

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CI-H-93-30

WILLIAM N. SPECHT,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by William N. Specht against the Township of Wayne. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by removing Specht's name from a list of police officer candidates because of his protected activity on behalf of the Township's police dispatchers. The Commission finds that the charging party proved by a preponderance of the evidence that his protected activity, in part, motivated the employer's decision to remove him from the eligibility list. Nevertheless, the Commission adopts the Hearing Examiner's recommendation that the police chief relied on a psychological and background investigation, which were substantially unrelated to Specht's protected activities, in removing him from the list.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CI-H-93-30

WILLIAM N. SPECHT,

Charging Party.

Appearances:

For the Respondent, John J. McKniff, Assistant Township Attorney

For the Charging Party, Schneider, Goldberger, Cohen, Finn, Solomon, Leder, Montalbano (David S. Solomon, of counsel)

DECISION AND ORDER

On September 28, 1992, William N. Specht, a police dispatcher, filed an unfair practice charge against the Township of Wayne, his employer. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),^{1/} by removing Specht's name from a list of police officer candidates because of his protected activity on behalf of the Township's police

^{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."

dispatchers. Specht further alleges that the Township has stopped assigning him work as a special police officer because of his protected activity.

On January 7, 1993, a Complaint and Notice of Hearing issued. On January 21, the employer filed an Answer denying that it had discriminated against Specht and asserting that his candidacy ended when it became aware of pertinent data in his background check.

On April 29, May 12, June 10 and June 11, 1993, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On November 23, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 94-9, 20 NJPER 20 (¶25010 1993). While he found that Specht's protected activity was a motivating factor in removing Specht from the eligibility list for police officer appointments, he concluded that Specht would not have been appointed even absent that protected activity. The Hearing Examiner also recommended dismissing the allegation concerning the special officer assignments.

On February 14, 1994, after an extension of time, the charging party filed exceptions to the Hearing Examiner's factual findings and legal conclusions. The employer did not file cross-exceptions or a reply.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 2-29).^{2/} An overview follows.

William Specht was hired as a civilian police dispatcher in 1987 and as a special police officer in 1988. He applied to become a full-time police officer. In November 1990, he was notified that he had passed the written, oral and physical agility tests and ranked 18 on the list.

Sometime after April 1990, Specht's shop steward asked him for help. Specht agreed. From then on he assisted dispatchers in adjusting problems with pay, time off and related employment conditions.

Specht received many written commendations as a dispatcher. His evaluations were also favorable, but they criticized his sarcasm and his tendency to challenge authority. Portions of these criticisms targeted his efforts concerning employment conditions.

On December 5, 1991, Specht organized a meeting of dispatchers. He posted the minutes of the meeting; those minutes

^{2/} We specifically adopt his finding that Specht did not tell the psychologist that he had been suspended from the first aid squad. Also, the charging party contends that Paylo's opinions of Specht and his suitability for employment as a police officer were never solicited. The chief testified that he consulted with Specht's supervisors -- Sergeants Paylo and Kussler -- before removing Specht from eligibility (4T69). But Paylo testified that he was never asked whether he recommended against Specht's appointment as a police officer (4T44). We find that even if Paylo was consulted, he did not recommend against employing Specht.

expressed dissatisfaction with employment conditions and with the majority representative.

On December 23, 1991, Specht sent a letter signed by 13 dispatchers to the police chief protesting the elimination of changeover days for dispatchers.^{3/} Specht posted a bulletin noting the circulation of the letter to the chief and inviting those who had not yet signed the letter to contact him. A police captain testified that the chief and deputy chief were upset by that letter. They indicated to him that Specht had changed since becoming active in the union and had overstepped his bounds and that something should be done about it.

The chief testified that he was annoyed at the captain, but denied being annoyed at anyone who circulated the letter or knowing of Specht's protected activity. The Hearing Examiner credited the captain's testimony and discredited the chief's testimony on this point. We therefore find that the chief resented Specht's union activities and was angry at Specht for writing the changeover letter.

The chief issued a memorandum responding to Specht's letter. Specht then responded with a "Dispatchers Association Bulletin" bearing his initials. Sometime later, a police lieutenant called the shop steward into his office and warned that Specht was hurting his chances of getting a job as a police officer.

^{3/} A dispatcher working the 4 p.m. to midnight shift and switching to the midnight shift would now have to return at midnight the next day rather than have two full days off.

In April 1992, Specht signed and posted another bulletin. It stated, in part, that AFSCME local president Witkowski had been told:

that because my name [Specht] does not appear on the current list of union officers or officials, I am not permitted to act on behalf of any other dispatchers (or myself for that matter) in relations with the Department or the Administration. Regardless of the fact that our one shop steward would have to come in on his own time 2/3 of the time to conduct union business, he must conduct it himself. Furthermore, if I do not discontinue my activities on behalf of other dispatchers or the union, the Administration will bring disciplinary action on myself and labor relations action on the union.

In July 1992, Specht was advised that he would be considered for appointment to police officer in August. Four other candidates were also considered at that time. They were appointed. Specht was not.

Around July 15, 1992, a lieutenant told Specht that the deputy chief had instructed him to remove Specht's name from the list of candidates. He warned Specht that the deputy chief would use against him Specht's problems as a member of the volunteer firefighter and first aid squads. The lieutenant suggested that Specht speak with the deputy chief before his eligibility was threatened. When Specht did so, the deputy chief replied that Specht would be fine if his background check and psychological evaluation were okay.

Specht and the other four candidates were given psychological evaluations. Specht was given the highest of four

ratings and was recommended for employment as a police officer. Because Specht's "lie" score^{4/} of 11 was slightly above normal, reflecting a desire to present a favorable image, the psychologist noted that the recommendation would change to "non-recommended" if any information provided by Specht proved to be invalid.

The psychologist found that while Specht was arrogant, he was also intelligent, motivated, and capable of accepting orders without resentment. Although the psychologist's recollection of the interview was vague, he probably asked Specht if he had had any disciplinary problems with either the fire department or first aid squad. Specht discussed an administrative suspension from the volunteer fire department, but did not mention his suspension from the first aid squad.

Candidate 1^{5/} had a "mildly elevated" lie score of 11. He was given an excellent prediction rating and was recommended without the reservation appended to Specht's recommendation.

Candidate 2 had a "mildly elevated" lie score of 10. The psychologist thought that he could become resistant to authority as a result of being criticized. Candidate 2 admitted to being arrested, but not convicted. He was recommended without the reservation appended to Specht's recommendation. On his police

^{4/} According to the psychological evaluations, a "lie" score is largely a measure of defensiveness and a desire to look good. It does not necessarily reflect a tendency towards lying.

^{5/} Numbers were used to protect the identity of the other candidates.

officer application, he was asked if he had ever been arrested or fingerprinted and he falsely answered no. The chief knew of that false answer, but hired him anyway.

Candidate 3 had a "mildly elevated" lie score of 10. He was characterized as a marginal candidate and was recommended with reservations. His license had been suspended and criminal charges had been filed against him for harassment. It was strongly suggested that his background be further investigated before deciding on his appointment.

Candidate 4 had a lie score of 15, so high as to invalidate any prediction. He was characterized as being resistant to accepting a subordinate role. At a certain point in his interview, candidate 4 admitted that he was trying to present a positive image. The psychologist recommended him for appointment.

The evaluations for candidates 1, 2, 3, and 4 state that for lie scores over 11, "any prediction may be optimistic." Specht's evaluation differs from the others: it states that for any lie score over 10 "any prediction may be optimistic." This discrepancy was not explained.

Specht's background report states that he "has meddled in union business without authority." It also criticizes his personal intervention into a co-worker's pay problem without getting his supervisor's permission and states that this incident embarrassed the administration. The report also mentions Specht's sarcasm, resentment of authority, arrogance, and willingness to challenge authority just for the sake of doing so.

