P.E.R.C. NO. 2004-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and- Docket No. CI-H-2000-45

DAVID C. McADAM,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint which was based on an amended unfair practice charge filed by David C. McAdam. The amended charge alleges that the Town violated the New Jersey Employer-Employee Relations Act by retaliating against the charging party for filing a grievance. Specifically, McAdam alleges that he was demoted, lost overtime opportunities, and suffered adverse working conditions as a result of his filing a grievance. The Commission concludes that McAdam did not prove that his grievance was a substantial or motivating factor in any adverse personnel actions.

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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In the Matter of

TOWN OF SECAUCUS,

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-and- Docket No. CI-H-2000-45

DAVID C. McADAM,

Charging Party.

Appearances:

For the Respondent, Martin Pachman, P.C., attorneys (Martin Pachman, of counsel)

For the Charging Party, Oxfeld Cohen, LLC, attorneys (Arnold Shep Cohen, of counsel)

DECISION

On June 6 and 20, 2000 and February 7, 2001, David C. McAdam filed an unfair practice charge and amended charge against the Town of Secaucus. The charge, as amended, alleges that the respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),[1/]

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." The February 7, 2001 amendment withdrew 5.4a(4), (5) and (7) allegations.

by retaliating against the charging party for filing a grievance. Specifically, McAdam alleges that he was demoted, lost overtime opportunities, and suffered adverse working conditions as a result of his filing a grievance.

On January 9, 2001, a Complaint and Notice of Hearing issued. On January 22, the Town filed an Answer denying it violated the Act and claiming that the charge does not contain a clear and concise statement of the facts constituting an unfair practice.

Seven days of hearing were held between March 21, 2001 and May 2, 2002. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On April 14, 2003, Hearing Examiner Wendy L. Young recommended dismissing the Complaint. H.E. No. 2003-18, 29 NJPER 229 (¶71 2003). She found that McAdam did not prove that the Town was hostile towards his filing a grievance seeking standby pay. In addition, she found that McAdam did not demonstrate any connection between his grievance and his failure to get a promotion, the assignment of overtime, or changes in his job duties.

On May 27, 2003, after an extension of time, McAdam filed numerous factual exceptions. We will address those exceptions in the course of summarizing the facts. McAdam argues that he

proved that his filing a grievance motivated his demotion and other adverse personnel actions. He seeks reinstatement to his former position, back pay for lost overtime, and the posting of a notice.

On June 3, 2003, the Town filed an answering brief. It argues that the exceptions do not comply with N.J.A.C. 19:14-7.3, which requires a statement as to the grounds for each exception, and must be rejected. It further argues that the Hearing Examiner's findings of fact, based in large part on determinations of witness credibility, and her conclusions of law should be adopted.

We now summarize the findings of fact and respond to McAdam's exceptions. We note preliminarily that many of the exceptions to particular findings of fact simply cite testimony cited by the Hearing Examiner in other findings of fact.

David C. McAdam has been a driver-laborer for the Town's public works department since April 1988. His direct supervisor is Michael Gonnelli.

Before 1998, the Town's ice rink was an open air structure on an asphalt base pad. In August 1996, McAdam was promoted to the position of recreational facilities maintenance coordinator/laborer-driver and given primary responsibility for maintaining the rink. He received a $4000 annual salary increase. Each year, he was required to convert the pad from a

tennis court into an ice rink in the fall and back again in the spring. He worked exclusively at the rink about 16 weeks per year. He was assisted by part-time recreation department employees.

In 1998, the Town was awarded a grant to cover the cost of partially enclosing and lighting the rink, thereby permitting more and different uses for the rink. Consequently, the recreation department recommended hiring a full-time recreation facilities maintenance worker. The Town sought a person with welding and fabricating experience. The position was posted and McAdam, who does not have welding skills, did not apply. Gary Voss applied for the position and was hired.[2/] Voss spends time in the morning and afternoon at the rink and then performs other duties throughout the Town.

McAdam trained Voss on how to construct and deconstruct the rink. The Town then purchased a new rink and in fall 1998, McAdam and others worked with Voss to set it up. Once the new rink was installed, Gonnelli did not include rink detail in McAdam's daily assignments. He last reported to the rink in March 1999. McAdam did not question the change in assignment or why he was being paid for rink work he no longer performed.

2/ Voss was hired and assigned rink duties before McAdam filed the grievance that is the subject of this dispute. Accordingly, we have no basis to find that retaliation for filing a grievance in any way motivated the decision to hire Voss or assign him regular rink duties instead of McAdam.

Most overtime is worked through a standby system.[3/] Employees are paid a certain amount for being on standby and premium pay if required to work. Employees are selected for standby duty on a rotational basis. Some employees are also paid overtime pay for working through their lunch break.

On the Friday before the 1998 Labor Day weekend, McAdam was next on the standby list. Two other employees wrongfully switched standby assignments in violation of the collective negotiations agreement. McAdam was thereby denied the standby assignment that was rightfully due him. Gonnelli was not on duty when the switch occurred. Supervising Foreman Snyder was acting superintendent and was aware of the switch, but did not require proper documentation.

McAdam grieved the denial of overtime compensation. In March 1999, Gonnelli, McAdam, a Teamsters delegate and a shop steward met over the grievance. McAdam wanted the Town to acknowledge wrongful action and pay full backpay. The Town offered to pay McAdam half the overtime that the two other employees had received and to give him the next standby opportunity, without any fault being assigned to any party. McAdam rejected any settlement offer that did not include a concession by the Town that supervision was at fault. The

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3/ This finding is not contradicted by exhibits showing the total amount of overtime worked and the amount of lunchtime overtime worked (CP-15 and R-21) as suggested by McAdam.

grievance was then scheduled for arbitration on September 29, 1999.

