P.E.R.C. NO. 88-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY SHERIFF'S DEPARTMENT,

Respondent,

-and-

PERC Docket No. CI-86-26-133
OAL Docket Nos. CSV-00113-86
& PRC-04494-86

WILLIAM DENVER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Essex County Sheriff's Department violated the New Jersey Employer-Employee Relations Act when it transferred William Denver to a 2:00 to 10:00 p.m. shift in retaliation for his filing a grievance contesting a work assignment. The Commission further finds, however, that Denver was not constructively discharged. Therefore, as a remedy, the Commission orders that the Department offer Denver reemployment, when available, in an atmosphere free of discrimination or retaliation.

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Appearances:

For the Respondent, H. Curtis Meanor, Acting County Counsel (Audrey B. Little, Assistant County Counsel)

For the Charging Party, William Denver, pro se

DECISION AND ORDER

On November 20, 1985, William Denver filed an unfair practice charge against the Essex County Sheriff's Department ("Department"). The charge alleges the Department violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection 5.4(a)(3),[1/] when it transferred Denver to a 2:00 to 10:00 p.m. shift in retaliation for his filing a grievance contesting a work assignment. He further alleges that the Department deliberately fashioned the reassignment to have the

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1/ This subsection prohibits public employers, their representatives or agents from: (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.

maximum hardship and that he could not comply with the order. Rather than fail to report, lose his job, and thereby lose pension rights, he resigned. He claims the resignation was involuntary and that the Department's action, therefore, was a constructive discharge.

On March 5, 1986, a Complaint and Notice of Hearing issued. On March 17, 1986 the Department filed its Answer. It denied the Complaint's allegations and, as an affirmative defense, asserted the managerial prerogative to reassign Denver for "training purposes."

On November 18 and December 5, 1985, Denver requested the Civil Service Commission ("Civil Service"), now the Merit System Board, to assist him in gaining reinstatement from Essex County ("County").[2/]

On January 29, 1986 the Department filed a motion to consolidate the Commission and Civil Service proceedings and sought a predominant interest determination before the Office of Administrative Law. Denver filed a cross-motion to consolidate and contended the Commission had the predominant interest.

On February 18, 1986, the Hon. George Perselay, Administrative Law Judge informed the parties that discovery had to be completed by March 21.

2/ County counsel represented both the Sheriff's Department and the County. For simplicity where appropriate, we will refer to both as the Department.

On April 1, 1986, the ALJ issued an order on motions for consolidation and determination of predominant interest. He first concluded, in agreement with the parties, that consolidation was appropriate. He then concluded that the Commission had the predominant interest.

On April 22, 1986, Denver filed with the ALJ a motion to compel discovery. The Department did not respond. On May 12, County counsel appeared to be heard on the motion. The ALJ suggested counsel contact Denver and inform him of what information the Department would supply. On May 20, the ALJ wrote Denver and indicated that the predominant interest determination had not yet been decided by the Commission and since ALJs do not ordinarily hear Commission cases, he was not sure of his jurisdiction. He further indicated that if his predominant interest recommendation prevailed, Denver should direct the discovery motion to the Commission hearing officer.

On June 16, 1986, Denver moved before the Superior Court, Appellate Division, for an order compelling discovery. On July 1, 1986, the Department opposed the motion arguing there was no reviewable interlocutory order and if there were, it should first be reviewed by the appropriate agency.

On June 26, 1986, the Commission adopted the ALJ's order and the Commission's General Counsel informed the Court that the Commission directed the ALJ to hear the case and that he could now rule on the discovery motion. On March 4 and 5, April 20, 21, 22,

and 23, May 5, 6, and 20, 1987 hearings were held. On July 14, 1986, the motion for leave to appeal was denied.

Throughout the hearing, there were numerous discovery disputes. In the first hearing on the discovery motion, the ALJ noted the Department should have answered prior to May 12, 1986, but allowed argument. On June 20, 1986, Denver offered to draft an order. Denver claims the ALJ said he would, but never did. Discovery was the subject of further argument. At one point, the Department agreed to permit Denver to inspect documents, but when he appeared at the County Courthouse, armed officers ordered him from the building. When Denver protested to the ALJ, Denver claims the ALJ refused to draft a specific order.

On July 25, 1986, Denver moved before the ALJ to compel discovery and urged the ALJ to recuse himself because of favoritism allegedly shown toward the Department. He alleged the Department had provided unsigned answers to interrogatories and that he was ordered from the County Courthouse by Chief Critchley while responding to County counsel's invitation to "amicably settle discovery matters." On July 29, the ALJ notified both parties that discovery matters would be heard on August 15. On August 7, the Department supplemented its answers to interrogatories and requested the motion to compel discovery be denied. On August 22, the ALJ issued an order authorizing Denver to attend County Counsel's office for discovery. On October 31, Denver requested a postponement because of his failure to obtain discovery and the pendency of other

actions in the Superior Court. He had been permitted access to his personnel file but not to requested teletype records. On November 10, the Department responded that it had fully complied with Denver's discovery requests. On November 19, the ALJ adjourned the hearing until January 26 and 27, 1987.

