

P.E.R.C. NO. 2001-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Respondent,

-and-

Docket No. CI-H-96-70

JO-ANNE JOBECK,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the County of Union. The Complaint was based on an unfair practice charge filed by Jo-Anne Jobeck alleging that the County violated the New Jersey Employer-Employee Relations Act when County officials harassed her in retaliation for her organizing on behalf of the United Electrical Workers Union of America. Jobeck also contends that she was unfairly denied the opportunity to work overtime, was wrongfully suspended for three days, and has had problems with the calculation of her pay. The Commission finds that the charging party did not prove that the County was hostile toward her protected activity or that it retaliated against her for such activity.

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

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JO-ANNE JOBECK,

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Appearances:

For the Respondent, DeMaria Ellis & Bauch, attorneys
(Kathryn V. Hatfield, of counsel)

For the Charging Party, Krenkel & Monaghan, attorneys
(David A. Krenkel, of counsel)

DECISION

On May 14 and July 14, 1996, Jo-Anne Jobeck filed an unfair practice charge and amendment against the County of Union. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{1/} when County officials harassed her in retaliation for her organizing on behalf of the United Electrical Workers Union of America. Jobeck also contends

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

that she was unfairly denied the opportunity to work overtime, was wrongfully suspended for three days, and has had problems with the calculation of her pay.

On October 8, 1996, a Complaint and Notice of Hearing issued. On June 12, 1997, the County filed an Answer denying any wrongdoing. By way of affirmative defenses, the County asserts that it had just cause to discipline Jobeck for absenteeism, tardiness, insubordination, failure to perform her duties, and neglect of duty.

On July 8, 1997 and June 9, 1998, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by March 2, 1999.

On May 8, 2000, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2000-10, 26 NJPER 260 (¶31102 2000). He found that the employer was not hostile toward Jobeck's protected activity and that it did not retaliate against her for such activity.

On May 22, 2000, Jobeck filed exceptions. She claims that the Hearing Examiner erred in finding that her record was not unblemished prior to her union involvement; in failing to find that she did not fill out a new leave form for the day she attended a PERC representation conference; and in finding that her testimony should not be credited because she did not disclose that she had made an inappropriate statement to John Tuite, the

Director of the Division of Information Systems and Telecommunications. Jobeck argues that she presented substantial and credible evidence which demonstrated that she was retaliated against or disciplined because of her protected activities.

On May 26, 2000, the County filed an answering brief. It asserts that Jobeck was issued a reprimand for excessive absenteeism and tardiness almost a year before her union involvement; there is no basis to reject the Hearing Examiner's finding that Jobeck completed a new leave form; and Jobeck never testified on direct examination that she had made an inappropriate remark to Tuite.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-26) with the modifications addressed below.

We specifically adopt the Hearing Examiner's statement that Jobeck received a reprimand in March 1994. The document is in the record. Whether or not there was cause for the reprimand is not crucial to the finding that the reprimand issued prior to Jobeck's engaging in protected activity.

We modify finding 11 to indicate that Jobeck may not have completed a new leave form. DeCuollo may have completed the form with Jobeck's consent (2T102). This modification, however, has no bearing on our overall findings or conclusions. DeCuollo first suggested to Jobeck that she could use a family sick day rather than a personal day to visit her sick father and later told Jobeck

that she had to change it back to a personal day because she had gone to a PERC proceeding instead. We infer no animus from the interaction and do not discredit DeCuollo's testimony. She ultimately testified that Jobeck did not sign the second form.

Finally, we modify finding 12 concerning the assessment of Jobeck's credibility. We do not rely on Jobeck's failure to testify on direct examination about a reprimand she had received. Jobeck was not asked about the reprimand on direct examination and we see no reason why her counsel should have asked her at that time about the earlier reprimand. Jobeck did answer questions about the reprimand on cross-examination and rebuttal. Nevertheless, we still find no basis for finding that DeCuollo constantly harassed Jobeck in retaliation for Jobeck's protected activity. There was no evidence of hostility to protected activity presented, no motive for such hostility, and no corroboration of Jobeck's testimony about DeCuollo's alleged harassment.

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.

The County Director of Administrative Services asked Tuite, Jobeck's supervisor, whether Jobeck was supposed to be at the PERC conference. Tuite then checked with DeCuollo who told him that Jobeck had taken a family sick day to see her sick father. That conversation led to the need to change Jobeck's leave request to a personal day. We infer no animus from these events.

We also have no basis to disturb the Hearing Examiner's determination to credit DeCuollo's testimony that she did not harass Jobeck. The Hearing Examiner based his determination on a


number of factors. Jobeck had no corroborating witness; DeCuollo had very little daily contact with Jobeck; DeCuollo was a credible witness; and Jobeck failed to disclose that she had been disciplined for making an inappropriate comment to Tuite. Even discounting the failure to disclose, who have no basis to credit Jobeck over DeCuollo and the charging party has the burden of proving her allegations by a preponderance of the evidence. N.J.S.A. 34:13A-5.3c; Bridgewater. She has not done so.

Under all these circumstances, we adopt the Hearing Examiner's recommendation to dismiss the allegations in the Complaint concerning the alleged harassment and suspension. In the absence of exceptions, we also accept the Hearing Examiner's recommendation to dismiss the allegations concerning overtime and pay calculations.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration.

DATED: July 20, 2000
Trenton, New Jersey
ISSUED: July 21, 2000

H.E. NO. 2000-10

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

In the Matter of

COUNTY OF UNION,

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-and-

Docket No. CI-H-96-70

JO-ANNE JOBECK,

Charging Party.

SYNOPSIS

The Charging Party has alleged that she was harassed and disciplined as the result of her involvement in organizing activities for the United Electrical Workers. The Hearing Examiner found that the Respondent was neither hostile toward Jobeck's protected activity nor did it retaliate against her for engaging in such activity. The Hearing Examiner recommended that the Commission dismiss the unfair practice charge.