Specht then received a letter stating that he was no longer considered a candidate. When Specht asked why he was removed from the list, the chief told him it was "based on what he knew of me as a police dispatcher" (1T90). The deputy chief later told Specht:

Look at you now. You put all your weight back on. You've become uncooperative. If you lose weight, straighten out your attitude, play along, take the test again, you'll do better. [1T91]

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

We first consider whether the charging party proved by a preponderance of the evidence that his protected activity motivated the employer's decision to remove him from the eligibility list for police officer. We conclude that he did.

Specht engaged in protected activity when he sought to improve employment conditions of dispatchers. While the chief denied knowing of that activity outside of Specht's just being a union member and "some rumor around that Mr. Specht was representing himself as some type of assistant shop steward" (4T67), the Hearing Examiner discredited that denial. So do we given the first hand opportunity of the Hearing Examiner to observe the witnesses, the documentary evidence, and the testimony of other superior officers credited by the Hearing Examiner.

Further, Specht posted numerous notices in an area constantly visited by supervisors. The notices dealt with contract negotiations, meetings of a "Dispatchers' Association," changeover days, and severing the dispatchers from their existing unit. Specht also exchanged information and documents with a captain concerning contract negotiations. One bulletin he posted stated that the administration had told an AFSCME union official that if Specht did not discontinue his activities on behalf of other dispatchers or the union, the administration would bring disciplinary action against him and labor relations action against the union.

Moreover, the chief and deputy chief knew that Specht had authored the letter concerning changeover days and were angry about that letter and Specht's "overstepping his bounds" by becoming active in the union. Specht was also criticized in his evaluations and in the background report for his efforts to improve employment conditions and for "meddling in union business." Finally, Specht was warned that he should stop his union activities if he wanted to become a police officer; even after his application was denied, the deputy chief told Specht that he'd do better if he straightened out his attitude and played along. Under all the circumstances, we adopt the Hearing Examiner's recommendation that Specht's protected activity was a substantial and motivating factor in removing him from the eligibility list for police officer.

We next consider whether the employer proved by a preponderance of the evidence that it would not have appointed Specht even absent his protected conduct. Id. at 242. Hostility to Specht's protected activity was part of the employer's motivation, but so were legitimate business reasons. The Hearing Examiner conducted four days of hearing, observed the witnesses, and in the end found that the chief relied on the psychological evaluation and background investigation, which were substantially unrelated to Specht's protected activities. We will not disturb the Hearing Examiner's finding.

The chief studied Specht's psychological evaluation and background report and they "absolutely" played a role in his

decision not to appoint Specht (4T55). While the psychologist recommended Specht for appointment, he continued that the recommendation would change to non-recommended if any information proved to be invalid. The background investigation revealed inconsistencies with the answers provided in the interview with the psychologist. Specifically, the chief referred to Specht's problems with the first aid squad and the fire department. The chief also noted comments during the background investigation from supervisors who "had stated some things of a negative nature concerning his performance" (4T57). He also referred to having informal conversations with some of Specht's supervisors, observing Specht in his overall performance, and speaking with the first aid squad and fire department.

The Hearing Examiner did not credit some of the chief's testimony concerning his hiring decision, including the chief's claim that truth telling was a factor. Yet William Specht exhibited weaknesses in his candidacy. He was not forthcoming about his suspensions on the first aid squad and fire department; his psychological evaluation noted his "aura of superiority and arrogance"; and he challenged authority on issues and in ways not protected by the Act.

After thorough review of the entire record of this proceeding, we adopt the recommended decision that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: September 29, 1994
Trenton, New Jersey
ISSUED: September 30, 1994

H.E. NO. 94-9

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

In the Matter of
TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CI-H-93-30

WILLIAM N. SPECHT,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that an unfair practice charge alleging that a public employer violated 5.4(a)(3) and (1) of the Act by refusing to appoint a civilian dispatcher to the police department, be dismissed. The charge also alleged that the employer unlawfully terminated the dispatcher's employment as a "special" police officer.

The Hearing Examiner found that the charging party demonstrated a prima facie case that his protected activity was a substantial or motivating factor in the employment action, pursuant to Bridgewater Tp., 95 N.J. 235 (1984). But the Hearing Examiner also found that the employer did not treat the charging party disparately and that the employer would have denied the appointment even in the absence of protected activity. The allegation concerning the employee's termination as a "special" police officer was also dismissed.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 94-9

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

In the Matter of
TOWNSHIP OF WAYNE,

Respondent,

-and-

Docket No. CI-H-93-30

WILLIAM N. SPECHT,

Charging Party.

Appearances:

For the Respondent
John J. McKniff, Assistant Township Attorney

For the Charging Party
Schneider, Goldberger, Cohen, Finn, Solomon, Leder,
Montalbano
(David S. Solomon, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 28, 1992, William N. Specht filed an unfair practice charge against the Township of Wayne. The charge alleges that on or about July 27, 1992, the Township unlawfully removed his name from the list of police officer candidates being considered for appointment to its police department. Specht alleges that his removal from the list was in retaliation for the exercise of rights protected by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Specht, a Township civilian police dispatcher included in a white collar negotiations unit, also alleges that the discrimination includes his August 17, 1992 termination as a "special police" officer of the Township. These

personnel actions allegedly violate subsection 5.4(a)(3) and (1) of the Act.^{1/}

On January 7, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On January 21, 1993, the Township filed an Answer, admitting that Specht was no longer being considered for appointment as a police officer and was no longer employed as a "special." It denies discriminating against Specht, asserting that his candidacy ended when it "became aware of pertinent data...in [his] background check...." It added that Specht "holds no position" with AFSCME Local 2192, the majority representative of civilian dispatchers and other Township employees.

On April 29, May 12, June 10 and June 11, 1993, I conducted a hearing at which the parties examined witnesses, introduced exhibits and argued orally. Post-hearing briefs were filed by August 14, 1993.

Upon the record, I make these:

FINDINGS OF FACT

1. William N. Specht is a public employee, the Township of Wayne is a public employer and AFSCME Local 2192 is a majority

^{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."

representative within the meaning of the Act. The Dispatchers Association is not a majority representative.

2. AFSCME Local 2192 represents a unit of more than 100 Township white collar employees, including about 14 dispatchers^{2/} (1T148).^{3/}

3. Specht was hired as a police dispatcher in 1987 and supplementally as a special police officer in April 1988 (1T72).

4. On April 17, 1990 and August 19, 1991, Specht wrote performance evaluations for two dispatchers, at the request of police superior officers. He recommended that one be retained and the other terminated. Both recommendations were followed (CP-11A, B;^{4/} 2T68-2T69).

5. Sometime after April 1990, AFSCME shop steward and fellow dispatcher Nicholas LaPlaca asked Specht to "help take care of the people." Specht agreed and assisted dispatchers in adjusting problems with pay, time off and related matters (2T79, 2T80).

6. On November 28, 1990, Lt. Orrie DuBois sent "police candidate" Specht a letter thanking him for taking the "recent"

^{2/} No precise unit description was placed in the record. On November 5, 1979, the Commission certified AFSCME Council 52 as the majority representative of all Township "full-time professional and non-professional white collar employees."

^{3/} 1T refers to the transcript of the hearing held on April 29, 1993; 2T refers to the transcript of the hearing held on May 12, 1993; 3T refers to the transcript of the hearing held on June 10, 1993; and 4T refers to the transcript of the hearing held on June 11, 1993.

^{4/} CP- refers to charging party exhibits.

Township police officer test (CP-4). The letter advised that his combined score on the written, oral and physical agility tests placed him 18th on the list of candidates, which would "remain in effect" for three years (1T79).

7. Between January 1988 and March 1993 Specht received eleven written commendations (CP-10). On August 23, 1991, August 10, 1992 and March 19, 1993, Chief of Police Donald Pavlak issued commendations for Specht's performance in emergencies (CP-10E, C, A). CP-10A, B, D, E, H, I and J all state that copies of the commendation "will be placed in your individual personnel file(s)."