On December 8, 1986, Denver moved to amend the pleadings as follows:

> (1) The Department allegedly failed to give the notice of termination required by N.J.S.A. 11:26D-1; (2) the Department allegedly violated N.J.A.C. 4:1-21.4 (prohibited conduct), 4:1-21.5(a) (conspire to violate civil service law) and 4:1-21.5(b) (failure of a public officer to do that which is required by law); (3) Denver's request for protection under N.J.S.A. 34:19-1 is withdrawn; (4) Denver applies for relief under N.J.A.C. 4:1-21.1 (enforcement of laws and rules); (5) the Department allegedly violated N.J.A.C. 4:1-17.1(b) (local appointing authority to promulgate standards) by violating a series of departmental regulations and 4:1-21.3 (prohibition against political activity); (6) The Department allegedly constructively discharged Denver; (7) The Department refused to negotiate in violation of N.J.S.A. 40A:9-117.6; N.J.A.C. 4:1-21.5 and N.J.S.A. 34:13A-5.4; (8) Denver's actions were compelled by the law enforcement nature of his job, and (9) the resignation was from the position of court attendant, not sheriff's officer and in any event was made under duress.

The Department did not respond to the motion to amend the pleadings. At hearing, the ALJ went over each proposed amendment. He first granted some and denied others. Denver objected to his going through the record and finding reasons to deny the motions despite the Department's failure to object in writing. The ALJ then allowed all of the amendments with the qualification that it did not

mean he necessarily considered the amendments to be relevant to the issues at hand. The ALJ did not include within but merely attached these amendments to his recommendation and stated that he would address the issues raised in his decision.

On April 29, 1987, Denver moved orally for sanctions and to enforce subpoenas issued to the Sheriff and five officers. The ALJ denied the motion for sanctions and directed Denver to serve new subpoenas and proceed under N.J.A.C. 1:1-8.1 and R. 1:10-5 to enforce them.

At the conclusion of Denver's case-in-chief, the Department moved to dismiss on grounds the proofs did not establish the allegations. The Department then rested without calling any witnesses.

After extensions of time, both parties filed post-hearing submissions by June 29, 1987.

On August 28, 1987, the ALJ issued his recommended decision. He found that Denver consciously and voluntarily resigned. He further found that Denver did not quit because of any unfair practice and that his voluntary resignation made it unnecessary for him to determine whether an unfair practice was committed. He therefore recommended that the Complaint be dismissed and that the resignation be approved and affirmed. He made no specific findings or conclusions regarding the allegations in the amended Complaint.

On September 23, 1987, Denver filed exceptions. He excepts: (1) to the ALJ's rulings throughout the case, specifically his

allegedly biased discovery rulings; (2) to the omission of findings of fact, particularly, as to the amended Complaint; (3) to the statement of issues, and (4) to the ALJ's analysis and decision, particularly his not determining whether the Department committed an unfair practice, his not considering the validity of the security desk assignment, and his not deciding whether the resignation was from a sheriff's officer or court attendant's position. The County did not reply.

FINDINGS OF FACT

1. William Denver was employed from April 1965 to September 16, 1985 by the Essex County Sheriff's Department.

2. In September 1982, Denver signed a list indicating his intention to become a sheriff's officer pursuant to N.J.S.A. 40A:9-117.6 et seq. In January 1983, the Department of Civil Service informed the Sheriff and Denver that, subject to completion or waiver of a training requirement, Denver would be considered a sheriff's officer (A-36).[3/] Carmen Malangone is a court attendant who began training for sheriff's officer, became ill and chose not to complete training. He was permitted to revert to court attendant. Edward Fox signed the list to become a sheriff's officer but requested and was allowed to remain a court attendant. John Perkin signed the list but was given the option of remaining a court attendant.

3/ A-32 refers to appellant-charging party Denver's exhibit 36.

3. Throughout his tenure, Denver was assigned to maintain order and decorum in the Essex County Courthouse.

4. On August 28, 1985, Denver was given a one-day assignment to the Bureau of Criminal Identification ("BCI") to sit at a security desk in the hallway outside the sheriff's office on the second floor of the courthouse. Off the hallway are elevators, a stairwell and the entrance to the sheriff's department business office.