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

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Appearances:

For the Respondent, DeMaria Ellis & Bauch
(Kathryn V. Hatfield, of counsel)

For the Charging Party, Krenkel & Monaghan, attorneys
(David A. Krenkel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 14 and July 14, 1996, Jo-Anne Jobeck filed an unfair practice charge and amendment, respectively, (C-3, C-4)^{1/} against the County of Union alleging that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A- et

^{1/} "C" refers to Commission exhibits received into evidence at the hearing in this matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearing are referred to as "1T" and "2T."

seq., specifically provisions 5.4a(1) and (3)^{2/} when County management representatives, in particular Ernestine DeCuollo, began harassing and intimidating her in January 1993, while Jobeck was engaged in organizing activities for the United Electrical Workers Union of America (UEW). Jobeck claims that the harassment became more severe after she attended a February 27, 1995 meeting at the Public Employment Relations Commission ("PERC"), which County representatives also attended. Jobeck further alleges that the County did not respond to her complaints about the harassment in March 1995, and that on September 12, 1995, Jobeck again raised the harassment problem to her supervisor and within a week she received several reprimands, formal warnings and suspensions. Jobeck claims that the County continues to be unresponsive to her attempts to resolve her situation and that the harassment has continued.

Jobeck further contends that she was unfairly denied the opportunity to work overtime, that she was wrongfully suspended for three days, and that she has had problems with the calculation of her pay.

On October 8, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1).

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On June 12, 1997, the County filed an Answer, including affirmative defenses (C-2), denying any wrongdoing. Specifically, the County denies it, and in particular DeCuollo, harassed Jobeck because of her union organizing activities. It further denies that: 1) it served Jobeck with any reprimands, formal warnings or suspensions because of her union organizing activities; 2) it failed to investigate Jobeck's complaints; 3) Jobeck has been unfairly denied overtime opportunities; and 4) it has taken any action against Jobeck in retaliation for her union organizing activities.

The County also sets forth several affirmative defenses. Specifically, it claims that it had just cause to reprimand Jobeck for excessive absenteeism, tardiness, insubordination, failure to perform her duties and neglect of duty. It further asserts that the County did not breach any duty owed to Jobeck and that the County conducted a good faith investigation of Jobeck's complaints.

A hearing was held in this matter on July 8, 1997 and June 9, 1998. The parties submitted post-hearing briefs by March 2, 1999. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. Jo-Anne Jobeck has been employed by the County since 1985 and, at the time of the hearing, is a principal data control clerk in the Division of Information Systems (1T14, 1T33, 2T120). She is the only County employee in this title and functions

autonomously. Her job is repetitive and does not require interaction with other employees (1T19-1T20, 2T13). Jobeck performs some clerical duties and handles bills and the tape library; however, the most important aspect of her job is processing payroll checks for approximately 3300 County employees (1T20-1T21, 1T140). Jobeck's immediate supervisor is Sandra Mazzella, Operations Supervisor (1T20, 2T11).

2. John Tuite is the County Director of the Division of Information Systems and Telecommunications and has held that position since 1985. Tuite, as department head, has approximately 40 employees under him (1T119-1T120, 2T3). The Division is in charge of the County's computer systems, phones, print shop and mail room (1T120).

Tuite has known Jobeck for the entire tenure of her employment (1T120-1T121). While Mazzella was out on extended sick leave in 1994, Tuite acted as Jobeck's direct supervisor (1T121). Tuite did not have a problem with Jobeck's attendance and job performance during the first 10 years of her employment (1T121-1T122). Occasionally, he felt it necessary to write a memo to employees in his department, reminding them to pay attention to their attendance (1T122).

3. Ernestine DeCuollo has been employed by the County for 25 years. She is currently the Supervisor of Systems and Programs and has been since 1993. She is responsible for installing the computer systems. DeCuollo has worked in the same department as Jobeck since 1992 (2T74-2T75).

4. On March 3, 1994, Tuite issued Jobeck a reprimand for excessive absenteeism and tardiness (2T63, 2T69; R-6). R-6 states that on a number of occasions, Tuite had to reassign Jobeck's work to other staff (R-6). Jobeck did, however, have a doctor's note for the period January 27, 1994 through February 1, 1994 (2T71-2T73; CP-3).

5. In June 1994, the UEW attempted to organize County employees. Jobeck became interested in the UEW because she, along with several other employees, felt that they needed representation better than the representation they were receiving from their current majority representative, Union Council No. 8, New Jersey Civil Service Association, IFPTE, AFL-CIO (1T14, 1T54; R-11).

Jobeck became very involved in organizing activities for the UEW. She attended rallies, recruited individuals, conducted telephone surveys and was interviewed by a reporter for the Newark Star Ledger newspaper (1T14-1T15, 1T54). This organizing activity occurred primarily at night, but also occasionally on weekends and during the day (1T55).

6. In 1994-1995, Tuite became consumed in the Total Quality Management Project for the County. It required him to attend numerous meetings and thus prevented him from monitoring employee attendance. Thus, in October 1994, he assigned time monitoring responsibilities to DeCuollo. She was to monitor employees' arrival times, attendance, lunch times and breaks. She was also required to handle employees' requests for time off and

ensure that employees properly punched in and out. Tuite expected DeCuollo to report any attendance problems to him. In October 1994, Tuite sent a memo to employees in his department, including Jobeck, advising them of DeCuollo's new duties (1T123-1T124, 2T4-2T6, 2T9, 212, 2T75-2T77; R-8). Based on the memo, Jobeck understood that she was required to approach DeCuollo when she needed time off (1T51).