8. Four "performance appraisals" extol Specht's skills, reliability and attendance (CP-3). His overall performance on each appraisal ranged from "good" to "very good."

The first in the series has an evaluator's signature, but no date. No testimony or document shows when it was written. Comments in all 11 categories were favorable.^{5/}

^{5/} The categories are quality, productivity, job skills, reliability, availability and attendance, independence and creativity, supervisory ability, initiative, adherence to policy, interpersonal relationships and behavior pattern.

The second evaluation is undated and unsigned. No witness claims authorship and no testimony shows when it was written. It may have written in 1990, but I cannot draw that inference.^{6/}

The "overall" performance was "very good", with Specht receiving high marks in skills, productivity, reliability, availability, independence, supervisory ability, initiative and behavior pattern.

Accompanying comments to these categories were favorable but some were also critical. For example, one comment read: "work performed well, but has tendency towards too much sarcasm." Another comment next to the "productivity" category was, "Efficiency very good, sarcasm again comes through in the quality." Another comment

^{6/} The fourth evaluation is dated April 1, 1992, by police captain Sandy Galacio and was written and dated March 31, 1992 by police sergeant Dennis Paylo (CP-3; 4T32).

The third evaluation was written by police sergeant William Kussler, who was a communications room supervisor in 1991 and 1992 (4T5, 4T6). He did not remember when he wrote the evaluation (4T7).

Considering the five or more years Specht is employed as a dispatcher, and the four evaluations proffered, I consider the likelihood small that separate evaluations were written at or around the same time. I also consider the likelihood small that Kussler would have written his evaluation when he was not a communications room supervisor. No one disputes the actual date of the writing of the March 31, - April 1, 1992 evaluation. Accordingly, I draw the inference that the third evaluation was written in 1991, the first year Kussler was communications room supervisor.

The inference suggests (as does experience generally) that the evaluations were written annually, leaving the second evaluation to have been written in 1990 or earlier.

was; "safety rules followed, personal conduct is at time antagonistic." Alongside the "interpersonal relationships" category was written, "co-worker cooperations is good - cooperation with supervision needs work." Finally, the "evaluator's additional comment" stated: "He possesses [sic] all the necessary tools, but needs to tone down his resistance to authority."

The third performance appraisal was written by sergeant William Kussler, probably in 1991 (see fn. 6). The overall evaluation was "good" but was also critical. Kussler wrote that Specht "has problems with authority and reacts with sarcasm and causes agitation with supervisors and other dispatchers." Kussler also criticized Specht's supervisory ability and independence and creativity. Kussler testified that he had "trouble with [Specht] follow[ing] my direct requests to do things a certain way that he particularly disagreed with...." (4T8). Kussler conceded that he never recommended discipline of Specht (4T21-4T23).

The fourth appraisal is a handwritten evaluation and a conformed typed copy with the signatures of Specht, police sergeant Dennis Paylo and captain Sandy Galacio. The date next to Paylo's signature is March 31, 1992 and the date next to Galacio's is April 1, 1992 (CP-3).

Paylo wrote the handwritten appraisal (4T30-4T32). The overall evaluation is "good" and comments alongside ten of eleven categories are favorable. The comment alongside the "adherence to policy" category states "knows more than most; sometimes to [sic]

independent in his approach." In the "needs improvement" section, Paylo wrote, "Bill constantly challenges authority, sometimes just for the sake of the challenge."

Paylo testified about two examples of Specht's "challenge to authority." Evaluating a dispatcher requires a review of "fixes", computer printouts which "indicate the errors that our communications people make" (4T36). The "fixes" are;

the source for a lot of this evaluation...Bill's response to the mistakes..., his comments back continuously challenging those mistakes rather than looking at them and saying ok, this is wrong or we'll fix that or whatever 'Why do you need this?...Why do you need a caller? And I think that was the existing attitude."
[4T36].

The second example of a "challenge to authority" occurred in a 1992 flood emergency, when, Paylo explained, the department was "inundated with calls." When he assigned a department data processing employee with dispatching experience to dispatch, Specht;

calls me from home and challenges me as to why I would do that...why I didn't call in overtime...."
[4T37].

Paylo was asked what "too independent in his approach" meant. He answered that Specht many times chooses not to place information in the computer "because he doesn't feel that it is important....I feel that's too independent and too single-minded" (4T41-4T42). Paylo stated that Specht walks "on the edge" of violating standard operating procedure, but has not "stepped over it" (4T42).

Finally, Paylo explained that the typed evaluation is a "conclusion" or compilation of a "job performance" by three other supervisors and himself (4T32-4T33). He stated that their handwritten reports (upon which the typed copy is ostensibly based and which are not part of the record) were uniformly critical of Specht's "challenging authority just for the sake of challenging authority" (4T33).

Galacio was not asked if his signature on the last page of CP-3 meant he agreed with the comments. Kussler testified that the captain's signature "just makes...the form complete" (4T20).

Specht also signed the typed copy on March 31, 1992, after Paylo discussed it with him (CP-3; 1T130). Specht chose not to file a written rebuttal, stating that overall, it was a "more than adequate appraisal of my work" and that he "understood" the evaluator was Paylo and his criticism "didn't concern [me]" (1T131). Specht denied that he has a "problem with authority" and did not know what "spurred" the criticism (1T129).

9. On December 5, 1991, the dispatchers met at Specht's request and he later produced minutes of the meeting, posting it in the "communications area", a place visited frequently by department supervisors (2T46-2T48; CP-9A). The document, "Minutes of the First Meeting" of the Wayne Police Department Dispatchers expresses dissatisfaction with both "current conditions of employment" and with the majority representative -- it states "a majority of dispatchers do not want the AFSCME white collar local to be their

collective bargaining agent...." It also poses that the dispatchers consider "becom[ing] their own local" and negotiating [their] own contract" (CP-9A).

The minutes also promises that a "letter will be sent to the Chief of Police requesting, in writing, a reason and explanation for the change in department policy regarding change over days." Another sentence states, "Dispatcher Specht will produce a list of conditions that we would insist upon, regardless of who our future bargaining agent is."

10. On December 23, 1991, Specht typed a letter to Chief Pavlak protesting the elimination of change over days for dispatchers (1T98, 1T99; CP-6).

"Wayne Police Dispatchers" appears at the top of the page and the signatures of 13 dispatchers (including those of Specht and LaPlaca) appear at the bottom. The text protests a November 28, 1991 memorandum discontinuing change over days for dispatchers. [A dispatcher working a 4 p.m. to 12 a.m. shift would receive two days off, but would have to return at midnight on the second day -- the change over day benefit provided the full two days off (2T18)].

The letter states that the change over day had been in effect for seven years and that denying it now is "unfair and does not reflect an interest in the well being or performance of our Bureau." The dispatchers "respectfully request" a written explanation for the "change in policy" (CP-6).

11. On December 24, Specht posted a "Dispatchers Association Bulletin" in the communications room stating in part that the "letter to the Chief regarding the possible grievance over change over days is in circulation. If you have not signed it yet, call Bill Specht at home at any reasonable time and he will come in to get your signature" (CP-9B). On December 27, Specht posted another "Bulletin" stating "Letter regarding change over days submitted to Chief at 15:30 this date" (CP-9C). It also states that the Chief "stated" he was unaware of the change over day benefit. Specht wrote his initials, "WNS", on the posting. Pavlak received the signed "change over day" letter (4T60).

Pavlak denied immediately knowing the author, but was apparently concerned enough to speak with the deputy chief and captains Galacio and LeFevere about it at a meeting in his office several days later (2T19, 4T60, 4T65).

The testimonies of Pavlak and Galacio differ significantly on his (Pavlak's) reaction to the "change over day" letter at the meeting. Galacio testified that the chief and deputy chief were upset by the letter.

[They] indicated they had a problem with it and that Bill Specht had changed since he got involved with being active in the union and that he had overstepped his bounds by posting something like this in the communications center^{7/} and that something should be done about it....
[2T19].

