-12).

41. Late notices and invoices were sent to the Accounts Payable Department of the police department requesting payment for seminars that Franckle attended in December 1994 and in 1995. (1T69-1T72; 2T51-2T58; CP-40; CP-41; CP-42; CP-43; CP-45; CP-46).

42. In September 1995, Franckle advised the Chief of a vehicle the rescue squad was disposing of and the Chief told Franckle to pursue it for the department. Franckle paid \$20 out of pocket for a title change for the vehicle (2T60-2T64).

Franckle sought reimbursement for the money by voucher but Vanaman refused, based on the fact that he had not approved the acquisition of the vehicle. He had by memo to the Chief stated that he was not in favor of the transfer of the vehicle to the department, citing the costs involved (2T49-2T50; 4T182-4T183; CP-56; CP-57). Vanaman was also concerned about the vehicle's age and the fact that he had seen such vehicles sit behind the police building and rarely get used (4T183-4T184; 5T14).



Franckle thereafter filed an October 4, 1995 grievance over the non-reimbursement (1T84-1T86; CP-63). After discussing it with the Mayor and Captain Harvey, Vanaman reconsidered and by December 5, 1995 memo to Chief Herman, approved the acquisition of the vehicle (4T184; CP-64). Franckle subsequently made a second request for reimbursement and was reimbursed shortly thereafter (2T50; CP-65).

Franckle is not aware of any other grievances that have been filed by unit members over the non-reimbursement of out of pocket expenses (1T89). However, Franckle had never learned if Vanaman had first approved the acquisition of the vehicle before he paid the title (2T62-2T64). He admits that it was Vanaman's prerogative as to whether to purchase the van and that the purchase should have been approved by management first (2T49; 4T179).

43. In April 1996, Franckle was assigned a review training seminar given by the FBI Academy. As an FBI Academy graduate, Franckle was required to attend this seminar in prior years. He was timely reimbursed for such seminars in May 1993 and May 1994, but in 1996, an additional request was required to get reimbursement (1T80-1T83). On May 29, 1996, he filed a grievance with the Chief seeking reimbursement. By May 30, 1996 memo, Herman responded to the grievance observing, "It is beyond my belief that every time you attend some training there is a problem with your particular reimbursement. I do not experience this with any other officer under my command." (CP-49).

44. Upon arriving at an assigned seminar in April-May, 1996 in Cincinnati, Ohio, Franckle learned that the City had failed to pay the registration fee (1T74). He thus paid the fee out of pocket. Franckle had submitted documentation to the City prior to the seminar, so that the registration fee would be pre-paid (1T74; CP-58). However, Vanaman did not know that Franckle had preregistered for the conference and that he had a voucher pending for it (2T41, 2T45).

On May 7, 1996, Franckle submitted a voucher for his expenses incurred. Vanaman wrote a memo to the Chief requesting an explanation of the seminar and the expenses, in light of the fact the police department budget was being depleted and that there was no line item for such. Vanaman was concerned how someone could go to a conference without knowing if he had been registered and approved (5T10-5T12; CP-47). Franckle viewed Vanaman's concerns as reasonable (2T46).

On May 14, 1996, Franckle filed a grievance (CP-48). The Chief forwarded it to Vanaman with some observations (CP-48). The Chief remarked that Vanaman, when he sees Franckle's name for a conference, appears to react differently than for other officers and that "monies are always found for conferences, conventions, travel unless it is for either myself or Sgt. Franckle." (CP-48). Franckle was ultimately reimbursed for the expenses (2T46; 5T13).

45. Since September 1994, Vanaman has also questioned payments of clothing allowances for Lieutenant Robinson (5T84).

He also questioned a request by Lieutenant Olah for a new filing system and new vehicles that were requisitioned by Captain Harvey. He has not had to question requests for attendance at out of state seminars besides those made by Franckle, since not too many officers go to out of state seminars (5T84-5T85).

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will

not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

In this case, I find there is insufficient direct evidence that the decision not to promote Franckle was based on union animus. Consequently, I must look at the circumstantial evidence to determine whether the Act was violated. I find that the Association has not met its burden under Bridgewater. The parties stipulated to the first two Bridgewater elements--that Franckle engaged in protected activity and that the City knew of it--but the Charging Party has not shown that the City was hostile towards Franckle's protected activity, as Bridgewater requires.

#### THE CITY'S FAILURE TO PROMOTE FRANCKLE

The Association asserts that Vanaman was motivated by union animus when he restructured the police department, which resulted in the elimination of a lieutenant vacancy to which Franckle expected to be promoted. The Association argued that Vanaman's desire to restructure came only after Franckle's September 1994 Commission meeting appearance where, as Union President, he spoke out against Vanaman. It claimed there was no legitimate reason for the restructuring. I disagree.