As far as Tuite knows, DeCuollo's New Jersey Department of Personnel job title encompasses time monitoring and attendance duties. Tuite spoke to Joseph Salemme, County Director of Administrative Services, and Gregory Hardoby, Director of Personnel, about whether it was appropriate to assign DeCuollo those duties. They agreed it was (2T12). With the exception of performing her time-monitoring responsibilities, DeCuollo did not have any role with regard to Jobeck and would only encounter Jobeck in a situation where Tuite, in his absence, put her in charge (2T12-2T16).

Mazzella and sometimes Tuite handled time monitoring duties prior to DeCuollo (2T7). When Tuite assigned DeCuollo the duties, he explained what they would entail in a broad brush; he did not issue her a lengthy set of directions (2T8-2T9, 2T75-2T76).

DeCuollo had a good idea of what Tuite wanted her to do, as she had been a supervisor for many years (2T75-2T76). Tuite and DeCuollo decided that employees' time would be kept through the use of a sign in and sign out sheet. Employees were required

to sign in when they arrived and sign out when they went on a cigarette break or to different floors (2T80).

DeCuollo would keep track of requests for days off. Employees would complete a request form and submit it to DeCuollo. DeCuollo would then approve it, give the employee a copy and then give a copy to personnel (2T80).

7. Jobeck did not always comply with the sign in and sign out procedure. When DeCuollo approached Jobeck several times about this, DeCuollo felt Jobeck was very arrogant. DeCuollo told her that if she refused to sign in and out, she could punch in and out on her time card (2T81). Prior to DeCuollo assuming time monitoring duties, Tuite rarely had any problems with Jobeck with regard to use of time (2T10).

DeCuollo felt that Jobeck's attitude towards her changed once she became timekeeper. DeCuollo described Jobeck as becoming arrogant and intimidating (2T88). According to Jobeck, DeCuollo made it very difficult for her when she needed time off (1T60). DeCuollo, however, never denied an employee's request for time off, including Jobeck's (2T80-2T81, 2T89).

In early 1995, Tuite held a meeting with his employees to review attendance procedures and policies, and to set forth his expectations. Jobeck asked to be excused from the meeting before it was over. Tuite said "fine." Later, Tuite confronted Jobeck and told her he did not appreciate her leaving the meeting early (1T125-1T126).

8. In January 1995, DeCuollo requested that Jobeck and fellow employees Bridget Ciaramello, Jamie Babas & Deborah Velez, provide her with a list of their duties (2T78; R-9). DeCuollo wanted the lists from these employees who she was responsible for because between October and November 1994, several employees requested time off and she wanted to ensure in the future that the work of absent employees was covered by back-up employees. The lists would also enable her to arrange vacation schedules (2T79). All employees quickly complied with DeCuollo's request except for Jobeck (2T79-2T80). Jobeck did not immediately comply and questioned the request because DeCuollo was not her supervisor and because Jobeck felt that DeCuollo's behavior had been vulgar for several months (1T21-1T22, 1T64-1T65, 1T130).

Tuite told Jobeck that he approved of DeCuollo's request and explained that now he was making the same request (1T22, 1T130-1T131). Jobeck told DeCuollo she was not going to provide the list promptly because she was having a problem with tax bills. Jobeck told DeCuollo she would provide it after tax season was over in a couple months. DeCuollo kept asking for the information and warned Jobeck she would write her up if she did not provide it. Jobeck told her she would provide it when she had time (1T65, 1T67, 1T130-1T131, 2T79-2T80). Jobeck finally gave DeCuollo the information in August 1995, approximately 8 months after the request was made (1T66-1T67, 2T80). Jobeck did not understand why the request was necessary, since, according to

Jobeck, the County already knew her duties, as there was a formally listed back-up employee for her (1T68).

9. On approximately February 21 or 22, 1995, Jobeck made a request to DeCuollo for a day off on February 27, 1995. Jobeck told DeCuollo that her father was sick and that she had a 3:00 p.m. appointment with social workers that day to discuss her father's case (1T51, 2T81-2T82).

DeCuollo offered some assistance to Jobeck, since she had worked in a nursing home at Runnells Hospital for 20 years. DeCuollo explained that if Jobeck needed any information on financial aid, Medicare, Medicaid or getting her father into Runnells Hospital, DeCuollo would try to help (2T82).

Jobeck completed a day off request form around February 23, 1995. There are three types of days off an employee can take: 1) a sick day; 2) a personal day; or 3) a vacation day. Jobeck originally requested February 27, 1995 off as a personal day and, as such, "personal day" was printed at the top of the form. DeCuollo approved it. DeCuollo, however, explained that if Jobeck desired, she could take a family sick day to see her father; she did not need to use a vacation or personal day. Thus, Jobeck completed a new request form, this time requesting a family sick day off for February 27 (2T25, 2T28-2T29, 2T82-2T83; CP-1; 2T94-2T99; CP-1).

After she made the request, UEW organizers asked Jobeck to attend a meeting at PERC on the same date. Jobeck asked the

organizers how long the meeting would take, in light of the fact that she had the 3:00 p.m. appointment that day to discuss her father. The organizers told her the meeting, which was scheduled to begin at 9:00 a.m., would not take more than an hour. Thus Jobeck decided to attend the PERC meeting, because she believed she could still make her appointment concerning her father (1T52).

10. On February 27, 1995, Jobeck attended a representation conference at PERC which Hardoby and Salemmé also attended, among others. Hardoby and Salemmé knew Jobeck but did not say anything to her at the meeting (1T15-1T16). Jobeck spoke at the meeting which over 20 people attended (1T53).

During the meeting, Salemmé called Tuite. He asked Tuite if Jobeck was supposed to be at the meeting, or if he knew that Jobeck was going to be at the meeting. Tuite told Salemmé that he had no idea that Jobeck was going to be there (1T126-1T127, 2T16, 2T21). Prior to this, Tuite knew she was interested in the UEW but did not know any specifics and did not know about the meeting (1T127, 2T22).