^{7/} Neither Pavlak nor Specht testified that the letter was posted in the communications room.

On cross examination, Galacio was asked how the chief and deputy chief expressed their displeasure with the letter (2T21). He answered:

Well, in the way they presented it. 'Did you see this', and 'look at this' and..'who is this the work of and well, it looks like Bill Specht, it looks like Bill Specht wrote this', because Bill is one of the more articulate people up at the desk and he's capable of putting together an articulate letter and he's known, he was known at that time to have become more active and more concerned in union activities, and they were angry, they were visibly angry. You could see it in their facial expression and in the attitude. [2T21].

Galacio commented to them, "let's not kill the messenger" (2T20).

Pavlak testified that he was annoyed at Galacio (my emphasis) "...because he is the commander of that division and he should have, he had an obligation to discuss this with me after I ascended to the rank of chief" (4T62). The chief stated that the change over day benefit is a "definite violation of the collective bargaining agreement with the dispatchers" (4T61).

He denied being annoyed at any one or group who circulated the letter, recalling his "drag out fights" with the Township when he was a PBA representative (4T62-4T63, 4T67). He also denied knowing about any of Specht's protected activity, "outside of just his membership...just like everyone else...that's not a union officer" (4T67). He acknowledged hearing a "rumor" that Specht was "representing himself" as an assistant shop steward.

I credit Galacio's description of the chief's and deputy chief's reactions to the change over days letter. His version was consistent and detailed; in responding to the "how did you know" cross examination question, he even recalled bits of their conversation. His demeanor was calm, forthright, unapologetic and restrained -- appropriate for someone in a paramilitary organization asked to testify truthfully about a superior officer. Furthermore, nothing in the record suggests that Galacio's motive for his testimony was less than scrupulous.

Chief Pavlak did not deny he was "annoyed" in the meeting; if his "annoyance" was directed at Galacio, as he claims, Galacio would not have been moved to plead on behalf of Specht, "lets not kill the messenger", a statement Pavlak never denied hearing. Nor did Pavlak specifically deny criticizing Specht. Specht had already posted bulletins in the centrally located communications area identifying himself as the proponent of the letter (and the change over day benefit), leaving me assured (inferentially) of the Chief's knowledge of Specht's participation. Accordingly, I do not credit his testimony that he had no way of identifying the letter writer (4T66). Similarly, I do not credit the Chief's testimony that he was unaware of Specht's activities "outside of just his membership" and his testimony that he was not angry at Specht for producing the change over day letter.

12. Pavlak spoke with the Township Business Administrator about the change over day and later they met with Violet Witkowski,

AFSCME's local president (4T65). The Business Administrator directed Pavlak to "cease and desist all change over days because it was a violation of the contract." Witkowski did not object (4T65).

On January 7, 1992. the chief issued a memorandum responding to the December 23 dispatchers' letter, advising that the dispatchers were not entitled to change over days. He invited further communication (R-1).

13. On February 28, 1992, Specht produced a memorandum addressed to Galacio and a "Dispatchers Association Bulletin, bearing his initials, which was posted in the communications area (CP-9K, E; 2T52). The memorandum and bulletin identify eight issues which were discussed at a February 6, 1992 meeting, attended by the Business Administrator, Chief Pavlak, Director of Personnel, Captain Galacio, police Lieutenant Devries, LaPlaca and Specht (CP-9K, E). The Bulletin advises that the purpose of that meeting was to address "eight items we brought to the attention of the Union as discrepancies between the white collar contract and our actual working conditions."

The first item, one of several "resolved", states, "there is only one set of official files and it is located in the personnel office." Other items concerned shift differentials, holiday pay, starting times, personal days, etc. (CP-K). The Bulletin advises that,

the Township has taken a hard line on the issue of our change over days and on February 6, I signed a grievance in that respect. The [business administrator] did not respond to our

grievance within 10 days as required, so the issue will probably go to arbitration.
[CP-9E].

14. Sometime after the December 23, 1991 dispatchers' letter was given to Pavlak (findings 10, 11), police Lieutenant DeVries called shop steward/dispatcher LaPlaca into his office and asked why he was "strong headed" because the chief was also "strong headed" and in "going tit-for-tat" Specht was "creating a problem for himself in getting on the job as a police officer" (2T81).

15. Specht concedes that he identified himself as an assistant shop steward on postings and in other contexts (1T121; 1T150). On April 21, 1992, Specht wrote, signed and posted another "Dispatchers Association Bulletin" stating in part that AFSCME local president Witkowski told him that the Administration stated,

...that because my name does not appear on the current list of union officers or officials, I am not permitted to act on behalf of any other dispatchers (or myself for that matter) in relations with the Department or the Administration. Regardless of the fact that our one shop steward would have to come in on his own time 2/3 of the time to conduct union business, he must conduct it himself. Furthermore, if I do not discontinue my activities on behalf of other dispatchers or the union, the Administration will bring disciplinary action on myself and labor relations action on the union.
[CP-9F].

Specht also concedes that the "Police Dispatchers Association" is "simply a heading...on the postings for lack of anything better..." (1T147).

Also near the end of April, Specht escorted a newly hired Township dispatcher to the treasurer's office to correct a payroll

problem (1T113, 1T125; CP-2). Sergeant Paylo wrote a May 19, 1992 "memorandum" to Captain LeFevere critical of Specht's involvement which caused "minor disruptions with regular business" (CP-2). The memorandum concludes, "Specht was well intended at the time and subsequently [sic] to our discussion, he now understands the proper procedure."

16. Police officer candidates on the Township eligibility list are contacted in ascending numerical order as positions become available. Specht was advised in July 1992 that the Township would consider his appointment in August (4T51). Four other candidates were also considered at the same time (CP-13, 14, 15, 16).^{8/}

^{8/} On May 14, 1992, candidate number 2 filed an application for a police officer position with the Township (2T34; CP-8). Question number 86 asks the applicant if he or she was ever "arrested, indicted, or convicted for any violation of the criminal law." The candidate wrote "no."

Detective Matthew Creegan conducted the background investigation of candidate number 2 and wrote in his report that he had been arrested in a New Jersey municipality on April 17, 1992, on a civilian-signed complaint, fingerprinted and photographed. The case was "dismissed by the complainant" on July 15, 1992. Detective Creegan's summary in the report states that the applicant is an "exceptional candidate" but "it should be noted" that his application included "questions answered in a false manner" (CP-7).

Candidate number 2 was hired as a patrol officer sometime after July 15, 1992 (2T30, 2T42).

Specifically, Lieutenant DuBois asked the candidates if they were still interested in the appointment. If any are interested, they undergo a medical examination, including an eye test, a psychological evaluation and a background investigation (4T53).

On or around July 15, 1992, DuBois told Specht that the deputy chief instructed him to "remove" his (Specht's) name from the list of candidates (1T81, 1T83; CP-12). He told Specht that the deputy chief would "use against him" problems he had had with the Wayne Township Fire Department and First Aid Squad. The Lieutenant suggested that Specht speak with the deputy chief before the matters became "permanent problems" threatening his eligibility (1T81-1T82).

That evening DuBois phoned Specht and stated that the screening process is continuing and he should undergo the medical and eye examinations immediately. Specht complied and passed them (1T83).

On July 16, Specht told the deputy chief about his concern for his eligibility, to which the deputy chief replied that if the background check and psychological test results were "okay", he would "be fine" (1T83).

17. On July 20, 1992, Specht and three other police officer candidates were tested by Dr. Irving B. Guller, a licensed psychologist and Director of the Institute of Forensic Psychology, Inc., a provider of psychological services (3T7, 3T8; CP-12), 13, 15, 16). Another candidate was tested on July 16 (CP-14).

Each candidate faces the same barrage of tests designed to measure intellect, motivation, honesty, psychological problems, etc. Guller produces a 15 page typed report on each applicant, including test descriptions, scores, and analyses. On the last page of each report, Guller grades the candidate in one of these categories:

4. recommended...
3. recommended with reservations noted...
2. not recommended...
1. ...definitely recommend against...