5. An unsigned order outlining the duties of the officer assigned to the security desk was taped to the inside cover of the visitors' log book (A-2). It provided that all non-employee visitors must be logged and issued a visitor's tag. Each visitor must sign his/her name, destination, and time in and out. Undersheriff John Tully did not know why A-1 (the duties in the log book) was issued or who issued it and believed it was not an order (TC 84).

6. The security desk assignment began briefly in April 1985 and then continued regularly in May. In February 1985, Sheriff's Officer Ronald Tamburro had submitted a report on manpower. He recommended eliminating a superior officer on the midnight shift. He was assigned to, and did not like working, that shift. On March 7, Chief James Critchley recommended Tamburro be demoted for his "cynical and negative attitude toward department policies and programs," his demonstrated "inability to comprehend the responsibilities and potential hazards of his present assignment,"

and his lack of command responsibility and sound judgment (A-32). On March 11, Deputy Chief Robert Kuta called Tamburro at home to inform him the Sheriff had demoted him because of the February report. Tamburro was regularly assigned to the security desk until December 1985. In July, Tamburro requested a transfer to any other assignment (A-31). He never received a response. In August, he was diagnosed as having an ulcer, in his words, "aggravated by the harassment, the job assignment, kind of futility of it all." (TF36).[4/] He filed a petition with Civil Service and then disciplinary charges were brought against him (TF47). He also filed a civil rights suit against the Department. His separation was settled without a hearing with a resignation in good standing plus payment of monies.

While at the security desk, Tamburro was told not to walk or to talk to anyone. Lieutenant Sherwood told him they were designing a post especially for him. In July, Captain Eugene Devine, second in command of the BCI under Kuta, issued an order at Lieutenant Edward Kozak's request prohibiting all personnel from talking to the officer assigned to the security post (A-3). In the beginning, there were no breaks. Passing officers suggested Tamburro "buy a few tickets" to straighten things out. Devine denied the security post was a punishment post, but acknowledged that "some may be more desirable than others, as assignments."

4/ TA refers to the transcript of March 4; TB to March 5; TC to April 20; TD to April 21; TE to April 22; TF to April 23; TG to May 5; TH to May 6, and TI to May 20, 1987.

7. Sheriff's Officer Anthony Paladino was assigned to the security desk in January 1986. At the time, he discussed with Denver his support of Charles Zizza's 1985 campaign against D'Allessio for Sheriff. He also told Denver his son actively supported Zizza. He did not recall telling Denver his assignment to the security desk was retaliatory.

8. During Sheriff D'Allessio's 1985 campaign, his campaign treasurer Thor solicited contributions from Department employees. The Sheriff conceded it was possible he provided employee addresses. Thor sent letters to employees inviting financial contributions for a political affair (TI27-28).

9. S.O. Dominic Fiorenza was employed by the Department from December 1969 to May 1986. In March 1985, he was reassigned from the Process Division to the Courts Division. In May, he was sent to BCI and in June, regularly assigned to the security desk. In January, Fiorenza's brother had gotten active in Zizza's campaign. Fiorenza met with D'Allessio who first informed Fiorenza of his brother's activity. D'Allessio told Fiorenza he did not like it and would take care of it. D'Allessio did not tell Fiorenza he was getting the security desk assignment for political reasons (TI39). Fiorenza later saw D'Allessio and confirmed his brother's activity. The next week he was reassigned and told not to see the Sheriff or any superior. In February, he asked Deputy Chief Gearty why he was being reassigned (A-23). Gearty told him, "you know as well as I why you're being reassigned" (TE74). He understood that to refer to his brother's activity.

Some officers would hold their mouths as they went by the security desk because they were not allowed to speak to Fiorenza. Friends walked by without saying hello. Fiorenza finally got a disability pension because of a bone growing against his spinal cord. His doctor restricted him to a desk job but the Department would not keep him on unless he could do regular work. He was told to resign, get a pension, or be fired. Frank Hurhuruz told him, "we drove one guy crazy. You're next." (TE92). Fiorenza believed Hurhuruz was referring to Tom Spinelli who had a nervous breakdown. Other alleged harassment included requirements to report activities such as when he used the paper cutter. He had to write, four times, a report on using a paper cutter to cut scrap paper because it was rejected. (A-24, A-25).

10. Richard Caruso worked for the Department from 1974 to 1985. He is currently an attorney in private practice. In November 1983, D'Allessio commended Caruso for his skillful and timely presentations concerning drug abuse (A-27). In January 1984, Caruso questioned Civil Service about the propriety of a promotional examination. Apparently, some people had received the questions and answers in advance. In March, Caruso told D'Allessio about his letter to Civil Service. D'Allessio was upset and said Caruso was hurting him and his cousin Jerry who was third on the promotion list. The next day, Caruso was transferred from the narcotics division to the courts. He was assigned computer tasks and logging papers in and out. Caruso believed his hours were changed

specifically to interfere with his ability to attend law school.[5/] In May or June, 25 disciplinary charges were brought against him. His attorney spoke to the PBA and then advised Caruso he was not going to get any help from it. He was terminated and his appeal was dismissed on procedural grounds.