McAdam is generally characterized as a good, conscientious worker. However, Supervising Foreman Snyder reported to Gonnelli that he noticed a change in McAdam's outlook and attitude. Gonnelli also concluded that McAdam had a problem working with others, since co-employees had asked not to work with him.

On July 20, 1999, Gonnelli asked McAdam to meet with him. Gonnelli told McAdam that it seemed that he was dissatisfied with his job. McAdam replied that he was not. Gonnelli reported to McAdam stories he had heard about McAdam "bashing" him. The 15 minute meeting ended with McAdam being upset and denying the allegation.

On August 4, 1999, McAdam complained to Town Administrator Iacono that Gonnelli had harassed him. Gonnelli wrote a response. Additional correspondence was sent back and forth. No further action was taken by either side.[4/]

4/ McAdam appears to except to the Hearing Examiner's finding that some employees complained about working with him. Gonnelli testified that at least six employees had complained to him. Three did not testify. The three who did stated that they had not complained. The Hearing Examiner did not address this arguable conflict in testimony. Accordingly, we do not rely on this finding. We note as well that Supervising Foreman Snyder testified that many employees expressed that they did not want to work with McAdam. Yet he could not name any who had complained. Accordingly, we do not adopt that finding. We add findings that Gonnelli's response to McAdam's letter charging

(continued...)

McAdam asked fellow employee Joseph Hartwig to testify on his behalf at his grievance arbitration hearing. The Hearing Examiner found that Gonnelli did not threaten or direct Hartwig not to testify. We accept that finding and her decision not to credit Hartwig's testimony, to the extent it conflicted with Gonnelli's. The Hearing Examiner also found that then-Councilman Elwell did not tell Hartwig not to testify at the hearing. We accept her credibility determinations.[5/] Hartwig did not attend the arbitration, but his written statement was read into the record.

On December 4, 1999, McAdam received the arbitrator's award denying his grievance.

Also in December, McAdam's rink position came to Administrator Iacono's attention during the budget preparation process. The chief financial officer had questioned why McAdam was receiving a stipend. He was told about McAdam's additional rink coordinator title, but was also told that McAdam had not been at the rink for over a year. Gonnelli explained that the

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4/ (...continued)
harassment was placed in McAdam's personnel file [6T70-6T71] and that Town Administrator Iacono testified that Gonnelli at least twice told him that he wanted to sit down with McAdam and a shop steward to discuss McAdam's attitude and morale.

5/ We modify finding 16 to indicate that then Councilman and now Mayor Elwell was not sure if Hartwig had been suspended twice for drinking on the job.

Town had hired Voss. The chief financial officer then spoke to the Town's labor counsel about how to proceed and thereafter, the Town passed a resolution eliminating McAdam's rink coordinator position. His salary was reduced by $4000 per year effective January 1, 2000.

At McAdam's request, he, a shop steward and Gonnelli met to review his personnel file. A December 1998 memorandum from Gonnelli and six other reprimands were destroyed.

McAdam testified that his duties changed from the time he filed his grievance in September 1998 until June 2000, when this unfair practice charge was filed.[6/] Specifically, he claimed that he was assigned menial duties with non-union workers which limited his ability to earn lunchtime overtime. The Hearing Examiner concluded that McAdam's overall overtime hours were above average after he filed his grievance. In particular, she found that between October and December 1998, McAdam was one of the top overtime earners; in 1999 he was one of the top ten earners; in 2000, he had a significant decease in overtime because he declined standby overtime on Election Day 2000 [7/]; and

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6/ The charging party argues that the assignments to menial jobs continued until at least July 2001, when he testified in this proceeding.

7/ McAdam has shown that the average number of overtime hours worked in 2000 was 99.7, that he worked 67.5 overtime hours, and that had he worked 7.5 hours of overtime on Election Day, his total overtime hours would have been 75 hours, 24.7

(continued...)

for the first half of 2001, he earned at least as much overtime as the average employee. The Hearing Examiner did not definitively resolve the dispute over McAdam's lunchtime overtime. She did, however, conclude that the charging party did not show any connection between his grievance and the overtime he received. We accept her conclusion that the record does not establish that after he filed his grievance, McAdam suffered retaliation in the form of decreased overtime opportunities. In particular, we note that the exhibits detailing McAdam's lunchtime overtime do not cover the period before he filed his grievance, and it is therefore not possible to use those exhibits to ascertain whether his assignments and lunchtime overtime decreased after he filed his grievance.

Hartwig and Elwell had another conversation in June 2000. Hartwig testified that Elwell told him to stay away from McAdam and not to get into trouble. Elwell denied threatening Hartwig. The Hearing Examiner found Hartwig's testimony to be inconsistent, unclear and unconvincing. We have no reason to second-guess her credibility determination.

In September 2000, the Teamsters president, Iacono and McAdam met. Iacono told McAdam that Gonnelli still felt that

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7/ (...continued)
hours below the average. We modify the Hearing Examiner's findings of fact accordingly.

McAdam hated him.[8/] McAdam denied it and Iacono told McAdam to communicate that to Gonnelli. McAdam told Iacono that he was not getting his fair share of overtime. Iacono responded that he had looked at the numbers and it appeared that overtime was being distributed fairly, but that he would look at it again. McAdam testified that, in addition to the matters testified to by Iacono, Iacono told him that if he wrote to Gonnelli dropping all charges, he would be put back in the mainstream with regard to assignments and overtime and would restore Hartwig's week suspension; and that if another promotion arose, McAdam could apply and would be considered. The Teamsters president did not testify and the Hearing Examiner drew an adverse inference. She did not credit McAdam's testimony to the extent he described matters that Iacono did not describe. We have no basis to disturb that determination.

After the meeting, Iacono received overtime information from Gonnelli. That information indicated that some employees got more overtime than McAdam, but that the majority got less. The information was submitted to Local 11. No grievance was filed.[9/]

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by

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8/ McAdam excepts to the finding that he disliked Gonnelli. We modify finding 28 accordingly.