After the call, Tuite went to locate DeCuollo to learn where Jobeck was supposed to be. DeCuollo advised him that Jobeck had taken a family sick day to see her sick father (1T127-1T128, 2T20-2T21, 2T29, 2T83-2T84, 2T103-2T104). Tuite then told DeCuollo Jobeck had to use a personal or vacation day, not a sick day for her attendance at the PERC meeting (2T19, 2T22, 2T83-2T84). Neither Tuite nor DeCuollo objected to Jobeck

attending the meeting. Tuite simply objected to the type of time Jobeck had requested off (1T128-1T129, 2T64, 2T86-2T87). Tuite has never questioned any other employee's use of personal time except for this instance involving Jobeck (2T24).

Jobeck had taken her own car to the meeting so she could leave early to keep her appointment with the social worker, if necessary. Jobeck, however, did not leave the PERC meeting for the appointment because the meeting could not be rescheduled, while the appointment with the social worker could. The PERC meeting lasted until 8:00 p.m. (1T152-1T53).

11. At 9:00 a.m. on February 28, 1995, the day after the PERC meeting, DeCuollo spoke to Jobeck at the time clock. Jobeck felt DeCuollo was "perturbed" (1T17). DeCuollo asked how Jobeck's father was. Jobeck responded she did not have a chance to see him, that she had attended a meeting instead (1T17-1T18, 1T54, 2T85). DeCuollo then advised Jobeck that she would have to change the type of time off she had requested. Jobeck consented. Jobeck then completed a new form, changing the requested type of time off to a personal day. DeCuollo backdated the new form to February 23, 1995. Prior to Tuite advising DeCuollo that Jobeck was at the PERC meeting, DeCuollo was not aware Jobeck was involved in union organizing activities (2T85-2T86).

Also on the morning of February 28, 1995, Tuite asked Jobeck why she had attended the PERC meeting. Jobeck explained that she had intended to see her father, but that her plans had

changed. Tuite told her to tell somebody when she changes her plans like that, as he did not appreciate hearing from Salemmme about her attendance at the PERC meeting (1T128, 2T23-2T24).

Tuite did not mind that Jobeck was involved in the union. Tuite would occasionally see Jobeck with union literature and would sometimes see her talking about the union (1T128-1T129). He did not reprimand or discipline Jobeck for attending the meeting. Tuite also did not discuss Jobeck's union activities with her (1T128-1T129, 2T24, 2T64, 2T86-2T87). After the PERC meeting, Jobeck claims Tuite mentioned her organizing activity to her, but never stated that he did not like it. Jobeck told him about the activity (1T55-1T56).

12. After the February 27, 1995 PERC meeting, Jobeck started feeling threatened by DeCuollo. According to Jobeck, DeCuollo began harassing her before the PERC meeting, but the harassment severely heightened after it. Jobeck claims on several occasions, DeCuollo thrust her groin at her and told her "she was going to watch everything Jobeck did, since Jobeck had been at PERC, when she wasn't supposed to be." (1T18-1T21, 1T58, 1T61, 1T70). Jobeck claims DeCuollo mentioned that she (Jobeck) attended the PERC meeting at least 10 times, beginning a few days after the meeting (1T56-1T57). DeCuollo did not say she did not like Jobeck's UEW activities, but Jobeck clearly felt she did not (1T57). Jobeck thought DeCuollo's behavior was especially frightening, since DeCuollo had no working relationship with

Jobeck. DeCuollo was not Jobeck's supervisor, although she was a managerial employee (1T18-1T19, 1T58, 2T118). After Jobeck's union involvement, she asserts that DeCuollo harassed her on a daily basis. Before Jobeck's union involvement, DeCuollo was not often in Jobeck's work area, except to perform administrative duties (1T59-1T60).

DeCuollo disputes Jobeck's allegations of harassment. DeCuollo claims she did not harass or intimidate Jobeck because of her attendance at the meeting or even raise to Jobeck her attendance there (2T85-2T86, 2T93, 2T106). She also denies she ever raised her voice or used harsh or off-color words to Jobeck (2T106). According to DeCuollo, she had very little daily contact with Jobeck, because from February 1995 through the end of 1995, DeCuollo was involved with installing a computer system in the County. Thus, DeCuollo would be out of the office 2 1/2 days a week; the other 2 1/2 days were spent either on the road or training people throughout the building (2T87). She would simply see Jobeck in the computer room, outside on cigarette breaks and sometimes in the ladies room (2T87). Tuite never heard DeCuollo mention to Jobeck that she had a problem with Jobeck's attendance at the PERC meeting (1T129).

In March 1995, Jobeck complained to Tuite about DeCuollo's harassment. Tuite spoke to DeCuollo about Jobeck's allegations. DeCuollo categorically denied the allegations. Tuite then asked Jobeck if anyone had witnessed the alleged

harassment; she responded no (2T38). Tuite believed that Jobeck's allegations had to be corroborated since DeCuollo categorically denied them (2T39, 2T66). Tuite then counseled DeCuollo advising "Well, for whatever reason Jo-Anne took offense so just be very careful in your speech and your dealings with Jo-Anne for whatever reason she is sensitive" (2T66-2T67).

DeCuollo was confused and startled by Jobeck's allegations. DeCuollo and Tuite agreed that she would have the least contact possible with Jobeck. After that, DeCuollo only crossed paths with Jobeck in regard to time off requests and DeCuollo's request for the list of Jobeck's duties (2T89). DeCuollo never denied Jobeck time off after she learned of Jobeck's allegations (2T89).

After her March 1995 meeting with Tuite, Jobeck claims DeCuollo continued to harass her (1T130). Jobeck asserts DeCuollo told her she would continue to watch Jobeck and would write her up. Jobeck characterized DeCuollo's behavior as vulgar and psychotic (1T21-1T22, 1T130).