11. Denver reported to BCI and was assigned by Kozak to relieve Fiorenza at the security desk. Kozak first asked Fiorenza to explain the duties. Fiorenza described challenging people that come in and out of the elevator as to their business in the Sheriff's office (TA76). Denver questioned the authority of the officer at the desk to require visitors to identify themselves. He asked what to do if a person did not respond. Kozak intended Denver to stop them if they walked past and then call a superior officer. Specifically he should detain the person, by force if necessary by the authority of the Sheriff. Kozak did not recall Denver stating he thought the order was unlawful; he believed Denver answered he didn't understand. Kozak was satisfied, however, that Denver would comply with the order. (TA84). Denver completed the assignment as ordered (A-2).

12. Deputy Chief Capozzi was commanding officer of the Courts Division in August 1985. He testified that the security post came about because of a conference between the sheriffs and judicial

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5/ Denver tried to question D'Allessio about Caruso's case but was confronted with a series of sustained objections. The Department never rebutted the allegations.

officers of the State. In November 1984, the Supreme Court approved "A Model Plan For Court Security in New Jersey Courts" that states that a county may decide to institute a building check-in with a log for signing in and out. In a Department of Labor hearing, Capozzi testified that an officer at the security desk would not have the right to use force in carrying out his duties. Before the ALJ, Capozzi testified that an officer at the desk could not use force unless the person poses a threat. If the person simply walked by, the officer "would perhaps have to escalate the situation on their own, or initiate some action on their own to make this a proper conduct. Such as putting their arm on the man or woman...and saying to them that you must have a purpose to be on this floor.... If the person then attempted to physically push his way past these officers then at that point they would be, I think, within their authority to particularly use force" (TA139-140). He could not cite any particular law that restricted public access to the sheriff's business office, but did not think an order restricting access is illegal. Capozzi further testified that if an officer believes an order is illegal, he should make his belief known to an immediate superior.

13. Denver first spoke to PBA vice-president William Cunningham about filing a grievance. He then filed a grievance (A-5) protesting the security desk assignment claiming it was a receptionist job and that explanations of the duties were "contradictory and non-informative."

14. James Casey was President of Local 183 for 17 years. He received the written grievance from Denver (A-5). He and Cunningham discussed it. In his 17 years, he had never seen an employee type, sign and submit his own grievance. The Local had always controlled the procedure. Casey objected to the way Denver handled it (TG32). After Denver requested PBA help, Casey discussed it with the membership and was told to consult PBA attorneys who advised him the grievance was not subject to arbitration because it was not a "contract grievance."

15. Fred DeMayo was the PBA state delegate. He recalled two or three meetings concerning the grievance; some with Undersheriff Tully without Denver. Tully represents the department in negotiations and handles grievances and disciplinary actions. DeMayo asked Tully for a written response to the grievance. Tully responded that it was new, that usually grievances are discussed informally. DeMayo informed Tully that Denver wanted everything in writing. A few days later, Tully responded. DeMayo felt the original grievance was frivolous. He didn't think Denver ever said he didn't know how to do the job; just that he didn't think it was his function and he didn't think he had the proper authority to perform the job (TG 164).

16. Tully testified that he saw the grievance but never responded to it. Exhibit A-5 is the grievance dated August 28, 1985. It contains the following "Answer by Division Head:"

> The assignment that Officer Denver is grieving is necessary to maintain security within the Sheriff's Office and the courthouse complex.

> Therefore, it is my opinion that Officer Denver's grievance has no merit.

It is signed by Tully and dated September 11.

17. Captain Eugene Devine ordered Kozak to file a report about the August 28 events because Denver filed a grievance (TA93). Devine did not recall ordering Kozak to submit a report and did not know why he would ask for one two weeks after the event. (TA98-100). Such a report would normally be forwarded up the chain of command with recommendations, but Devine did not think the situation required further action. He did not recommend a departmental investigation. On September 11, Kozak filed that written report.

18. Deputy Chief Frank Capozzi was commanding officer of the Courts Division in August 1985. When told Denver did not understand his duties, he ordered Denver to write a report and Lt. Minni to find out what happened. He, however, did not know any law authorizing a peace officer to demand identification of a citizen in a public building. (TC87).