9/ Any exceptions not addressed above are rejected.

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.

Based in large part on credibility determinations, the Hearing Examiner found that the charging party did not prove that

his grievance was a substantial or motivating factor in any adverse personnel actions. She found no showing of hostility to his grievance. We accept her findings.

McAdam's demotion was unrelated to his grievance. In fact, the decision to hire a full-time employee with welding skills to staff the ice rink was made before the charging party filed his grievance. The decision to eliminate his stipend was made because the chief financial officer questioned why McAdam was being paid for work he did not perform.

The Hearing Examiner did not credit Hartwig's testimony that Gonnelli and the Town administrator tried to intimidate him out of testifying on McAdam's behalf. The Hearing Examiner also noted that even if Hartwig had testified, there is no evidence that the arbitration would have gone in McAdam's favor.

As for the loss of overtime opportunities, the charging party did not prove that the Town unlawfully changed his job duties or denied him overtime because of his grievance.

The charging party's exceptions to the Hearing Examiner's analysis center on his disagreement with her credibility determinations. Having found no basis to overturn those determinations, we likewise find no basis to reject her legal conclusions. Accordingly, we adopt the recommendation to dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners DiNardo, Katz, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: July 24, 2003
Trenton, New Jersey
ISSUED: July 25, 2003

H.E. NO. 2003-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and- Docket No. CI-H-2000-45

DAVID C. McADAM,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Town of Secaucus did not violate the New Jersey Employer-Employee Relations Act when it demoted David McAdam. The Hearing Examiner determined that the charging party did not prove that the Town was hostile towards the exercise of protected activity, namely the filing of a grievance for standby pay. Additionally, McAdam failed to demonstrate any connection between the filing of the grievance and his failure to get a promotion, the assignment of overtime or changes in job duties.

H.E. NO. 2003-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Respondent,

-and- Docket No. CI-H-2000-45

DAVID C. McADAM,

Charging Party.

Appearances:

For the Respondent,
Martin Pachman, P.C., attorney

For the Charging Party,
Oxfeld Cohen, LLC, attorneys
(Arnold Shep Cohen, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On June 6 and June 20, 2000, David C. McAdam filed an unfair practice charge and amendment, respectively, (C-1)[1] against the Town of Secaucus. The amended charge alleges that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, 5.4a(1), (3), (4), (5) and (7)[2]

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[1]"C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to charging party's exhibits and respondent's exhibits, respectively, received into evidence at the hearing. Transcripts of the successive days of hearing are referred to as "1T", "2T", "3T", "4T", "5T", "6T" and "7T."

[2]These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights

(continued...)

by retaliating against McAdam for filing a grievance. Specifically, McAdam alleges that, as a result of the grievance, he was demoted, lost overtime opportunities and suffered adverse working conditions.

On January 9, 2001, a Complaint and Notice of Hearing issued (C-1). On January 22, 2001, the Town filed an answer, denying it violated the Act and setting forth two separate defenses (C-3). On February 7, 2001, McAdam again amended his charge, withdrawing his a(4), (5) and (7) allegations (1T8; C-2). Hearings were held on March 21, June 6, June 26, July 5, July 24 and December 17, 2001 and on May 2, 2002. The parties submitted post-hearing briefs by October 2, 2002 and reply briefs by October 10, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

McAdam and the Rink

1. David C. McAdam has been a driver-laborer for the Town's

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[2](...continued)
guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

Department of Public Works (DPW) since April 1988. His direct supervisor is and always has been Michael Gonnelli (4T11-4T12, 4T98-4T100). Gonnelli has served as DPW superintendent since approximately 1984 (5T134).

2. As of 1995-1996, the Town ice rink was an open air structure on an asphalt base pad; it did not contain a roof, side tarps or lights. It served as a combination ice rink/tennis court then. It had to be assembled from scratch to become an ice rink and then later completely disassembled to become a tennis facility. Specifically, under this complex operation, the boards were taken down and stored and the mats were rolled up (5T144-5T145).

In 1995, because of staffing problems with the seasonal/temporary employees at the rink and, because of overtime concerns with respect to DPW employees who worked extra hours there, the Town Administrator and Gonnelli discussed hiring a rink coordinator or manager (5T145-5T148; R-17). Thereafter in August 1996, the Town posted R-1, seeking an individual to assist in and coordinate the assembly and disassembly of the rink and to periodically check the rink when it was operational. Gonnelli recommended that a laborer-driver be hired for this position. This individual would work with part-time/seasonal recreation department employees (5T148-5T151).

McAdam applied for the position and, at Gonnelli's

recommendation, was hired as the recreational facilities maintenance coordinator/laborer-driver (2T38-2T40, 4T145-4T146, 5T159-5T160; R-1, R-2). McAdam was informed by the mayor and council that the position was a promotion and that he would receive a $4000 salary increase (4T12-4T13, 4T145, 5T119).

McAdam's new position resulted in additional job responsibilities. Specifically, twice a year, he was required to manually convert the rink from an ice rink to a tennis court and then back to an ice rink. These duties required McAdam to solely work at the rink about 16 weeks a year (4T12-4T14, 4T18). Part-time recreation department employees assisted him (4T14, 4T150).

McAdam's rink duties did not include welding. Welding was only rarely done at the rink, when repairs were needed. If this happened, an outside welder would be hired (1T96-1T97, 4T18-4T20).

Local 11 filed a grievance over McAdam's promotion, claiming that the posting was not in accordance with the parties' contract and the new position was outside the bargaining unit because employees in the Recreation Department are not unit members (4T15-4T16; CP-6). McAdam, nevertheless, continued in the position after the grievance was filed (4T16).

3. In 1998, the Town was awarded a Green Acres Grant for construction at the rink, which would enable the rink to open for a longer period and would enable it to serve more functions.