[CP-12-16].

The reports were dated July 23 and delivered to the Township by the end of July 1992 (3T48).

18. Specht received a number "4" rating, "recommended..." with double asterisks and an explanation below stating, "See all comments in interview above. If any information provided by the individual proves to be invalid, this recommendation would change from 'recommended' to 'non-recommended'" (CP-12).

Guller is referring to Specht's "honesty" on "anything significant", such as his work history or arrest record (3T12, 3T13). Guller stated that the asterisks are used in many reports (3T12). He added the notation because Specht has a "rather high" score of "11" on the Candidate Officer Personnel Survey ("COPS"),

known as the "lie score"^{9/} and because he "made no eye contact" and claimed to have "no job difficulties whatsoever" with his superior officers (3T13, 3T14). Guller wrote in his report that the "lie score" of 11 "in this case was high, reflecting a desire to look good...." Test descriptions are repeated verbatim in all proffered psychological reports. In the "prediction rating" section of CP-13, 14, 15 and 16 the following sentences appear:

In cases where the lie score is very low (under 5), the prediction rating below may be somewhat upgraded. Conversely, for high 'lie' scores (over 11) any prediction may be optimistic.

The first sentence of the quoted portion is repeated verbatim in Specht's report. The second sentence states: "Conversely, for high 'lie' scores (over 10) (my emphasis) any prediction may be optimistic" (CP-12).

Guller wrote that Specht is the "brightest" of four candidates and "most intelligent", but is "cautious in responding" and presents the "most positive possible image." "It is for this specific reason," Guller wrote,

that it is strongly recommended that any of his statements with respect to his background, for which the examiners have no independent information, be checked by the department.
[CP-12, p. 13].

^{9/} The average lie score of a "public safety candidate" is between 8 and 9. A lie score of 11 is about one standard deviation above the mean, "...just slightly out of normal" range (3T35).

The report states that Specht initially denied having any disciplinary problems and later admitted to a 2 1/2 week "administrative" suspension from the volunteer fire department. Guller also wrote that Specht denied that he had been reprimanded by or suspended from the first aid squad (or "ambulance corps") (CP-12).

Guller wrote that Specht "exudes an aura of superiority and arrogance" and when confronted with that observation during the interview, he "seemed somewhat startled...." Specht "does not easily seem able to accept criticism if he does not see the reason for it clearly."

Specht is praised for his ability to "relate adequately with peers...", his higher than average motivation, absence of emotional disorders and his manifesting "less prejudice than the norm of the population."

Under the sub-heading, "Motivation and Maturity", Guller wrote that his high "impulsivity score" may connote "quiet resentment about taking orders or being strictly supervised." Under the sub-heading, "Additional Findings, Including Attitudes Towards Authority", Guller wrote that Specht's work history, initiative and responsibility are "usually associated with good relationships with superiors." A few pages later, Guller wrote that "the profile indicates a person who is capable of accepting orders and following directions from superiors without resentment."

One comment, suggestive of Guller's point of view, states:

When asked what animal he would be if he could choose to be only one animal, he stated a whale. He indicates, 'I love the ocean now and a whale has an undisturbed mystique about it.' It appears that the latter quality is one which this man attempts to convey in his social interactions. [CP-12].

In his summary paragraph, Guller wrote that Specht was advised that if any "information" he provided is "contrary to fact" he could be disqualified. Specht, like all Township police officer candidates interviewed by Guller, signed a certification on the truthfulness of his responses. Guller repeated his conditional recommendation -- that if any information was "contrary to fact", he recommends against appointment (CP-12).

19. Guller's memory of the Specht interview is "very vague" and he did not recall Specht's responses to questions (3T81, 3T82). He recorded some notes at the interview (3T81). In reconciling his written comments on Specht's "resentment" of authority, Guller stated; "he could probably follow orders without resentment but that he might resent criticism if he was criticized..." (3T89). This comment is nonsensical. Guller also maintains that he asked Specht about disciplinary problems with the fire department and the "ambulance squad" (3T90, 3T91).

20. Specht "did not recall" if Guller asked him about a disciplinary problem with or a suspension from the ambulance squad (1T134).

I find that Specht did not disclose his suspension from the first aid (or ambulance) squad. Guller is an experienced

interviewer who would logically ask about disciplinary problems with both organizations after Specht apprised him of his work in both organizations. Even if Guller did not literally ask about suspensions from "the fire department and the first aid squad" or "both" organizations, the intent of his question was to elicit responses about both organizations. Guller's verbatim question to Specht at the interview may have encouraged the candidate to give an incomplete answer. Guller testified;

...if an individual indicates that they had been involved in the volunteer fire department, the volunteer ambulance squad, the question is 'have you had any disciplinary actions or complaints associated with either.' He said fire department....
[3T90-3T91].

By fixing on the word, "either" in his interview, Specht might have given the answer to which he testified ("fire department") and now claim his answer is "truthful" (but not wholly truthful).

This possibility gives greater meaning to Specht's responses in the following exchange with counsel for respondent:

Q: And is it your testimony that everything you told Dr. Guller was truthful?

A: Yes.

Q: Do you recall when asked by Dr. Guller about an incident regarding the first aid squad that you stated you had no problem with the first aid squad and you had never been suspended?

A: I don't recall being asked that question.

Q: You don't recall being asked that question?

A: That's correct.

Q: Did you have a problem with the first aid squad?

A: How do you define a problem, sir?

Q: Suspension, that the first aid squad suspended you.

A: I was suspended from the first aid squad.

[1T133-1T134].

Specht first denied, then admitted to one suspension in his interview, calling it "administrative", as though his behavior was beside the point. His equivocation reveals a defensiveness on the issue, having been "warned" by Lt. DuBois that his "problems" were to be used against him.

I observed a defensiveness in his above-quoted testimony. When Specht's response was repeated to him as a question, he did not pause even momentarily to reflect, so sure was he that he "didn't recall." The immediacy of his response suggests it had been rehearsed. The next question asked for a statement on disciplinary "problems" in the first aid squad clearly identified moments beforehand. Specht's response, an insincere request for further clarification, belied a contentiousness confirmed simultaneously in a sarcastic tone and stony demeanor.

It is unlikely that Specht "did not recall" being asked about the one topic which not only threatened his eligibility, but about which he sought assurances from the deputy chief shortly before the Guller interview. In both the quoted testimony and in the interview with Guller, Specht waited for the question about being suspended from the ambulance squad. The difference is that the interview was not adversarial and that Specht knew the intent of the question, even if Guller used the wrong word. I do not credit Specht's testimony.

21. Also in July 1992, lieutenant Jack Meurer conducted and wrote "background investigations" for two or three police

officer candidates, including Specht (1T23, 1T24). Meurer was not "directed" to report or not report any facts; he reviewed Specht's personnel file, which had copies of warnings but no commendations (1T27, 1T44; CP-2). He also spoke with other superior officers and former employers. He relied heavily on the performance appraisals (see finding 8).

Prefaced by the conclusion, "Reluctant to Recommend for Employment", the investigation report is 3 1/2 pages, typed and single-spaced. It has a detailed employment history. Beginning with a criticism by his former employer, a shopping mall security supervisor, that Specht challenged "what he was told to do", the report praises his abilities and intelligence and is critical of his "resentment towards authority" (CP-2).

This paragraph is illustrative;

He has been asked to explain via reports, why he had taken certain actions, either in contrast to orders or S.O.P. His rhetoric can only be construed as glib with overtones of sarcasm. He has been brought to task on the following: Improper entries on the B.L. screen, unauthorized notification about a restraining order, his personal intervention into a co-worker's pay problem by using subterfuge to gain information [sic] or resolve that problem, all without first getting supervisory permission. This has brought some embarrassment to the administration. He has also acted on other matters for dispatchers without authority or protocol. He was given a reprimand [sic] about taking his lunch time which allowed him to go home early, in violation of S.O.P. also he has meddled in union business without authority.
[CP-2].