19. Denver submitted his report (A-4) on September 3, 1985. It was entitled "Explanation of grievance" and stated, in part:

> I could get no clear idea of just what was expected of me other than the above requesting to sign-in.
>
> Specifically there remain the unanswered questions:
>
> 1. Under what authority of law may an officer refuse admittance?
> 2. Under what authority of law may an officer require identification?
> 3. Upon refusing admittance, in the event a person ignored the "security officer's" order to stop,

> under what authority may an officer use force to affect such a stop?
> 4. In the event of a suspicious looking person visiting, who had, say a bulge in his pocket, under what authority of law would the said "security officer" act to perform a stop and search?
> 5. Upon failure of a person to produce satisfactory identification, what authority is there to deny admittance?
> 6. Who was required to produce identification? All persons? Suspicious looking persons? Apparent police officers? ("...properly identified officers" -order)
>
> * * *
>
> With my past training and experience I understand my duties when guarding courts, i.e. judges, or juries or prisoners. But this new assignment seems to lack the benefit of specific legal authority present in those other instances.
>
> * * *
>
> Moreover, I have found myself criticized by superior officers in the past for stopping citizens in the corridors of the courthouse in circumstances far less remote than this. I have been told by superior officers that I had no legal right or authority to demand identification in the courthouse.
>
> * * *
>
> I raised these questions with Lt. Kozak and he said he would get back to me. He has not done so to date.
>
> * * *
>
> For the reasons of all of the questions in my mind that have remained unanswered by superior officers, I grieved the assignment.

20. Denver's reference to prior criticism related to a 1981 incident where Denver wanted to stop someone in the hallway of the courthouse and was told at the time that people had a right to go anywhere they wanted in the corridor. He was told specifically that he had no right to demand identification. When he differed with his superiors, then Sheriff Charles Cummings threatened to fire him. He appealed to the PBA and was advised he was subject to charges for remarks critical of his superiors. He backed down. Denver

testified he had been trained never to back down and that after being threatened with firing, he did. After that, he had trouble living with himself.

21. Capozzi did not recall making any written recommendations concerning the dispute to Chief Critchley. Capozzi instructed Denver, pursuant to Critchley's order, that he was the subject of a departmental investigation. On September 11, he issued an official notice to that effect (A-6; A-12). It was placed in Denver's file in the Special Investigation Division. In the Labor Department hearing, Capozzi testified he knew the PBA would not pursue a grievance on Denver's behalf. Tully testified he did not know Capozzi and Critchley had made a decision to investigate or that Denver had been asked to submit an explanation.

22. Capozzi met with Chief Critchley and agreed that some "retraining" should be instituted: "general retraining and attitudinal motivation." Denver was being "very argumentative." (TB34). Capozzi did not feel Denver's questioning of the particular duty had any merit (TB35). He didn't think he had any problem answering questions regarding legal authority, but acknowledged that he gave conflicting testimony at the two hearings. Capozzi insisted that the security officers' authority flowed from the Sheriff. However, the order in the log book was not signed. In such a case, Capozzi testified an officer should question his superior. When asked if that wasn't what Denver did, Capozzi responded that Denver's "Explanation of the grievance" was after the fact; instead

of going to a superior to talk it over, he filed a grievance because he felt he was being forced to perform an unauthorized duty. Tully testified that when an officer questions the legality of an order, he should perform the duty and then grieve it through the PBA (TC 63).

23. Casey suggested Denver withdraw the grievance. Officer Beloski suggested he withdraw because he liked Denver and didn't want to see anything happen.

24. On Friday, September 13, Capozzi order Denver to report for work from 2-10 p.m. on Monday, September 16 for training in the BCI. Regular training occurs between 8 and 4:00 p.m.

25. Critchley, Kuta and Capozzi gave conflicting testimony about who suggested the reassignment. Critchley testified the order to reassign Denver originated with Capozzi and Kuta and that, as he recalled, he was not aware of the grievance (TH21). But he also testified the departmental investigation was triggered by Denver's report entitled "Explanation of grievance" (A-4; TH23). Kuta did not recall making any specific recommendations regarding Denver's reassignment. He claimed he became aware of the reassignment when told Denver was to report. Capozzi testified that he agreed with Critchley that Denver needed retraining but that he did not recommend the shift change. He admitted that he knew from DeMayo that Denver had filed a grievance at the time of the reassignment, but that he hadn't discussed it with anyone and he hadn't seen the actual form. Capozzi rationalized that by working both through a

day and night shift Denver would be more aware of the varied duties of departmental offices. He testified it didn't enter his mind that it was a reprisal.

26. Denver immediately asked to see the Sheriff (TI91). He then submitted a formal request (A-9). Critchley denied his request and advised Denver that Critchley would speak to Denver the following week and that Denver should report at 2:00 p.m. as ordered.

27. Later that day Denver met with Tully, Casey and DeMayo. Casey and DeMayo stated the order was a reprisal and should be reconsidered or at least delayed to permit Denver to make changes in living arrangements or transportation.