Thereafter, a roof, side tarps and new lighting were installed to the rink. The rink then was no longer used as a tennis court in the spring/summer but was now used for roller hockey and various community events and was used significantly more than it had been previously (2T42-2T46, 4T19-4T23, 5T122-5T123, 5T152-5T156, 6T18-6T19; R-16A, R-16B, R-16C).

As a result, the Recreation Department recommended that a full-time employee be assigned to the rink because of the increased work there; thus, the Town created the full-time position of recreation facilities maintenance worker (2T42-2T46, 5T122-5T123; CP-2). The Town sought a person with welding and fabricating experience for the new position, because the Town had always subcontracted for these skills at the rink and throughout the Town's other facilities (1T109-1T110, 5T157-5T158, 6T27-6T28, 6T33, 6T69). The Town did not simply expand McAdam's rink position and hire him because the majority of McAdam's work was as a laborer-driver and the Town could not afford to lose a laborer-driver to a different title that required a new full-time employee with additional skills. The new position is significantly different than McAdam's, because welding and fabricating skills are also included in the job description (4T148, 5T157, 5T160, 6T21-6T24, 6T32-6T33, 6T160; CP-2). On March 23, 1998, the new position was posted (5T157-5T158; CP-2).

In April 1998, Gary Voss, who had worked part-time for the

Town since October 1997, applied for it. McAdam, who does not possess welding skills, did not apply for this new position which was posted at a lower rate than his (1T100, 2T46, 4T147, 5T161-5T162, 6T25; CP-2). Gonnelli recommended Voss for the job because he had the necessary welding skills and Voss was hired about four weeks later (2T76-2T77, 4T146-4T148, 5T122-5T123, 5T157, 5T162; CP-2).

Although McAdam realized that some duties of this new position were similar to those he was performing at the rink, he never inquired of any Town official or supervisor if this new position would affect his rink position (4T147). According to McAdam, his job duties did not immediately change as a result of Voss's hiring (4T26, 4T29).

4. McAdam trained Voss on how to construct and deconstruct the ice rink the first time Voss was assigned these duties (1T92, 1T95, 4T149). McAdam and Voss worked together at this time (4T23, 4T25-4T26, 4T45, 4T51).

The Town then purchased a whole new rink from Continental Airlines Arena, including new permanent boards and new glass. In Fall 1998, McAdam, along with seasonal recreation department employees, worked with Voss to set up the new rink (4T45, 5T154, 5T163, 5T184). Specifically, Voss installed the new boards, tarps, scoreboards, exterior gate, and some lights; McAdam helped him with the boards (5T164, 5T184).

5. Once this new rink was installed, Gonnelli never again included rink detail in McAdam's daily assignments because he was no longer needed there. However, neither Gonnelli nor any other supervisor ever told McAdam not to report to the rink any more. Nor was he advised that his rink duties would cease at the end of 1998; rather, he just never received any assignments there in 1999 (4T23, 4T25-4T26, 4T151, 5T163, 5T185). Specifically, he did not help convert the rink from ice to roller hockey and vice-versa in spring and fall 1999, as he had done previously (4T45). He last reported to the rink in March 1999 (4T151).

McAdam never asked Gonnelli or any Town official why he was no longer assigned to the rink. Nor did he ask why he was still being paid for work he no longer performed there (4T151-4T152, 5T185).

Gary Voss' Position

6. Voss works primarily for the Town's Recreation Department but also does welding, fabricating and cleaning details for other departments as needed. His typical job responsibilities begin with a daily inspection of the rink (1T82-1T85, 1T105, 2T73, 6T12-6T15, 6T33, 6T69; CP-2).

He then carries out his other assignments throughout the Town. If any problem develops at the rink, Voss goes there and addresses it (1T83-1T89, 1T105; CP-2).

During the summer, Voss also works at Town functions at the

rink (1T93-1T95). Specifically, he sets up and takes down props and tables for these functions (1T95).

The amount of time Voss spends at the rink depends upon the season. Voss spends the most time there in the fall, when he turns the rink into an ice rink. At this time, Voss works there 2 to 8 hours a day for a period of 3 to 4 weeks. When the rink is functional, Voss spends 1 ½ to 2 hours in the morning and 1 hour at the end of the day there (6T12-6T15).

Voss also does welding at the rink when needed; specifically, if something breaks or when something new has to be installed (1T97, 1T109, 6T69-6T70). He rewelded the eye hooks and S-hooks on the tarps, welded the doors, gates and fences, and installed the scoreboard (6T15-6T17). He has also done welding repairs to the Zamboni ice resurfacing machines; however, these repairs are rare (1T97-T99, 1T108).

Voss is also responsible for any welding needed throughout the Town, and has completed welding projects for the Town swim center, the DPW vehicles, the little league field and the recreation department (1T109-1T110, 6T27-6T28, 6T33, 6T69). The Town saved $30,000-$35,000 with Voss completing the welding project at the little league field, rather than a subcontractor. Although Voss probably could be kept busy full-time as a welder, his job description also requires him to perform non-welding rink duties; thus, he reports there everyday. His job description has

not changed since being hired (1T110, 6T27-6T28, 6T73).

Voss spends more hours working at the rink than McAdam did, because now the rink is used for many more events. Aside from the welding, however, McAdam could perform the other repair work Voss performs at the rink (6T18-6T19, 6T32-6T33).

The Standby Overtime Grievance

7. Most overtime is acquired by DPW employees through the standby system (5T138-5T139). Under this system, an employee receives a certain amount of pay simply for being on standby status and if the employee is called for overtime work, the employee receives a premium rate for that work. Employees are selected for standby based upon a predetermined rotational schedule. Every 9 to 10 weeks a different crew of two laborer-drivers and a foreman go on the standby list. There is also a seniority list whereby in case of an emergency requiring more than the standby crew, the first man on the seniority list is called to work overtime (4T100-4T101, 5T135-5T137).