The report also states he was suspended from the first aid squad for two weeks because he drove an ambulance in an emergency without authorization. In his appeal of the discipline (which was sustained), he argued that he would repeat his act in a similar emergency (CP-2). He had also been suspended twice from the fire company because he failed to timely complete fund-raising efforts. Meurer reported that letters of reprimand had been removed from Specht's file at the fire department and first aid squad office (CP-2). A concluding sentence states:

What disturbs his supervisors is that he takes things on himself to disregard regulations or S.O.P.s and becomes 'creative' (as I was told by some) and does it the way he thinks it should be done....

Attached to the report are copies of letters critical of Specht's performance, including an August 2, 1991 notice of suspension from the Packanack Lake Fire and Emergency Squad, a January 28, 1992 notice of suspension from the Wayne Township Memorial First Aid Squad and a May 19, 1992 memo from police sergeant Paylo reminding Specht of the proper procedures for correcting a payroll problem.

22. Meurer explained that his comment in the background investigation, "...meddled in union business without authority" refers to Specht purporting to be a "shop steward" for dispatchers when in fact he was not a "union official" (1T36). He denied that his overall recommendation would have been different without the "meddling" incident; he maintained that Specht challenges

regulations, "takes things on himself", is "headstrong" and had personality problems with supervisors (1T28, 1T38, 1T39, 1T47). Meurer stated that captain Galacio and sergeant Lotischer were critical of Specht's penchant for wanting to do things "another way" (1T54, 1T55).

Meurer could not cite one instance in which Specht failed to follow an order, or complained about one (1T52, 1T53). He demurred to the examples in the background investigation (1T54).

23. On or about July 27, 1992, Specht received a letter from Chief Pavlak and Lieutenant DuBois stating the he was "no longer [being] considered as a candidate for the position of police officer..." (CP-5). Specht also spoke informally with DuBois, who suggested that he speak with the Chief (1T87).

On or about August 7, 1992, Specht spoke with the Chief and deputy chief in the Chief's office (1T89). Specht asked for the reasons why he was removed from the list and they did not "give [him] a specific reason." The Chief said the decision was "based on what he knew of me as a police dispatcher" (1T90). The meeting soon ended and the deputy chief remarked to Specht as they left the office;

Look at you now. You put all your weight back on. You've become uncooperative. If you lose weight, straighten out your attitude, play along, take the test again, you'll do better.
[1T91].

24. Chief Pavlak testified that he gave all applicants "equal consideration" and that in Specht's case, his decision was

based upon the psychological evaluation, background investigation, "personal observations", and informal interviews with supervisors (4T55, 4T58, 4T68).

Pavlak stated that Specht "...was not truthful with Dr. Guller and in my opinion a police officer has to be a truthful person" (4T58). He later testified that his not being truthful was "one reason" why he should not be a police officer (4T71). "Other factors" included;

informal conversation with some supervisors and the benefit myself of observing, hearing Mr. Specht in his overall performance, and I also spoke with members of both the first aid squad and the fire department as well, and based upon all of that...it was my decision that he was not an acceptable candidate as a police officer.... [4T58].

25. The psychological evaluations of the four other police candidates approved by Pavlak in late July 1992, were placed in the record (CP-13, 14, 15, 16).

Candidate number 4 had a "lie score" of 15, which Guller characterized in his report as "exceptionally high." "At this level", he wrote, "...it can mean either naivete or deceptiveness...." In the "prediction rating" section, a compilation of three test scores and the "lie score", Guller wrote in capitals, "This subject's lie score was so high as to invalidate any prediction."

Guller also wrote that number 4's profile "suggests resistance to accepting a subordinate role. While probably able to follow directions, this person does not seem comfortable in a

subordinate role." The report also states, "relationships with authority appear to be generally good." On this candidate's high lie score, Guller wrote,

...when he was confronted with some of these items, he readily admitted that he was trying to present a positive image...he admits that he has a number of characteristics that are common to other people.... He is not any "con artist", but he was trying to present himself in the most favorable light.
[CP-13].

Guller recommended this candidate, assigning him the highest number 4 rating.

Candidate number 3 had a "lie score" of 10, which Guller described as "mildly elevated." He was found to be "...defensive, reluctant to answer questions, and questionable in a variety of areas, including his reactions to stress and pressure." Guller wrote "he is somewhat more marginal candidate than others seem and his background should be further investigated before any decision is made with respect to hiring him" (CP-14).

He was given a number 3 rating, "recommended with reservations", with a double asterisk and explanation below:

This subject is considered marginal for all of the reasons suggested above. It is strongly recommended that his background be further investigated before any decision be made with respect to whether he should be appointed as a police officer.
[CP-14].

Candidate number 2 had a lie score of 10, also characterized as "mildly elevated." This person "...appears to accept the authority of supervisors and the opinions of others, but

could become resistant to authority as a result of being criticized.... This subject may either ignore criticism or resent it if he does not see the point clearly" (CP-15). The candidate "admits to having been arrested for some offense since the age of 16, but denies having been convicted...." Guller later wrote that the candidate had "no disciplinary action or complaints against him." He received a number 4 rating, "recommended."

Candidate number 1 had a lie score of 11; characterized as "mildly elevated" but was considered overall, a "very good candidate for appointment." This applicant was given an "excellent" prediction rating, and "relationships with authority" were "exceptionally good." Guller described this candidate as "somewhat humble, but honest and straightforward, although he is not a very outgoing person socially." He later calls him "very honest and outgoing." Guller assigned him a number 4 rating, "recommended."

26. Sometime in late September or in October 1992, captain Lefevere informed Specht that chief Pavlak ordered that he no longer be employed as a "special" (1T94). Lefevere told Specht that the chief "did not feel that it would be appropriate for [him] to be working as a special officer while...suing the Town[ship]" (1T95). Specht had not been engaged as a special after he was dropped from the police officer candidate list (1T96). Specht's attorney had already formally contacted the Township about the possibility of litigation (1T96).

27. On or about October 21, 1992, AFSCME and the Township resolved the charge over day grievance in a "settlement and consent award" (1T102; CP-9G).

ANALYSIS

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). 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 unlawful motives 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 first resolved by the hearing examiner.

I first consider whether Specht has met his burden of proving that his protected activity^{10/} was a substantial or motivating factor in the decisions to end his candidacy as a Township police officer and to terminate his employment as a "special" police officer. I hold that Specht has specifically established, as the following review of evidence shows, both direct and circumstantial evidence of anti-union motivations since he was engaged in protected activity; the Township knew of this activity; and the Township was hostile toward the exercise of his protected rights. Bridgewater.

^{10/} In North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (1978), the Commission stated:

We find 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.

[4 NJPER at 454].

Applying this standard to the facts, I note that Specht's postings, letter, objections and grievance are protected by the Act. With the contingency noted in footnote 11, his effort on behalf of another dispatcher is also protected.

In early December 1991, Specht called and presided over a meeting of the civilian dispatchers, transcribed minutes identifying himself as their spokesperson on terms and conditions of employment, including the "change over days" issue, and posted the minutes in the communications area of the police station, a place visited frequently by superior officers.

On December 24, 1991, Specht posted a notice in the communications area stating that a letter to Police Chief Donald Pavlak on a "possible grievance" over the loss of "change over days" is being circulated for dispatcher signatures and that he (Specht) "will collect any signature(s), if asked." On December 27, the Chief received the protesting letter, signed by 13 dispatchers, including Specht and shop steward LaPlaca. At a meeting with two captains and the deputy chief in the Chief's office a few days later, Pavlak was angry at Specht for writing and sending the letter; he and the deputy chief threatened that the dispatcher had "overstepped his bounds" and that "something should be done about it."