I credit DeCuollo's denial of harassment. Significantly, Jobeck failed to provide one supporting witness or otherwise provide any corroboration for her testimony about DeCuollo's alleged harassment and vulgar behavior. Moreover, DeCuollo had very little daily contact with Jobeck during the time of the alleged harassment. She was installing the County computer system during this time. (See supra, p. 13.) Thus, it would have been

impossible for DeCuollo to have constantly harassed Jobeck, as Jobeck claims. Further, DeCuollo was a credible witness and was forthright in her testimony, while Jobeck sometimes was not. Specifically, Jobeck failed to testify on direct examination about a September 1995 incident when she approached Tuite about a reprimand she had received and told him "that he ought to get a dick." (Jobeck received a suspension for making that statement. See Finding No. 18.) Jobeck's apparent intentional failure to disclose this incident during her testimony undermined her credibility.

13. Jobeck claims that there was an unwritten policy whereby employees were entitled to a half hour break to cash their paychecks. In March 1995, Jobeck notified fellow employee John Matson that she was leaving the building to cash her check. DeCuollo, however, approached Jobeck when she returned and asked where she was. Jobeck responded that she was cashing her check. Jobeck claims DeCuollo screamed at Jobeck about this (1T63-1T64).

14. In September 1995, when DeCuollo and Tuite were in Jobeck's work area, Jobeck approached them in an attempt to resolve her situation (1T24-1T25, 1T68-1T69). She told Tuite that DeCuollo was violating her civil rights, and that while the UEW election had been five months ago in April 1995, the harassment by DeCuollo continued. Jobeck then told Tuite the ordeal was adversely affecting her health, and that DeCuollo has no work relationship with her. According to Jobeck, DeCuollo mentioned

that Jobeck was not supposed to be at the February 27, 1995 PERC meeting (1T25, 1T68-1T69).

Jobeck warned Tuite that if the harassment continued, she wanted verification from the New Jersey Department of Civil Service that DeCuollo is qualified as an attendance officer or as a supervisor of operations. Tuite responded that he could not do that. According to Jobeck, he intimidated her by continually mentioning how it looked like Jobeck was about to cry (1T25-1T26).

Tuite again told Jobeck he would speak to DeCuollo about Jobeck's complaints. He did. DeCuollo again categorically denied the allegations. Tuite again counseled DeCuollo to be careful in speaking to Jobeck because Jobeck apparently is easily offended (1T135-1T136). Tuite never produced documentation showing that DeCuollo had supervisory authority over Jobeck (1T26).

According to Jobeck, DeCuollo's harassing behavior continued. Jobeck next went to her supervisor Mazzella and explained how she felt she was being persecuted; Mazzella agreed. Mazzella told her she had never seen anything like it in 16 years (1T27). However, Mazzella was not called as a witness to testify in this hearing. I previously credited DeCuollo's denial of the alleged harassment. (See Finding No. 12.)

Mazzella was the individual who would usually allow Jobeck to work overtime; however, at this time, Tuite pulled her from this responsibility and from supervising Jobeck (1T27).

15. Jobeck was not assigned any overtime after February 1995. Specifically she was not assigned any overtime in June-July 1995 while, according to Jobeck, substantial overtime was assigned to several other employees in the information systems area. Jobeck claims she complained to Tuite about this (1T31-1T32, 1T37-1T38).

16. In August 1995, Jobeck's doctor, Dr. Patel, diagnosed her with shingles, an ulcer, hypertension, dizziness, anxiety, weight loss and stroke-like symptoms. The formal diagnoses from Dr. Patel was adjustment disorder. Dr. Patel suggested that Jobeck go on a reduced work schedule (1T46, 1T109-1T110).

In August-September 1995, Jobeck approached DeCuollo about reducing her work hours. Jobeck told DeCuollo she wanted the shorter hours because she did not have enough work to do and because she wanted to be home for her children when they returned from school. DeCuollo agreed with the request but had to get it approved by Tuite. DeCuollo relayed Jobeck's request to Tuite, along with Jobeck's reasons for the reduced hours. Tuite claims that Jobeck never requested that her hours be reduced because of Dr. Patel's recommendation or because of DeCuollo's alleged harassment. Rather, the discussion about reducing her hours arose in a discussion about her attendance and problems with it (1T71-1T72, 1T131-1T132, 2T91-2T93).

On September 12, 1995, Jobeck made a written request to reduce her hours (R-3). R-3 does not indicate that Jobeck's doctor had recommended that her hours be reduced. Tuite then agreed to reduce Jobeck's hours with some guidelines that he set forth in a memo to Jobeck (1T132-1T134; R-2).

It became obvious to Tuite that well before Jobeck's hours were reduced, her job did not require a full-time employee. A substantial part of Jobeck's job was eliminated because of changes that resulted in less paperwork for her (1T140).

17. Tuite did not mind Jobeck's hours being reduced. Tuite discussed overtime situations with Jobeck and when they would occur. Employees had to first receive approval from their supervisor before working overtime, except in emergency situations (1T142). Tuite told Jobeck, and other employees, that any overtime situation must be documented (2T43-2T45). Tuite noted that he did not want to encounter a situation where Jobeck would be working less than 20 hours and then be requesting overtime (1T134, 2T45-2T47). Tuite had an unwritten overtime policy that if an employee worked less than a full-time schedule, that employee would be subject to more scrutiny with regard to overtime. He was concerned that a situation would arise where a person working less than full-time hours would be incurring a lot of overtime. Tuite communicated this policy to Jobeck and DeCuollo (2T47-2T48).