The exception to the rule that the standby crew receives overtime first is with regard to lunch time overtime. In this case, the crew that is assigned to a particular detail that must be completed would continue to work through lunch and earn overtime (5T136-5T137).

The collective negotiations agreement for DPW employees specifically contains a provision under which employees are

selected for overtime opportunities (2T36, 3T139; R-3). Under the system, an employee has the right to refuse overtime, except in limited emergencies (2T36-2T37).

8. On the Friday before Labor Day weekend 1998, McAdam was not scheduled to work but was next on the standby list. Two of his fellow employees, Billy Sallick and Walter Moss, wrongfully switched standby assignments that day, in violation of the agreement. This resulted in McAdam being denied the standby assignment which was rightfully due him (3T41-3T42, 3T51-3T52, 4T100, 4T104; R-3).

As a result, on September 9, 1998, Local 11 filed a grievance on McAdam's behalf regarding the issue. McAdam claimed he was entitled to compensation because he was next on the standby list and thus should have received the overtime that the others had earned that weekend (3T29, 3T33-3T35, 4T34, 4T100-4T101, 4T104-4T105; CP-8).

Gonnelli was not on duty when the illegal switch occurred; Assistant Superintendent Charles Snyder was in charge in his absence. Gonnelli first learned of the switch the following Tuesday and immediately investigated. He determined that Sallick and Moss had switched without following contractual procedures; thus, the employees were subject to discipline as required by the contract (4T125, 5T165-5T166).

Gonnelli also learned of McAdam's grievance when it came

before him under the second step of the grievance procedure. McAdam did not follow the first step of the grievance procedure which would have required him to discuss the grievance with Gonnelli first. Gonnelli responded to the grievance at each step it moved through the grievance procedure (5T166-5T167).

9. Gonnelli conferred with Town Administrator Anthony Iacono about settling McAdam's grievance rather than incurring fees for arbitration (5T168). In March 1999, Gonnelli, McAdam, Teamsters delegate Rich Jones and Local 11 Shop Steward Frank Sasso met regarding McAdam's grievance (3T26, 3T31-3T37, 4T108-4T109, 5T169). McAdam expressed that he wanted management to take responsibility for the wrongful actions of Moss and Sallick and wanted the Town to pay him the full standby overtime he would have received if it were not for the illegal switch (3T35). Although Gonnelli was absent when the illegal switch occurred, McAdam insisted it was management's fault, because Snyder was aware of the switch and did nothing (4T120). Snyder had mistakenly believed the switch had been approved by a higher level of supervision (4T122).

The Town refused McAdam's demand that management be blamed for the illegal switch. Rather, it offered to pay McAdam half of the overtime that the two individuals had received, about $375-$400, and agreed not to place blame on either side, thus avoiding the need to discipline Sallick and Moss. The Town further agreed

to offer McAdam the next standby overtime opportunity (3T35-3T38, 4T108-4T109, 4T126). Gonnelli urged settlement of the grievance despite his understanding that under the contract, even if the two employees had made an improper standby switch, the remedy was to discipline the employees not to pay McAdam for the missed overtime opportunity (5T165-5T166; CP-8, R-3).

Local 11 was willing to accept this settlement offer, but McAdam was not. While the $375-$400 offer was acceptable, he still refused to settle because the Town would not concede that supervision, specifically Snyder, was at fault and should accept responsibility. Although it was undisputed that neither Sallick nor Moss had given written notice to Snyder, as required by the contract, McAdam still felt the illegal switch was management's fault (5T171-5T173).

McAdam, however, did not explain what should happen to Snyder (5T173). Morever, McAdam acknowledges it is management's job, specifically Gonnelli's, not his (McAdam's), to mete out discipline to employees, such as Snyder (3T45-3T46, 4T110, 4T114, 4T119-4T121, 4T123-4T125, 6T29-6T30).

According to McAdam, Gonnelli asked him at the meeting if he still felt the switch was management's fault. McAdam claims that when he replied, "yes," Gonnelli said, "I'm not paying a dime because he'll brag to the guys on the job that he beat me on this. I'm not going to have this hanging over my head" (4T113-

4T115, 4T123-4T124, 4T126).

Gonnelli denies saying what McAdam claims (6T33). Further, Local 11 Shop Steward Sasso does not recall Gonnelli saying this (3T43-3T44). Rather, Gonnelli claims he was the one to offer McAdam half the money without any fault on either side; Gonnelli just wanted to end the grievance (5T168, 6T33). I credit Gonnelli's version. It was credible. Further, Shop Steward Sasso did not recall McAdam's version, but confirmed Gonnelli's description of the Town's settlement offer (2T135-2T136, 3T45).

10. Because McAdam rejected the settlement, the grievance was then submitted to arbitration. McAdam sought the full overtime compensation, between $600 - $800, that the employees who had illegally switched had earned. McAdam believed he was owed this because he would have been the next in line for the overtime, if it had not been for the illegal switch (3T29-3T30, 6T33). The arbitration was then scheduled for a September 29, 1999 (3T59, 5T173).

The July 1999 Meeting with Gonnelli

11. Numerous fellow employees, including foreman, who have infrequently or occasionally worked with McAdam characterized him as a good, conscientious worker who is knowledgeable about the job (1T70, 1T81, 1T89-1T90, 1T118-1T119, 1T122-1T123, 2T81-2T83, 2T88, 3T9, 3T18-3T21, 3T55, 3T111, 3T114, 4T8, 5T7). Further, Town Administrator Iacono has observed that McAdam satisfactorily

performs his duties and Gonnelli considers McAdam a good prompt worker who completes his assignments (2T10, 6T4-6T5).