In February 1992, about one month after Chief Pavlak issued a memorandum stating that dispatchers were not contractually entitled to the change over days benefit, a meeting of the Township and AFSCME was convened to address various labor relations matters, including change over days. Pavlak and Specht were among the attendees; after the meeting Specht filed a formal grievance protesting the loss of days. Lieutenant Devries and shop steward

LaPlaca also attended the meeting and some time later Devries cautioned him on "going-tit-for-tat" with the Chief, warning that Specht was "creating a problem for himself in getting on the job as a police officer."

Circumstantial evidence also establishes hostility. In April 1992, the Chief met with AFSCME local president Witkowski, who evidently agreed with him that Specht was not an "authorized" union representative. Specht had recently protested sergeant Paylo's assignment of unit work to a non-unit employee in a flood "emergency", an act Paylo described as a "challenge to authority." (Specht's protest concerned an arguably negotiable term and condition of employment. See Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991), app. dismd. App. Div. Dkt. No. A-518-91T5 (8/18/92)). About the same time, Specht escorted a newly hired dispatcher to various administrative offices to correct a payroll problem. On May 19, 1992, Paylo wrote a critical memorandum to Specht's personnel file. The incident was later described in Meurer's background report as "meddling in union business without authority."^{11/} Considering the Chief's anger at Specht months

^{11/} The Township has asserted in its Answer, in testimony and documents and in its post-hearing brief that Specht was not a union "official." This fact could justify the Township ignoring Specht's protestations, and in appropriate circumstances, disciplining him for violating work rules. Specht may have violated work rules if he caused "minor disruptions" in the various administrative offices which he visited to correct a payroll problem. But the Township was not free to criticize Specht for his lack of "union authorization." See Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

earlier, the warning that his eligibility was tied to the change over days grievance and the coincidence of police supervisors' reactions to Specht's most recent acts on behalf of dispatchers, I find that Pavlak's effort to strip Specht of his representative role, upon penalty of discipline, is evidence of hostility.

Finally, the deputy chief's offhand comments to Specht immediately following their August 7, 1992 meeting with the Chief about his decision to end Specht's candidacy show both unlawful motives under our Act and other motives.

An employee's alleged lack of "cooperation" and "bad attitude" and an employer admonition to "play along" often connote anti-union animus. These comments are especially suspicious in light of the Chief's vague response to Specht's inquiry about why his name was dropped from the list.

The deputy chief's references are in the context of Specht's recent behavior -- "look at you now" and "you've become uncooperative." Although Specht engaged in protected activities in the six to seven months preceding the declared end of his candidacy and has shown the Township's consequential hostility, the record also shows that the deputy chief's comments allude to Specht's work problems and to problems raised in the background investigation. The deputy chief might also be referring to the April 1992 annual evaluation in which Specht was criticized for being "too independent" and for "constantly challenging authority", including

challenging his mistakes on "fixes." The July 1992 background investigation was critical of Specht's "resentment towards authority", not following standard procedures, and it included a copy of the notice of suspension from the ambulance squad. Specht's rhetorical tone -- "glib" and "sarcastic" was also criticized. These writings, in addition to any protected activity, may also have prompted the deputy chief's remarks.

Under all these circumstances, I believe that Chief Pavlak and the deputy chief knew and disliked Specht's union activities; that Specht's eligibility was threatened over the change over days grievance; that the Chief sought to remove Specht from his representative role on behalf of the dispatchers; that Specht had been criticized in evaluations for his union activities; and that he was warned to stop those activities in order to become a police officer. I conclude that Specht's union activities played a substantial or motivating role in the Township decision to end his candidacy to the police department.

I next consider whether the Township has met its burden of proving by a preponderance of evidence that it would have ended Specht's candidacy even in the absence of his protected activity. I conclude, for the reasons set forth below, that the Township has met this burden.

The Township contends that Specht's psychological evaluation and background investigation made him an unacceptable candidate. Portions of each assessment are consistent with my own

view of Specht's personality, based upon his testimony and demeanor.

Guller's report intimates that Specht is a liar, referring guardedly to his "caution in responding", "presenting the most positive image" and then "strongly" recommending comparing his statements to his background investigation. Specht did not deny that Guller confronted him about his "arrogance" and "aura of superiority", characteristics which in combination with his intelligence and lack of eye contact during the interview, probably added to Guller's suspicions.

Guller wrote that Specht's lie score of 11 "in this case was high", but acknowledged in testimony that a score of 11 is "just slightly out of normal range." Specht urges that two other (successful) candidates, whose lie scores were 15 and 11, respectively, were not conditionally recommended, raising an inference of disparate treatment.

Guller wrote that candidate number 4's lie score of 15 was only "an attempt to look good" and that the candidate admitted as much during the interview. Guller wrote that this person was not a "con artist." (The opposite may be adduced about Guller's perception of Specht).

Specht contends that Guller's explanation "defies logic." I disagree. Guller was favorably impressed by the candidate who openly conceded his "lies." Although another psychologist might have interpreted this data differently, I cannot say that Guller's

documented reasoning is irrational. The charging party has not shown that it was.

Guller scarcely commented upon candidate number 1's lie score of 11 but remarked favorably upon that applicant's relationships with authority, "honesty", and prediction rating. No statements were critical of the candidate's demeanor. Considering Guller's "4" recommendation of both Specht and candidate number 1, I cannot conclude that the "cautionary" asterisks for Specht were disproportionately critical. Just as Guller was favorably impressed by candidate number 1's "straightforward" responses, he was negatively impressed by Specht's "caution in responding."

Candidate number 3 had a lie score of 10 but was considered "marginal" overall. Guller applied asterisks to this evaluation, warning that this candidate's "background", like Specht's, merited further investigation. He also wrote that applicant number 3 was "defensive" and "reluctant to answer questions." Guller found both candidates less than straightforward, prompting his skepticism. No evidence was placed on record about candidate number 3's background investigation. Accordingly, I cannot determine if candidate number 3 was less deserving of the Chief's approval than Specht.^{12/}

^{12/} For example, if candidate number 3's background investigation revealed no lies, offenses, etc., then his "3" recommendation would be higher than the "recommend against" evaluation Guller hypothesized and Pavlak found when Specht's ambulance squad suspension was revealed in the background investigation.

Specht has not shown that Guller's evaluation of him should be discredited. The evaluations of candidates 4, 3, 2 and 1 do not show that Guller applied and interpreted criteria inconsistently^{13/} or that he was hostile to Specht's exercise of protected activity. A lie score of 10 or 11 or even 15 did not "guarantee" either a positive or negative evaluation. The asterisks reflect Guller's doubt about an applicant's credibility.

Guller's "either or" recommendation of Specht is unique among the five evaluations, but Specht posed an unusual combination of traits. He was "a most intelligent individual", the "brightest" of all candidates, scoring well on tests, but he was also arrogant and defensive and he donned an "undisturbed mystique." Guller was not evaluating a merely mediocre candidate, or one whose benign abilities merited an unalloyed "4" recommendation. Guller essentially warned that an intelligent, arrogant and defensive person who cautiously responded to questions might lie about important matters; (Specht had hedged in answering the question on his suspension from the fire department) if facts show that he had lied, then Guller would not recommend hiring him.

The Meurer background investigation report criticizes Specht for both legitimate reasons and reasons which implicate

^{13/} The one exception is Guller's lowering to "10" in Specht's evaluation only the score above which "any prediction was optimistic." This suggests a personal prejudice against Specht, but no other evidence in his report or testimony permits such a finding.

protected rights. Specht is criticized for meddling in union business without authorization and "challenging" a superior officer over a disputed term and condition of employment. I do not credit comments implicating Specht's rights under the Act as legitimate criticism.