28. Denver lived in Bricktown. He regularly took a bus home that left Newark at 6:30 p.m. He would now have to take an 11:00 p.m. bus to Lakewood, ten miles from his home, or stay in Newark during the week. When he had worked nights once or twice before, he had stayed over in Newark.

29. Tully stated the reassignment order might be reconsidered if Denver withdrew his grievance and questions (TI91).[6/] Tully also told Denver the duties would not be exclusively indoors. He might be ordered to get a car and go up to the pen to fingerprint a prisoner.

30. Denver described his response as follows:

6/ Denver's testimony was unrebutted.

> At that moment it became clear to me that what management planned was to put me on the spot. They were "going" to order me to take a car and go somewhere alone and that would force me into revealing a painful fact. That fact was that at the time I did not have driver's license. That I had lost my license in July of 1985 for drunken driving. (TI91-92).

Denver was sure management knew that fact. When he was arrested he had his badge on him and it is standard police procedure to inquire with the authorities involved to verify authenticity.7/

31. Denver then again asked to see the Sheriff. He believed he might obtain a more favorable discussion with him. His request was denied.

32. The PBA officer explained to Denver his only redress was through arbitration and that could take months. He went home and unsuccessfully tried to contact a lawyer over the weekend.

33. On Monday, September 16, Denver reported at 8:30 a.m. He gave Kuta a Notice of an Application for an Order to Show Cause With Temporary Restraints. At 11:00 a.m. Superior Court Judge Thompson denied the request on the papers.

34. Denver then submitted a memo to D'Allessio through the chain of command stating he was "on route to the appellate division to appeal that denial." I cannot get there and back by 2:00 p.m. I request leave to appeal" (A-8).

35. Capozzi advised Denver to make an appointment with the Court for Tuesday morning and ordered him to report for duty as

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7/ This testimony was also unrebutted.

ordered (A-8). Capozzi testified that he denied the leave request "because I could not afford to lose the man. I wanted prior notice so that the whole structure could be, you know, so that we could replace him for that day. And also you were assigned on that day to begin retraining" (TB69). Denver, however, was the only employee assigned to the 2-10 p.m. shift. As for notice, Capozzi was aware that Denver had taken issue with the assignment the previous Friday, the day he was first issued the order.

36. Denver responded that he would not return that day and if the order was pressed he would demur and if further pressed, he would resign (A-11). Capozzi then urged him not to resign, but did not grant his leave request.

37. Denver then returned to the PBA office. He typed a memorandum to D'Allessio, through channels, explaining that while he would not ordinarily refuse a transfer, when it is given to "calculatedly cause injury," to himself and his family, he would not comply. He continued that he was "unwillingly" tendering his resignation (A-17). DeMayo suggested Denver would be better off not coming to work and then the PBA would be able to defend and question the discipline. Other PBA members also tried to convince him not to resign.

38. Denver next met with Tully. He also denied the leave request. He testified he denied it because Denver had to go through the chain of command. Yet Denver had already been denied the leave by Capozzi, his superior officer. Tully testified that Capozzi was

there at the time and admitted there was no possible way Denver could have gone through channels differently than he had (TC35-54).

39. Tully testified Denver had a manila folder in his hand and that although he did not know what was in it, he advised Denver not to compound the situation. D'Allessio, however, knew about the resignation in advance and instructed Tully to encourage Denver not to resign.

40. Denver then submitted his resignation to Tully, who acknowledged receipt.

41. Casey wrote to D'Allessio that day (A-34). He indicated that neither he nor DeMayo agreed with or had any input into the resignation or court action. He then stated that Denver's actions were highly irrational, based on suspect emotions, and warranted some type of counselling and treatment. He requested the resignation be held in abeyance. D'Allessio did not respond (TG118).

42. D'Allessio testified that he had very little recollection of what occurred. He didn't recall, but believed he learned of the grievance after the resignation (TI4). He stated he did not review any files before testifying although subpoenaed to bring any "memoranda, reports, notes, or books you may need to refresh your recollection...." The ALJ noted "the nature of his testimony then goes to his credibility. He has no recollection, he made no effort to review anything. Perhaps that speaks for something. I don't know...." (TI6).

43. D'Allessio testified he had a written report on the matter from Critchley. County Counsel then informed D'Allessio, despite a sequestration order preventing witnesses from hearing previous testimony, that Critchley had previously testified that he did not write any reports. The ALJ instructed D'Allessio to check for any reports. The next day of hearing D'Allessio changed his testimony and reported there was no such report.

44. D'Allessio testified he read the resignation, but did not understand it to be under protest for a retaliatory assignment to work nights (TI56). He stated that it is solely the jurisdiction of the chief to investigate complaints of illegal acts by superiors. (TI60). He conceded that it was possible there was no way a departmental hearing could take place against the chief.