Supervising Foreman Charles Snyder, however, noticed a change in McAdam's outlook and attitude towards his job recently. Snyder explained that while McAdam completes his work, he has begun to double check with him on simple things that he should know or has known in the past. Snyder has not confronted McAdam about this or written him up; he simply answers McAdam's questions (1T124-1T128).

Snyder believes McAdam is disgruntled with his job and his attitude rubs off on some of the employees he works with (1T128-1T131). Snyder informed Gonnelli of his observations about McAdam. He informed Gonnelli that McAdam is unable to get along with co-workers and that many have expressed they do not want to work with him (1T128-1T131, 6T61-6T63).

Further, Gonnelli has also concluded that McAdam has a problem working with others, since certain employees have asked not to work with him. Gonnelli does his best to keep these employees away from McAdam (6T5-6T7, 6T39, 6T61-6T63; CP-12). Gonnelli never advised McAdam of the names of those employees that requested not to work with him, because he did not want to pit one employee against another (6T68).

Gonnelli expressed concern to Iacono about McAdam's work attitude for the last year and one-half and its impact on the

workforce. He told Iacono that McAdam's job morale had become low and that McAdam was unhappy with work, particularly with Gonnelli. He also explained that McAdam was coming to work with a chip on his shoulder (2T10-2T12, 2T24-2T25). Gonnelli further informed Iacono that McAdam was driving a wedge between employees and that fellow employees Joseph Hartwig and Troy Conville were also developing negative work attitudes (2T12-2T14, 2T16).

However, several fellow employees testified that they have not heard Gonnelli complain about McAdam; nor have they complained or heard any complaints about McAdam, particularly that McAdam harassed any fellow employees or that they don't want to be assigned with him (1T70-1T74, 1T81, 1T90, 1T118-1T119, 2T84, 2T89, 3T21, 3T30, 3T56, 3T111-3T112, 3T114, 4T9, 5T7).

12. In June 1999, while getting a haircut at a Hoboken hair salon, McAdam had a conversation with his hair stylist about his job. Specifically, McAdam complained that the Town would not pay him overtime he was owed and indicated that he thus intended to file suit (1T55-1T56, 1T60, 1T62). Town Engineer Gerald Perricone was getting his haircut next to McAdam that day and heard the conversation. He knew McAdam worked for the Town's DPW (1T64-1T65). Specifically, Perricone heard McAdam say that there were deficiencies and shortfalls with Town management and that he did not agree with how management handled its functions. Perricone deduced that Gonnelli was the "management" McAdam had

referred to and, shortly thereafter, Perricone reported the conversation to Gonnelli. Perricone believed it would be beneficial for Gonnelli to have the information, so that he could do some "damage control" with his employees and circumvent future problems. Perricone relayed to Gonnelli that he had heard from McAdam of some shortfalls with Town management and of some problems that should be examined. Gonnelli responded that he would take care of it and left it at that (1T66-1T68).

13. Because of what he had heard about McAdam from Perricone, Snyder and his employees, and because of his own observations, Gonnelli asked McAdam to talk with him on July 29, 1999, the day before McAdam's two week vacation was to begin. Gonnelli asked about McAdam's family and his vacation plans and then told McAdam that it seemed that he was dissatisfied with his job. McAdam replied that he was not. Gonnelli further asked if his job was up to par; McAdam replied it was. Gonnelli then told McAdam that DPW employees had informed him that McAdam was dissatisfied with the job and that Perricone had heard McAdam bash Gonnelli at the Hoboken hair salon (4T52-4T53, 4T126-4T127)

Gonnelli further stated that the men in the garage have told him how McAdam has been bashing him. McAdam asked that Gonnelli bring the men in; Gonnelli replied not to worry about that. The 15 minute meeting ended with McAdam being upset and denying what Gonnelli claimed he did (4T53-4T54, 4T127-4T128). Gonnelli did

not threaten, fire, or take any disciplinary action against McAdam at this meeting (4T129-4T130).

According to Gonnelli, the meeting was simply meant to be a conversation between him and McAdam about McAdam's work attitude, nothing more. However, McAdam did not believe Gonnelli had the right to call him in to discuss a problem, because there was not a problem (4T129-4T130, 6T46-6T47).

14. Thereafter, on August 4, 1999, McAdam filed a complaint with Town Administrator Iacono, alleging that Gonnelli had harassed him at the July 29, 1999 meeting. Gonnelli wrote an August 5, 1999 response, denying any harassment. He copied the Mayor and council because they had been copied with regard to McAdam's complaint (6T47-6T48, 6T74-6T76; CP-11, CP-12). Gonnelli's response, in pertinent part stated:

> Prior to the July 29, 1999 meeting DPW supervisory personnel had informed me that there was an obvious problem with Dave's attitude regarding the job. They complained that after Dave was given job assignments, he frequently called to request further direction. The supervisors had informed me that Dave is unable to get along with his co-workers, many of whom have expressed that they do not want to work with him. I had also heard from Town Engineer, Gerry Perricone, that while he was at a hair salon in Hoboken, he overheard Dave talking to the barber complaining that his boss does not know how to run a job. I have heard that Dave has complained, similarly, to his co-workers.
>
> Because of the observations of the foreman, the unresolved grievance of September 1998, Dave's apparent dissatisfaction with the job, Gerry Perricone's statement to me, coupled with my own observations that Dave never looks at me directly when I give him assignments, I decided to speak with Dave, in an

informal manner, before any action was taken.

> On July 29, 1999, I did call Dave into my office. I told him that I wanted to clear the air because I was under the impression that he was not happy on the job. I asked him if he wanted to talk informally, or, if he did not, to let me know. He voiced no objection. We discussed the job in general, his vacation plans, his family, the project by his home, and then I mentioned what I had heard from others. I asked him if these remarks had any merit. I told Dave that I do not like to listen to hearsay and that I would take him at his word if he denied the incident. He did, and that was the end of the conversation. At no time did he appear dissatisfied or upset with our discussion. I thought that the meeting had gone well and that it had ended on a friendly note.
>
> I adamantly deny that I harassed Dave McAdam at any time.