From the outset of his term as Director of Public Safety in May 1993, Vanaman spoke to Van Hook about his experience with the 3 lieutenant structure that had operated when Van Hook was Director of Public Safety throughout the 1980's. He also discussed with the Chief which officers were performing what duties in the department and analyzed the operations. He concluded that Lieutenant McDonough's highly paid position performing clerical functions was unnecessary. Thus, upon McDonough's retirement in November 1994, along with the possible retirement of Lieutenant Porch, he began considering a reorganization of the department. (See Findings Nos. 11 through 13)

Vanaman, by R-6, solicited opinions by top City officials Van Hook, Thompson and McCarthy, about the possibility of restructuring the department. He entered into a series of meetings with them, and later the Chief, to discuss the restructuring. The meetings resulted in a unanimous decision to change the structure. While Vanaman allegedly had an unlawful motive, Van Hook, McCarthy and Thompson had no motive to retaliate against Franckle. Subsequently, the City Commission adopted CP-75, which vested Vanaman with the power to determine the structure of the department and, pursuant to the Ordinance, he made a captain and reduced the number of lieutenants by 2, resulting in no lieutenant vacancy available for Franckle. (See Finding No. 21)

The Association claims that no actual restructuring took place, because the City Commission took no formal action to eliminate the 2 lieutenant positions. However, by adopting CP-75, the City Commission gave Vanaman the authority to restructure. Further, there is no evidence that the 1989 structure change which increased the number of lieutenants from 3 to 5 took place as the result of formal City Commission action. (See Findings Nos. 9, 21)

There is no evidence that Franckle or any other individual was specifically discussed at the meetings concerning the restructuring. Vanaman was not even sure who was next in line to be a lieutenant (See Finding No. 19).

The Association also claims that the City's unlawful motive is proven by the fact that the Chief, who is an expert in the field of police administration, was basically shut out from the decision to restructure the department and his suggestions were ignored. The Chief, however, was consulted. He attended two of the restructuring meetings, and his opinion and recommendations were considered before the final decision to restructure was reached. In fact, the final restructuring meeting was held to see if any "common ground" could be found between the Chief's recommendations and everyone else's. (See Finding No. 18). Simply because Vanaman, McCarthy, Van Hook and Thompson disagreed with the Chief and went ahead with the restructuring is not proof of an unlawful motive. The structure the City implemented was not extraordinary, it was the one that had existed throughout the 1980's. (See Findings Nos. 9, 22).

Finally, the lack of an unlawful motive is further supported by the fact that the structure change was made over 5 months after Franckle's September 1994 Commission appearance. Contrast Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (17197 1986).

Despite the Association's arguments, I find the City had a legitimate business reason for the restructuring--to streamline command and control. The City was convinced that a second-in-command captain was needed and that 2 lieutenants, who made in excess of \$50,000, were unnecessary, as they were too far removed from active police work (See Findings Nos. 17, 24). The structure changes in the police department were consistent with changes the City made in its Water and Sewer Utility Departments (See Finding No. 17). Although the restructuring was not based on budgetary reasons, and no outside surveys or data were collected, that does not effect the legitimacy of the decision.

The Association further claims that the City violated its longstanding practice of promoting the top individual on the Civil Service List in March 1995, when Vanaman promoted Sergeant Riley to lieutenant over Franckle, to fill the vacancy created by the promotion of Lieutenant Harvey to captain. According to the Association, Franckle was ranked above Riley on J-5, the Civil Service List relied upon by Vanaman, and thus should have been promoted.

However, Vanaman simply followed the recommendation of the Chief, who incidentally is Franckle's close friend, in promoting Riley. Further, Riley is listed first on J-5 with Franckle second; thus, Vanaman believed he was following the longstanding City practice in promoting Riley over Franckle (See Finding No. 28). Nevertheless, the City has the non-negotiable right to choose from among the top three candidates on a Civil Service promotional list. Township of Riverside, P.E.R.C. No. 97-56, 22 NJPER 9 (128009 1997).

Based on the above, I do not find that the City was hostile towards Franckle because of his protected activity. The restructuring of the department which resulted in the elimination of a lieutenant position which might have gone to Franckle was not motivated by union animus but was based on a legitimate business reason. Finally, I find no union animus with respect to the promotion of Riley over Franckle.

Thus, I find that the City did not violate subsection 5.4(a)(3) and derivatively subsection (a)(1) of the Act with respect to its failure to promote Franckle.

THE ALLEGED RETALIATION AGAINST FRANCKLE REGARDING  
REIMBURSEMENT REQUESTS AND OTHER TERMS AND CONDITIONS  
OF EMPLOYMENT

I do not find that the City retaliated against Franckle with respect to reimbursement requests or any other term and condition of employment. Franckle admits that he has been



reimbursed for all work expenses incurred and is not owed any money from the police department. While the Association claims that Franckle's reimbursement requests have been delayed since September 1994, Franckle admits that since then, some of his requests have gone through without delay. (See Finding No. 38).