45. D'Allessio stated he was satisfied the resignation was accepted in good faith and that the Department is much better off without Denver.

46. Denver resigned because of the threat of disgrace and because he felt that things might escalate further. He wanted time to think. He was afraid if he did not report, he would lose both his job and his pension.

47. Denver did not go to the PBA about getting his job back because he felt they were overcome by fear of retaliation. He testified the PBA contributed large amounts to D'Allessio's campaign. The last PBA meeting he attended was taped by several persons including S.O. Tommy Bea. Denver was later confronted with

a transcript of that meeting in a United States Attorney General's office in connection with a probe of official corruption. Sheriff John Cryan was ultimately indicted as a result of Denver and 50-60 other officers' testimony.[8/] Later, while D'Allessio was in charge of special investigations, Bea was charged and convicted of illegal narcotics and weapons possession.[9/]

48. Denver applied for numerous jobs after his separation. He worked in a 7-11 store for one month, but quit because he could not stand on his feet for eight hours a day. He worked one week in a boatyard but quit because the job was too strenuous and dangerous. He did not seek employment with any other law enforcement agency.

ANALYSIS

The essence of Denver's unfair practice allegation is that the Department committed an unfair practice by constructively discharging him in retaliation for protected activity: his filing a grievance questioning the propriety of a security desk assignment. That discharge was allegedly manifested by the Department's reassigning him to a duty so onerous it forced him to resign.

The Department defends on these grounds: (1) Denver was not engaged in protected activity; (2) if he were, the decision to reassign was not retaliatory, and (3) his decision to resign was completely voluntary.

8/ The results of that indictment are not in the record.

9/ This finding is based on Denver's unrebutted testimony.

The ALJ first found that Denver voluntarily resigned and that, therefore, reinstatement and back pay were not available as remedies. He then determined Denver had not established that his grievance motivated the reassignment to the security desk.[10/] He concluded, however, the resignation did not make it necessary to determine whether the Department committed an unfair practice.

We disagree with the ALJ's approach. As we stated in our order adopting his predominant interest determination:

> [A] constructive discharge occurs "where the facts reveal that an employee resigned due to an employer's unfair practice or following an employer's imposition of onerous 'working conditions' after the employee's exercise of a protected activity . For an employer to be held legally responsible, it must be alleged and shown that the termination involved was the culmination of a plan on the employer's part to force such action, or the foreseeable consequence of earlier harassment." [12 NJPER ___; quoting Morris Cty., P.E.R.C. No. 82-28, 7 NJPER 578 (¶12259 1981)]

This analysis first requires a determination whether the Department retaliated against Denver and then a determination whether his resignation was a planned or foreseeable consequence.

In re Bridgewater Tp., 95 N.J. 235 (1985), establishes the standards to be applied in determining whether the Department unlawfully discriminated against Denver in retaliation for his protected activity. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the

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10/ The ALJ stated he considered and rejected, without stating or ruling on individually, all of Denver's arguments.

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.

Filing a grievance falls squarely under the umbrella of protected conduct. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987). Contrary to the Department's assertion, Denver's grievance was not a mere personal gripe, but an attempt to question the legal authority for an

assignment he completed. Even Undersheriff Tully, the Department's negotiations and grievance representative, conceded that when an officer is given an order but questions its legality, the officer should "perform the duty and then...grieve the duty through the local PBA." The Department cannot have it both ways. It cannot direct employees to a grievance procedure to resolve disputes and also expect that the resulting use of that procedure is not protected. A grievance over whether an employee is being asked to perform unlawful duties directly affects working conditions and is protected under our Act. Even frivilous grievances or those pertaining to non-mandatory subjects are protected.

There is no dispute the Department knew of Denver's protected activity. He questioned the assignment immediately. He filed his grievance the same day. PBA representatives met with Tully two or three times concerning the grievance. Tully even noted the unusual request by Denver that he respond in writing. On September 3, 1985, Denver also submitted a two-page report entitled "Explanation of grievance."

There is a dispute, however, as to when those who reassigned Denver first knew of the grievance. The ALJ essentially found two parallel but separate hierarchies within the Department. One was supposed to have known about and handled the grievance while the other knew nothing of the grievance and independently decided Denver need retraining. The facts show otherwise. Tully indisputably knew about the grievance, but did not order the reassignment. Critchley,

Kuta and Capozzi were responsible for the reassignment and knew about the grievance. Critchley admitted the departmental investigation, which preceded the reassignment order, was triggered by Denver's "Explanation of grievance" and stated the order to reassign originated with Capozzi and Kuta. Capozzi admitted he knew at the time of the reassignment that Denver had filed a grievance, but claimed the reassignment order originated with Critchley. Kuta did not recall making any recommendations. Thus, while no one wanted to take responsibility for originating the reassignment order, all involved knew about the grievance at the time.