Thereafter, on August 10, 1999, Iacono wrote to McAdam asserting that Gonnelli had the right to do what he did. On August 30, 1999, McAdam wrote back to Iacono, again alleging harassment by Gonnelli. Iacono responded by letter dated September 10, 1999, stating that since the alleged harassment did not involve the type of harassment specifically prohibited by law, it was not considered illegal harassment. As far as the Town was concerned, the harassment case was over; nevertheless, McAdam again wrote to Iacono regarding his claim. McAdam never filed a grievance about this July 29, 1999 meeting; he had never received any discipline as a result of it (4T57-4T58, 4T132-4T139; R-8, R-9, R-10, R-11).

The July 29, 1999 meeting was the only meeting Gonnelli had with him regarding his attitude. After this, Gonnelli was afraid

to speak to McAdam (4T66, 6T46-6T47).

McAdam's Arbitration

15. McAdam asked fellow employee Joseph Hartwig to testify on his behalf at his scheduled September 29, 1999 arbitration; Hartwig agreed to. Prior to the arbitration, Hartwig provided a written statement to McAdam regarding his intended testimony; specifically, Hartwig who was working standby with Walter Moss on the date in question planned on testifying about the wrongful standby switch and the resultant loss of standby overtime for McAdam (3T70-3T71, 3T75-3T76, 4T105, R-18). McAdam never told any Town representatives that Hartwig intended to testify on his behalf at the arbitration (4T69, 4T107-4T108, 5T173-5T175).

On the morning of the arbitration, Gonnelli did not know who McAdam's intended witnesses were; specifically, he was not aware that Hartwig had been asked to testify or planned on doing so (3T100, 5T173-5T175, 5T178). First thing that morning around 6:30 a.m., Hartwig approached Gonnelli and asked to speak to him. This was not unusual for Hartwig; Hartwig frequently did this (5T178-5T180). Hartwig then told Gonnelli that McAdam wanted him to testify at the arbitration and he did not know what to do. According to Hartwig, Gonnelli asked him if he had signed any statements; Hartwig replied "No." Hartwig claims Gonnelli then mentioned Hartwig's work accidents and that he was trying to help Hartwig with them and also advised Hartwig not to go to Town Hall

that evening to testify on McAdam's behalf at the arbitration (3T65-3T68, 3T78-3T79, 3T100, 3T103-3T106, 3T120).

Gonnelli disputes Hartwig's version of this conversation. He claims he simply asked Hartwig if he was subpoenaed and explained what that meant; Hartwig replied "No." Gonnelli then advised Hartwig "Do what you feel is right. If you feel you should go to do that, do that. If you don't want to do it, don't do it." Gonnelli never threatened or directed Hartwig not to testify during this less than minute-long conversation (5T173-5T175, 5T179-5T183). Further, he never indicated to Hartwig that McAdam would suffer consequences for having filed his grievance (5T181-5T182).

I credit Gonnelli's version of this conversation. Gonnelli was a credible witness, while Hartwig was not. In fact, Hartwig admitted he had a bad memory (3T124). Moreover, Gonnelli is not considered to be anti-union by the employees under him or by Local 11 shop stewards and, in fact, he served as Local 11's chief shop steward for several years (1T77, 3T29, 5T134, 5T187-5T188). Further, he felt any testimony by Hartwig would be irrelevant, as he believed there was no chance the Town would lose the arbitration under the contract (5T182-5T183).

16. Hartwig also spoke to then Councilman and current Mayor, Dennis Elwell on the day of the arbitration. Elwell has been involved in Town politics for several years. As such, Town

employees have asked Elwell for help for various reasons, particularly when they have problems on the job (5T58-5T61).

Hartwig asked Elwell for help on several occasions; he described Hartwig as having a tendency to get into job related problems. Specifically, Hartwig has: 1) a chronic lateness problem; 2) been suspended twice for drinking on the job and; 3) has had about 25 or 26 job-related accidents. Hartwig acknowledges that since 1993, he has asked Elwell for help several times when he has gotten into trouble on the job and Elwell has "gone to bat" for him. Hartwig considered Elwell a "good friend" (3T96-3T97, 3T127, 5T60-5T63, 5T69, 5T74-5T75, 5T79-5T80, 5T107-5T108).

According to Hartwig, Elwell came to the DPW garage to speak to him on the day of the arbitration and said: ". . . you have a good job and everything, and don't cause trouble." Hartwig claims that Elwell further mentioned how he had helped Hartwig when he had gotten into accidents and how he had stood up for him several times. Hartwig claims Elwell then told him not to go to Town Hall that evening for McAdam's arbitration, and asked Hartwig to come to his house at 5:30 p.m. (3T60-3T62, 3T64, 3T88, 3T90, 3T92).

Elwell's version of this conversation differs. According to Elwell, Hartwig called him on the morning of the arbitration. Elwell was not home but his wife was and spoke to Hartwig. Mrs.

Elwell then informed her husband that Hartwig had called and that he was very upset; Elwell thus stopped by the DPW to see Hartwig (5T67-5T68, 5T99).

Elwell described Hartwig as being extremely upset then; he asked him what was the matter. Hartwig kept stating "people keep telling me to say things I don't want to say." Elwell asked Hartwig who he was referring to; Hartwig replied McAdam. Hartwig then indicated that McAdam had asked him to testify at his arbitration that evening. Hartwig also stated he was disgusted with the job and being pressured by people. According to Elwell, he then repeated the advice he had been giving him since 1993, "Joey, why don't you pay attention to what you're doing. Try to keep yourself out of trouble and mind your own business." Elwell never told Hartwig not to testify at the arbitration; nor did he say that McAdam was going to get into trouble for filing a grievance (5T68-5T70, 5T98-5T102, 5T105, 5T109, 5T111). At that point, Elwell did not know McAdam's arbitration was that evening (5T106).