Any work that Jobeck did not complete before she was scheduled to leave at 2:00 p.m. was to be completed by Jobeck's back-up worker (1T103). During this time, Jobeck claims she missed overtime opportunities during tax season, because the County had a messenger, Gordon Campbell, performing her job duties after 2:00 p.m. (1T104-1T105). According to Jobeck, the work Campbell performed fell under her "jurisdiction." However, Tuite disagreed that it did and does not recall Jobeck complaining that she should have been given this work (2T58-2T59). In fact, Tuite does not recall a specific complaint by Jobeck regarding overtime; further, he does not recall ever denying her overtime when it was necessary and she asked for it (2T51-2T52, 2T67-2T68). If Jobeck had approached Tuite with a legitimate reason to work overtime that was necessary, he would have allowed her to work it (1T142-1T143, 2T68). However, Tuite would not allow overtime for Jobeck on the day after she was absent, as Jobeck's absence would have created the overtime (1T143).

Jobeck admits that she would not be entitled to earn overtime pay until her work hours reached 40 and not the 25 for which she was then scheduled (1T105-1T106). However, she claims Tuite gave his approval for Jobeck to work 1-2 overtime hours, over her 25 hours, and then Tuite refused to pay her for it (1T32, 1T107). Jobeck did not file a grievance with Council 8 over this (1T68, 1T108-1T109).

Tuite recalls a complaint by Jobeck that overtime was unevenly distributed. Tuite did not investigate the matter as he is aware at any given time how overtime is distributed. Moreover, he asked what overtime she was referring to but Jobeck could not provide a specific instance. Generally, at times overtime was available, there was only one person on his staff available to do it (2T52-2T58).

I credit Tuite's version of the overtime situation with regard to Jobeck. Jobeck provided no examples of when she specifically asked for overtime and Tuite denied it. Moreover, she did not substantiate or corroborate her bare testimony that several other employees received substantial amounts of overtime in June-July 1995. Further, while Jobeck claims Tuite approved 1-2 hours of overtime for her and then failed to pay her for it, she did not show when this instance occurred. Also, she never filed a grievance over it. Jobeck simply never provided any proof that she was unfairly denied overtime by the County.

18. On September 19, 1995, Jobeck claims her supervisor asked her to leave work and take a coffee break across the street. Jobeck declined, stating that "they're watching me." The supervisor asked Jobeck 3 times and finally convinced her to go. Before she left, Jobeck told the secretary she was leaving (1T73-1T75). Jobeck, however, did not call the supervisor as a corroborating witness. I find this omission significant and I fail to credit Jobeck that she was "goaded" into leaving the building by her supervisor.

Tuite saw Jobeck returning to the building after the break and asked where she had been. Jobeck did not have a reasonable explanation and Tuite had learned that she had not signed in or out. Tuite found Jobeck's behavior particularly offensive because he had recently met with his staff to express his concerns about time and attendance (1T146). On September 25, 1995, Tuite gave Jobeck a formal warning, R-4, for leaving her work area on September 19, 1995 without authorization (1T74-1T75, 1T143-1T145; R-4). R-4 stated:

Please do not let this happen again. Further violations will result in additional warnings and persistent behavior may result in suspension or more serious disciplinary action.... Also, an examination of the log book indicated that you are not signing back in from your break. Please make sure you do so in the future.

Outside of his office, Jobeck approached Tuite about the reprimand. Jobeck also raised the alleged harassment by DeCuollo. According to Jobeck, Tuite began to degrade her by raising an incident regarding Jobeck and fellow employee Debbie Velez that had occurred several years earlier. Jobeck then told Tuite "that he ought to get a dick." The statement was made in front of several staff, including the controller of the Finance Department (1T75-1T77, 1T136).

After Jobeck's comment, Tuite spoke to Salemme about the appropriate discipline. Jobeck was then suspended 1 day for the comment to Tuite (1T136-1T137).

19. On October 4, 1995, Jobeck received another warning for failing to comply with Tuite's directive regarding attendance, specifically, the requirement that employees record absences by using sign in and sign out sheets (1T147-1T148; R-5). R-5 concludes by stating "...continued non-compliance will result in more severe discipline."

20. On October 23 and 24, 1995, Jobeck filed complaints against Tuite and DeCuollo with Salemmé. Specifically, Jobeck complained that DeCuollo harassed her and behaved psychotically. The complaint against Tuite was more detailed. It chronicled Jobeck's job history and complained how she had been required to perform her duties, as well as others', without assistance. It charged that Tuite was violating the collective negotiations agreement and Department of Personnel practices, that he bypassed her for overtime opportunities, and that he refused to pay her overtime that she had earned. Jobeck wanted to meet with Tuite and DeCuollo to resolve the issues (1T28-1T29, 1T32, 2T33; CP-2).

Tuite was astonished by the allegations and found them meritless. Tuite wrote a memo to Salemmé, in response to Jobeck's allegations (1T137-1T138, 2T35). Tuite was not asked by Salemmé to investigate the allegations. Nor did he speak to DeCuollo about them, although he was given a copy of Jobeck's complaint against DeCuollo (2T35-2T36).

21. Director of Personnel Hardoby then responded to the complaint (1T32). Hardoby informed Jobeck that he would be

handling the complaint against Tuite and that Affirmative Action Officer John Boles would be handling her complaint against DeCuollo (1T80-1T81).

In November 1995, Jobeck spoke to Hardoby about her complaints. Jobeck explained that she had been employed by the County since 1985 and suddenly, after her union activity began, she received reprimands and the September 25, 1995 suspension. She requested that the suspension be rescinded. Jobeck believed that the suspension was given in retaliation for her union organizing activity (1T32-1T34).

Jobeck also complained to Hardoby that she felt that Tuite was abusing her physical capabilities, because Jobeck had no back-up employee, although she historically had one. This became a problem when Jobeck's work was not complete. The County believed there was a back-up employee to help Jobeck, yet no such back-up employee existed (1T35-1T36, 1T83-1T84). Tuite found Jobeck's complaint meritless. At this point her work hours had been reduced, because there was not enough work for her to work full-time (1T139).