There is also a dispute as to whether the Department was hostile toward the exercise of protected rights or whether it simply reassigned Denver to correct deficiencies in knowledge and ability to carry out assigned duties.

There is direct evidence linking the reassignment to the grievance. Denver credibly testified, and the Department did not rebut, that Tully stated the reassignment order might be reconsidered if Denver withdrew his grievance and questions.

In addition, an inference of hostility can be drawn from the timing and nature of the reassignment: (1) The ALJ noted "it is strangely coincidental that the notice of the transfer for training followed the meeting with Tully shortly after Mr. Denver received the denial of his grievance." Timing is an important factor in assessing motivation. See Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, __(¶17002 1985); (2) The retraining was not to train

Denver how to carry out his duties (he had already successfully completed the security desk assignment), but was for "general retraining and attitudinal motivation": to correct Denver's argumentative attitude. Capozzi felt Denver should have gone to a superior with his questions rather than file a grievance. The fact is he had already tried that. In any event, filing a grievance is protected; (3) The "retraining" was to be on an irregular shift to which only Denver would be assigned and which would cause him and his family hardship, and (4) Denver would be asked to drive and forced to reveal his drunken driving conviction.

Also, there is a history of retaliatory assignments which supports the inference that Denver's reassignment was retaliatory. Tamburro was assigned to the security desk for his "cynical and negative attitude." Paladino was assigned to the security desk at a time when he and his son actively supported Zizza, the Sheriff's electoral opponent. Fiorenza was assigned to the security desk because of his brother's support for Zizza. Caruso was reassigned because he complained to Civil Service about the propriety of a promotional examination.[11/]

We thus find that the reassignment was motivated by protected activity. We also reject as pretextual the Department's explanation

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11/ The testimony regarding these employees was unrebutted. It is not improbable, extraordinary or surprising in the context of this case and there are no other reasons in the record for doubting its accuracy. See, Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482 (1956).

of the reassignment. Accordingly, we find that the Department violated subsection 5.4(a)(3) when it reassigned Denver to the 2-10 p.m. shift in retaliation for protected activity -- the filing a grievance contesting a work assignment.

We now address whether Denver's resignation was a constructive discharge. In Morris Cty., we articulated a standard for finding a constructive discharge. In applying this standard, we must balance competing interests. Public employers have an interest in not having employees quit in protest of unfair practices. This agency and the Act it implements provide make-whole remedies for violations of employees' rights to engage in protected activity. Public employees have an interest in not allowing employers to insulate themselves from unfair practice liability by creating conditions so onerous for employees in retaliation for protected activities that it becomes unbearable for those employees to continue working.

We have already found that Denver was reassigned because of his protected activity. However, when Denver suggested to both his employer and the PBA leaders that he would resign, all vehemently objected. DeMayo even suggested Denver not come to work and then the PBA would be able to defend and question any discipline imposed. Although the reassignment was illegal and may have imposed difficulties, Denver had alternatives to quitting which he could have pursued and which the Department intended or could have reasonably expected him to pursue. Thus, Denver has failed to prove his resignation was the intended or a foreseeable consequence of the

Department's unfair practice. Thus, we do not find a constructive discharge. Despite that, it was the Department's illegal conduct that caused Denver to resign. Also, the Sheriff expressed hostility to the possibility of his reinstatement. He ignored the PBA's attempt to have the resignation held in abeyance and testified the Department was better off without Denver. We are confident that absent Denver's protected activity, the Department would have either rescinded the resignation or reinstated him. Accordingly, in addition to ordering the Department to cease and desist from engaging in similar illegal conduct, and mindful of our obligation to "take such reasonable affirmative action as will effectuate the policies of this act," N.J.S.A. 34:13A-5.3(c), we order it to offer to Denver reemployment, when available, in an atmosphere free of discrimination or retaliation. Denver must respond within 21 days of the offer.12/

ORDER

The Essex County Sheriff's Department is ordered to:

A. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act, particularly by retaliating against

12/ We also find that Denver's resignation was from the Department's employ and not from any specific title and that the Department had no duty to negotiate with Denver under N.J.S.A. 34:13A-5.4 or 40A:9-117.6. In addition, we transfer to the Department of Personnel all remaining allegations of violations of Civil Service (now Department of Personnel), statutes and regulations. N.J.A.C. 1:1-17.8(b).

William Denver for his filing a grievance contesting a work assignment.

B. Take the following affirmative action:

1. Offer William Denver reemployment, when available, in an atmosphere free of discrimination or retaliation. This offer shall remain open for 21 days.

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

The allegation concerning a duty to negotiate is dismissed. The remaining allegations are transferred to the Department of Personnel for appropriate action.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
February 22, 1988
ISSUED: February 23, 1988