There is no evidence that Vanaman was motivated by anti-union animus with regard to his treatment of Franckle with regard to reimbursement requests, training courses or assignments. Vanaman, an individual with a college education in accounting and finance and a lengthy work experience in those areas, had been questioning and reviewing City expenses, reimbursements, and municipal issues, since 1986, when he became a member of the Millville Concerned Taxpayers Association. From his election in May 1993, Vanaman made it clear he intended to be a hands-on Director and since that time has questioned all City finances, per his campaign promises. (See Finding No. 4). In fact, in September 1993, he questioned the Chief on his overtime practices and a neighborhood watch program. (See Finding No. 6). Moreover, he first questioned an assignment of Franckle's in May 1994, several months before the September 1994 Commission meeting (See Finding No 7). Further, since September 1994, he has questioned not only requests made by Franckle, but also some made by Lieutenants Robinson and Olah and Captain Harvey. (See Finding No. 45).

With regard to Franckle's September 1995 reimbursement request for the rescue squad vehicle, Franckle admits that he had never learned if Vanaman had first approved the acquisition of the vehicle, and also acknowledges that the acquisition of the vehicle should have first been approved by Vanaman (See Finding No. 42). Moreover, Franckle acknowledges that Vanaman's concerns over his reimbursement request for an April-May 1996 seminar were reasonable. (See Finding No. 44).

Franckle also admits that Vanaman was reasonable in questioning his October 1994 request for new bike uniforms. (See Finding No. 32). Franckle's claim that he was singled out with regard to the Gore visit was unsubstantiated, since Vanaman questioned not only an assignment regarding Franckle, but also one involving Henry Taylor. (See Finding No. 33). While Vanaman's November 4, 1994 memo questioned the Chief's request for training courses and assignments for Franckle, it also questioned assignments for other individuals. (See Finding No. 34).

Based on the above, I find that the City did not unlawfully deny Franckle reimbursement for work expenses incurred and further find that the City did not act unlawfully with regard to Franckle's reimbursement requests, assignments, training courses or any other term and condition of employment. Therefore, I find that the City did not violate subsection 5.4(a)(3) and derivatively subsection 5.4(a)(1) of the Act. Those allegations should be dismissed.

Finally, the Association has not presented any evidence in support of its subsection 5.4(a)(2), (4), (5), (6) and (7) allegations and, thus, I recommend they also be dismissed.

THE COPS FAST ARTICLE

In Commercial Tp. Bd. Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983), the Commission held that where an employer's conduct deliberately attempts to restrain employee participation in protected activity, it independently violates subsection 5.4(a)(1) of the Act. It further reiterated that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent (a)(1) violation. The tendency to interfere is sufficient. Mine Hill Tp.

In North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454, n. 16 (¶4205 1978), aff'd NJPER Supp. 2d 90 (¶74 App. Div. 1981), , the Commission held that "...individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act. See Dreis v. Krump Mfg. Co., 545 F.2d 320, 93 LRRM 2739 (7th Cir. 1976) and NLRB v. Interboro Contractors, Inc., 388 F.2d 455, 67 LRRM 2083 (2nd Cir.

1967)." Thus, in North Brunswick Tp. Bd. of Ed., the Commission adopted a broad definition of individual employee conduct which would constitute protected activity. However, such broad definition is not without its limitation. Protected individual conduct must occur in the context of enforcing an agreement or existing working conditions in a recognized or certified negotiations unit. Atlantic County Judiciary and Derek Hall, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994).

Here, I find that Vanaman's comments in CP-71, the December 21, 1994 memo which was sent to Franckle, could constitute an independent (a)(1) violation. Franckle's comments to the newspaper about the COPS FAST grant were part of his assigned responsibilities and involved a bargaining unit working condition and thus were protected. North Brunswick Tp. Vanaman's remark "Please be advised any further comments which are intended to distort the full facts, or be misleading to the public will be dealt with accordingly"-tends to interfere with Franckle's participation in protected activity and thus could constitute a violation of the Act. North Brunswick; Commercial Tp.

However, I can not find an independent (a)(1) violation with respect to the remark because it was not so plead or presented by the Association. Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372, (¶13170 1982). The Commission has held that I can not go beyond the Charging Party's pleadings and

presentation to find an independent subsection 5.4(a)(1) violation. Ocean County College.

CONCLUSION OF LAW

The City did not violate the Act or retaliate against Franckle for engaging in protected activity. Specifically, I find that:

1.) the City did not unlawfully alter its promotional practices, procedures and structure in order to deny Franckle a promotion;

2.) the City did not unlawfully deny Franckle reimbursement for authorized work expenses incurred; and

3.) the City did not act unlawfully with respect to Franckle's reimbursement requests, assignments, training courses, or any other term and condition of employment.

Accordingly, I make the following:

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.

*Regina A. Muccifori*  
Regina A. Muccifori  
Hearing Examiner

Dated: May 15, 1997  
Trenton, New Jersey