By a February 1, 1996 memo, Hardoby responded to Jobeck's complaint against Tuite (R-1, R-7). Jobeck did not believe the memo addressed her allegations; it did not address the suspension or her claim that her physical capabilities were being abused (1T83). Hardoby concluded that Tuite's actions were appropriate and proper in the disposition of discipline. Jobeck then forwarded the memo and her complaints to her union (1T86).

Boles next gave Jobeck a written response to her complaint against DeCuollo (1T88; R-10). Boles specified that he was only addressing the sexual harassment part of the complaint (1T88). Boles determined that there was no sexual harassment by DeCuollo, but did not address Jobeck's general allegations of harassment. Boles stated that he interviewed the witnesses cited by Jobeck, but not one was able to ratify or substantiate the alleged fact that DeCuollo had made any comment or gesture to Jobeck which could have been construed as being sexually offensive. The memo further stated: "In essence, not one of the individuals who I interviewed was able to give credence to your claim against DeCuollo. Moreover, all of them stated that they had neither seen nor heard the party in question do or say anything to your person which was sexually offensive." Thus Boles concluded that Jobeck was not sexually harassed (1T89-1T90, 2T90-2T91; R-10). No County supervisor higher than Boles or Hardoby reviewed Jobeck's complaints (1T116).

22. In March 1996, when Jobeck was scheduled to leave at 2:00 p.m., there was still payroll work to be completed in her computer. She asked her co-worker, Bridget Ciaramello, to ask Jobeck's back-up worker, Debbie Velez, to complete the work. Jobeck had previously filed fraud charges against Velez. Jobeck did not ask to work overtime because she was only working part-time then. When Jobeck came to work the next day, the payroll work still had not been processed (1T43-1T45, 1T94-1T95, 1T102).

Jobeck approached Velez, and asked her why she had not completed the payroll work. Velez swore at her and mumbled "it's your job." Jobeck then started to complete the work; however, Jobeck immediately received a call from her union shop steward. Jobeck had been waiting to hear from the steward since she (Jobeck) had filed her October 1995 complaints. While Jobeck was on the phone with her shop steward, Velez informed her that Salemmme wanted to see her (1T144-1T45, 1T95-1T97).

Jobeck entered Salemmme's office; Salemmme said, "I am ordering you to process the payroll." Jobeck indicated that she would do it; however, she explained that the work was assigned to Velez. Jobeck noted how she had complained to Salemmme about the work five months earlier and that she and Salemmme would have to work it out. Salemmme continued to order her to complete the payroll work (1T45, 1T98).

Jobeck then walked out of Salemmme's office. She developed an excruciating headache and felt like she was going to vomit. Jobeck then went to her supervisor, Mazzella, and told her she was sick and had to go home (1T45-1T46). Mazzella replied "fine" and told Jobeck to sign her sick card and punch out. Jobeck did and went home (1T46, 1T99-1T100).

Jobeck did not then go to the County doctor because there is not one. Upon arriving at home, Jobeck received a phone call from DeCuollo. DeCuollo indicated that Salemmme wanted Jobeck to bring in a doctor's note upon her return to work. Jobeck

explained that this would be a problem because her doctor was not in that day, and that she was sick because of the way Salemme spoke to her. Jobeck thought it was unusual that DeCuollo called and asked for the note because she was simply using sick time she was entitled to. Jobeck never obtained a doctor's note regarding the sick time (1T100-1T101).

22. Jobeck returned to work the next day to learn that somebody had completed the task that Salemme had ordered her to do. According to Jobeck, it was only a "five minute task" (1T47).

As a result of the incident, Jobeck received a three day suspension for insubordination and neglect of duty. Jobeck received the discipline, even though Mazzella had approved her leaving (1T47). Jobeck believed the suspension was in retaliation for her union organizing activities (1T47, 1T114). She believed that after the February 27, 1995 PERC conference, the County began a paper trail to discredit her (1T33, 1T41, 1T48). According to Jobeck, she continued to receive memos which formed a paper trail that made no sense. Jobeck wanted to meet with management representatives to resolve her situation, but that has not happened (1T48). Jobeck is currently on medical leave (1T49).

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates

subsection 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

Here, I find that Jobeck failed to prove that the County violated the Act under Bridgewater. I find that there is

insufficient direct evidence of union animus by the County. While Jobeck claims that after she attended a representation conference at PERC on February 27, 1995, DeCuollo openly and continuously harassed her and mentioned Jobeck's attendance at the PERC meeting several times, DeCuollo denied this activity, and I credited DeCuollo. (See Finding No. 12.) Further, Jobeck was not disciplined or reprimanded for attending the meeting. Thus, I do not find any direct evidence of union animus.

Consequently, under Bridgewater, I must now look at the circumstantial evidence to determine whether the Act was violated. Jobeck has met the first two Bridgewater elements. She engaged in protected activity through her organizing activities on behalf of UEW and her attendance at the PERC meeting. The County knew of this activity, as County representatives saw her at the meeting. However, Jobeck has not shown that the County was hostile towards her protected activity, as Bridgewater requires.

Jobeck claims that in January 1995, DeCuollo began harassing and intimidating her while she was engaged in organizing activities on behalf of UEW and that the harassment became more severe after she attended the February 27, 1995 PERC meeting. She also claims that the County did not respond to her complaint about the harassment in March 1995, and that on September 12, 1995, Jobeck again raised the harassment problem to her supervisor and within a week she received several reprimands and suspensions. Jobeck further contends that the County continues to be

unresponsive to her attempts to resolve her situation and that the harassment has continued.