I am also suspicious that commendations were missing from Specht's file. Under the terms of a February 1992 agreement between the AFSCME local and the Township, all commendations or at least those stating that it (they) would be "placed in the individual personnel file", should have been present for Meurer's inspection. Their absence does not raise an inference that they were removed from his file because no facts show they were placed in his file before Meurer's inspection.^{14/}

Other portions of the investigation do not concern protected activities. They address improper entries on the computer screen, improperly notifying an individual of a restraining order and an improper taking of a lunch period. Of special significance are a criticism by a former employer about challenging a work order, notices of suspensions from the first aid and ambulance squads, (including Meurer's statement that Specht insisted at a disciplinary appeal of that he would repeat his behavior) and a criticism of his "glib" and "sarcastic" rhetoric. Finally, the investigation

^{14/} Some commendations were initialed "WNS", dated "8/13/92", and numbered. This raises an inference that the commendations were placed in the file after Meurer conducted the background investigation.

criticizes Specht for resolving problems "creatively." Although I would not necessarily characterize such behavior negatively, I am not employed in a para-military organization where strict adherence to procedures is often expected. Accordingly, I credit criticisms of Specht's performance which do not concern protected activities.

Furthermore, Specht has not shown that Meurer's overall negative evaluation would be different if all criticism of his "protected" activities was expunged and all commendations were included in the file. The commendations reinforce the notion that Specht was an excellent worker, a finding generally acknowledged in his annual performance evaluations.

The critical issue is whether the Township has shown that the Chief's rejection of Specht was for the reasons asserted, principally, the revelations in the psychological evaluation and background investigation. The Chief emphasized that it was the "inconsistencies" or lies about suspensions revealed in background investigation and warned of in Guller's report that guided his decision. He said, "[Specht] was not truthful with Dr. Guller and in my opinion a police officer has to be a truthful person...." He also was critical of Specht's alleged difficulty in following procedures and of his "resistance" to and "challenges" of authority. He cited other factors including comments by supervisors Paylo and Kussler and discussions with members of the first aid and ambulance squads.

Undermining the purported significance of truth telling is the Chief's approval of candidate number 2, who explained to Guller the circumstances of his criminal arrest (including the dismissal of the charge) but denied in his employment application having ever been arrested. (Candidate number 2 was arrested one month before filing the application).

Detective Creegan wrote the background investigation for candidate number 2, concluding that he "appeared exceptional" but advising that he had been arrested and fingerprinted and had answered questions about those issues falsely in the application. The Township did not rebut or explain this evidence.

Inferring that the Chief reviewed the psychological evaluation and background investigation of candidate number 2 before approving him for the police academy, I do not credit the Chief's testimony that truth telling was a factor in his hiring police officers in July 1992. This finding is necessarily qualified by the observation that when the Chief reviewed candidate number 2's background investigation, he also saw a July 15, 1992 letter from the charging municipality stating that the criminal case had been withdrawn by the complaintant. The Chief also read Guller's summary of candidate number 2's explanation of the incident in the psychological evaluation, perhaps leaving him with the distilled impression, "where there's no smoke, there's no fire." (The opposite impression, that is, a candidate sought to hide his bad performance; may be gleaned from Specht's evaluation and

investigation). The Chief was not asked if candidate number 2's apparent innocence in the criminal matter dissipated the concern Creegan raised in the background investigation.^{15/}

Even assuming that the Township failed to carry its burden on this issue of fact,^{16/} I cannot ignore the over-arching fact that candidate number 2 was rated higher than Specht in both the psychological evaluation and background investigation.

The Chief's explanation for his decision is not contradicted by his approval of the other candidates in July and August 1992. It is also consistent with the Guller evaluation and background investigation, both of which provide legitimate reasons to disapprove Specht's candidacy. I credit the Township's proffered reasons for the employment action.

SUMMARY

Specht's advocacy on behalf of the dispatchers was vigorous, forthright and intelligent. It angered Pavlak through at

^{15/} Guller testified that if he was given an applicant's statement or document, which "turned out to be false" he would recommend against the appointment of that applicant. Guller rated this candidate "4", recommended, finding his judgment "good", his lie score 11, and his prediction rating, "excellent." No facts show that Pavlak knew and advocated Guller's "policy", and Guller's evaluation (by not recommending a comparison of candidate 2's background investigation with facts reported in the evaluation) did not intimate that candidate number 2 was a liar.

^{16/} One could argue that Specht carried the burden of showing that no mere rationalization occurred because he has alleged disparate treatment in retaliation for his exercise of protected activity. A simple rationalization does not suggest illegal motive.

least April 1992, when he successfully obtained the local president's agreement that Specht was not an "authorized" representative (Specht had earlier expressed misgivings about the union, suggesting in writing the formation of a separate dispatchers unit). Whether Pavlak personally threatened Specht's candidacy is an unresolved issue of fact. Specht nevertheless demonstrates a prima facie case that his protected activities contributed to Pavlak's rejection of him as a police officer candidate. The deputy chief's offhand remarks to Specht soon after the rejection confirm that his protected activities played an important part in the personnel action.

Specht is less successful in proving disparate treatment. The other candidates, for the reasons explained, were either more highly rated than Specht or facts allowing my complete evaluation of at least one of them were not placed in the record.

The Township's business reasons for rejecting Specht -- that he received unsatisfactory evaluations in both the psychological report and background investigation -- withstand a review of the evidence. Consistent with the deputy chief's statement to Specht (before he was interviewed by Guller) that his candidacy would hinge on the two reports, the Chief found a "recommendation against" -- as prescribed by Guller's evaluation -- when the background investigation revealed the ambulance squad suspension.

If Specht was uniformly well regarded by his supervisors -- police superior officers, I would be more skeptical of the business justification. Agreeing that some criticism of him was unlawful under the Act -- and most of it was fairly explicit and may therefore be delineated -- I believe that Specht demonstrated over the years, personality traits panned by his supervisors. At the same time he performed his job well, Specht was variously cocky, sarcastic and "too independent" in fulfilling his dispatching duties. The annual performance evaluations praise his skill and criticize his attitude; the criticisms were written by officers (Paylo, Kussler and one other not identified) with no ostensible reasons to retaliate against Specht for protected activity. In fact, at least one ambivalent annual evaluation was completed before Specht engaged in protected activity.

Like any in-house employee seeking a promotion, Specht was better known than his applicant rivals. Sergeant Meurer tapped this knowledge readily at the department for his background investigation and it disadvantaged candidate Specht. I particularly noted Meurer's testimony that Galacio -- who testified credibly on behalf of Specht at the hearing -- was critical of dispatcher Specht's "independence."

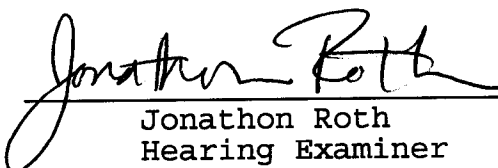
Guller's psychological evaluation confirmed the documented performance criticisms. Specht was "arrogant", carried an "aura of superiority" and had the "unfortunate quality" of "showing off" his intelligence. Guller confronted Specht with his criticisms and the candidate was "startled." (The facts do not show that Guller's report should be discredited.) Finally, I briefly observed similar

personality traits in Specht during his testimony.

I do not mean to suggest that the Chief always testified credibly; he was angry at Specht for the changeover day "grievance" and he was not an unassailable advocate of "truth telling" among police officer candidates in July-August 1992. I have offered an explanation of his latter decision which the Commission may or may not dispute. In any event, Pavlak did not have to rely on Specht's "protected" conduct for the decision to end his candidacy. Specht's results on the psychological evaluation and background investigation were substantially unrelated to protected activities. The Chief could and did rely on them, knowing Specht would not be his police officer.

RECOMMENDATION

I recommend that the Commission ORDER the complaint be dismissed. 17/


Jonathon Roth
Hearing Examiner

DATED: November 23, 1993
Trenton, New Jersey

17/ Minimal evidence was placed on the record concerning Specht's employment as a "special officer" (see findings 3, 26). Although the captain's comment to Specht was suspicious, I do not believe it raises an inference that the personnel action was taken in retaliation for protected activities. I also note that Specht has not alleged a violation of 5.4(a)(4) of the Act and the entire matter was not raised in the charging party's post-hearing brief. Accordingly, I dismiss this portion of the complaint.