I do not find that the County was motivated by union animus with respect to any actions it took regarding Jobeck. As stated previously, I did not credit Jobeck with regard to her allegations of harassment by DeCuollo. Further, Affirmative Action Officer Boles also, after his investigation, found Jobeck's claims of harassment by DeCuollo to be unsubstantiated. Moreover, I disagree that the County failed to respond to her complaint in March 1995, as County representative Tuite met with her about the allegations. Thereafter, Tuite spoke to DeCuollo about the allegations and counseled her to be careful in her speech and dealings with Jobeck. She and Tuite agreed that DeCuollo would then have the least possible contact with her.

Moreover, I do not find that Jobeck received several reprimands, formal warnings and suspensions because she again raised the harassment problem to her supervisor in September 1995. Jobeck received a September 25, 1995 reprimand for leaving her work area without authorization. The warning was not related to any protected activity by her. She had left the building without permission and had failed to sign in or out, in spite of the fact that Tuite had just conducted a departmental meeting shortly before the incident concerning the importance of time and attendance procedures. Moreover, I did not credit Jobeck's version of the incident that she was essentially "goaded" into leaving the building by her supervisor. (See Finding No. 18.)

Further, shortly thereafter, Jobeck was suspended for one day for making the vulgar and derogatory statement to Tuite. Jobeck does not dispute making the statement; further, the statement was made in front of several fellow employees, including the controller of the Finance Department. Jobeck received the one-day suspension solely for making this highly offensive comment to her supervisor in front of several staff members. She did not receive it because of any protected activity or because she had raised the alleged harassment problem in September 1995. The County had a legitimate, good faith business reason for taking the adverse action against Jobeck.

Moreover, I do not find that Jobeck was unfairly denied the opportunity to work overtime or that she was wrongfully suspended for three days, as she claims. Jobeck provided no examples of when she specifically asked for overtime and was denied it. While Jobeck claimed that Tuite approved 1 - 2 hours of overtime for her and then failed to pay her for it, she did not prove when this alleged instance occurred. As stated previously, I do not credit Jobeck's unsupported assertions regarding the denial of overtime. (See Finding No. 17.) In addition, Jobeck was working a reduced schedule from September 1995 and, as she acknowledged, overtime opportunities would be rare, if not impossible, for her from that point forward.

I also find that the County did not unlawfully suspend her for three days. Rather, the three-day suspension was issued

because she left work without processing the payroll and failed to bring in a doctor's note as directed. Jobeck admitted that the task which she did not complete was only a "five minute task", yet she did not stay and complete it. Nor did she complete the task the next day when ordered to do so by Salemmme. Instead, she went home sick and failed to bring in a doctor's note for the sick day, even though DeCuollo specifically told her she was required to do so. For these reasons, she received the three-day suspension, not because of any protected activity on her part or union animus by the County. The County had a legitimate business reason for its action and was not hostile toward the exercise of protected rights.

In her brief, Jobeck claims that her union activity was the motivating factor in all the adverse employment actions the County took against her. She notes that she had worked for the County for ten years with an unblemished record, and that it was not until her involvement with the UEW and, in particular, her attendance at the PERC meeting that her career took a turn for the worse. Jobeck also asserts that the County's actions are suspect based on the fact that Salemmme and Tuite had never made inquiries into an employee's whereabouts in the past, except for the incident involving Jobeck's attendance at the PERC meeting. Jobeck argues that the above facts clearly demonstrate that she was indeed retaliated against because of her union activity.

I disagree. Salemmme simply asked Tuite if he was aware that Jobeck was at the meeting. Tuite did not know the and thus

he asked DeCuollo if Jobeck had requested the day off. Tuite did not mind that Jobeck had attended the meeting; rather, he was embarrassed that he did not know the whereabouts of one of his employees when questioned by his supervisor. Moreover, Jobeck's record was not unblemished prior to her union involvement, as she had received a reprimand for excessive absenteeism and tardiness in March 1994. In any event, as explained previously, the County had legitimate, good faith business reasons for taking the disciplinary actions against Jobeck after the February 1995 PERC meeting.

Finally, while Jobeck alleges she has unlawfully had problems with the calculation of her pay, she presented no evidence in support of this allegation.

Based on the above, I do not find that the County violated the Act under Bridgewater. The disciplinary actions Jobeck received were based on legitimate business reasons. Further, there is no evidence that the County unlawfully denied Jobeck the opportunity to work overtime. I do not find that the County, and in particular, DeCuollo and Tuite, were hostile towards Jobeck because of her protected activity. Accordingly, I find that the County and, particularly DeCuollo, did not violate

5.4a(3) and, derivatively, 5.4a(1) of the Act with regard to Jobeck.^{3/}

CONCLUSIONS OF LAW

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

1) The County, and in particular Ernestine DeCuollo, did not harass or intimidate Jobeck for engaging in union organizing activities, and, specifically, for attending the February 1995 PERC meeting;

2) The County did not unlawfully fail to respond to her complaints about the alleged harassment in March 1995 or at any time thereafter;

3) The County did not unlawfully discipline Jobeck for engaging in protected activity;

4) The County did not unlawfully deny Jobeck overtime opportunities; and

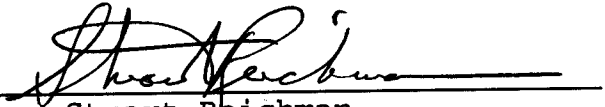
5) The County did not act unlawfully with respect to the calculation of Jobeck's pay.

^{3/} In its brief, the County alleged that some of Jobeck's allegations were outside of the statute of limitations. However, I do not find it necessary to address this argument since I have decided, on the merits, that the County did not violate the Act with respect to any of Jobeck's allegations.

Accordingly, I make the following:

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.


Stuart Reichman
Hearing Examiner

Dated: May 8, 2000
Trenton, New Jersey