I credit Elwell's version of this conversation. As stated previously, Hartwig admitted having a bad memory and could not definitely remember whether this conversation took place in the morning or afternoon (3T88-3T89, 3T124). Further, Hartwig's testimony was inconsistent. For example, he testified that he called Elwell for help after speaking with Gonnelli because he

became nervous that he would lose his job. However, later in his testimony, he denied calling Elwell for help and stated he did not know why Elwell came to the DPW garage to speak to him (3T106-3T107, 3T126, 3T128).

17. About 5:15 p.m. that evening, Hartwig went to Elwell's house and approached Elwell in his home office while he was on the phone. Hartwig asked Elwell who was on the phone; Elwell replied "McAdam." Hartwig then asked Elwell what McAdam said. According to Hartwig, Elwell informed him not to worry about it and further instructed Hartwig to stay away from McAdam because McAdam was going to lose everything, including his job (3T62-3T63, 3T93-3T95, 3T128, 3T131). Hartwig got nervous and mad; he then left (3T64).

Elwell denies saying this. He claims that he and Hartwig simply renewed their conversation from the morning, about Hartwig being nervous about testifying at the McAdam arbitration. According to Elwell, Hartwig kept stating that McAdam wanted him to testify but he did not know what he wanted to do. Elwell again told Hartwig to mind his own business and worry about his own responsibilities and his own job. He advised Hartwig to just "go to work." According to Elwell, he did not threaten Hartwig or tell him that he would lose his job if he testified, nor did he tell him that McAdam would lose his job or benefits if he pursued the grievance (5T72-5T75, 5T115-5T117).

I credit Elwell's version of the conversation. Elwell has been giving Hartwig such job-related advice and help since 1993 and Hartwig acknowledges this. Further, Hartwig was not a credible, confident witness and his testimony was not convincing. Moreover, he admits his memory is bad (3T124).

18. Hartwig thereafter advised McAdam of his contact with Elwell that day. Then, McAdam, several hours before the arbitration, notified his attorney, Raymond Heineman, about what had happened. Heineman advised McAdam not to raise the matter at the arbitration and that he (Heineman) would take care of it (4T106-4T107; R-14, R-15).

At the arbitration, Heineman read Hartwig's brief statement about the illegal switch into the record. The statement confirmed that on September 4, 1998, Hartwig who was scheduled for standby duty with Walter Moss was informed by Acting Superintendent Charles Snyder that William Sallick, not Moss, would be Hartwig's partner on standby duty. The Town was not contesting the fact that Moss and Sallick had switched standby assignments (CP-8; R-18).

According to Hartwig, he did not attend the arbitration because he was afraid he would lose his job if he did, based on his earlier conversations with Gonnelli and Elwell (3T64, 3T70, 3T129, 4T106; CP-8; R-18). The arbitrator asked if Hartwig was present; Heineman indicated Hartwig was not and informed the

arbitrator that he may need to further question Hartwig. McAdam then informed Heineman that he wanted to appeal the case because of what had happened to Hartwig (4T106-4T107). Heineman, however, did not make a claim during the arbitration that a witness had been interfered with (3T29-3T30). Nor did he ask for an adjournment (4T106, 5T175-5T176).

McAdam entered several written witness statements into evidence at the arbitration. Gonnelli was present at the arbitration and Snyder testified (5T174-5T177).

19. On December 3, 1999, McAdam received the arbitrator's award denying his grievance. The arbitrator determined, among other things, that the wrong employee had performed the work rightfully (e.g. it was bargaining unit work) and, therefore, the employee(s) should be disciplined. He further found that McAdam had no right to be paid for the missed overtime as a penalty. The arbitrator added, "[t]his is especially so in this fact pattern when the record evidence established that the Town's administration was not responsible for the employees' misconduct (CP-8)."

Shortly thereafter, McAdam asked Heineman again if he could appeal the award; Heineman advised him to forget it, that it was not worth it (4T107, 6T109-6T110; CP-18).

McAdam is Removed From His Coordinator Position

20. In December 1999, McAdam's rink position came to

Iacono's attention during the budget preparation process. The chief financial officer had questioned McAdam's stipend; Iacono did not understand why McAdam was receiving it. Iacono then learned of McAdam's additional rink coordinator title. Since Voss had been performing the duties of recreation facilities maintenance worker on a full-time basis since April 1998, Iacono inquired whether McAdam was still performing his rink duties. Specifically, Iacono spoke to Gonnelli, as well as the director of recreation, the recreation department supervisor, and personnel at the rink; he learned that McAdam had not been at the rink for over a year. Iacono then asked Gonnelli why McAdam was no longer performing his rink duties. Gonnelli explained it was because the Town had hired Voss (2T41-2T48, 2T74-2T75, 2T77-2T79, 5T124-5T127, 5T129-5T130, 5T185-5T187; CP-7).

For about a year, McAdam had been getting paid for his rink duties, although he was no longer performing them. Gonnelli never told Iacono that McAdam was getting paid for these duties that he no longer performed because he "wasn't about to try to take anything away from Dave." Gonnelli also figured that he would have McAdam if there was ever a future need for him at the rink (6T33-6T37).

Iacono concluded that it was wrong to continue to pay McAdam a stipend for duties that were no longer being performed (2T47-2T48, 2T74). Iacono then consulted with Town labor counsel about

the proper way to address this issue under the contract and civil service law. Town council thereafter passed a resolution, in accordance with the contract and the law, eliminating McAdam's rink coordinator position (2T48-2T49). McAdam's salary was reduced by $4000 as a result (4T75). McAdam learned of this by a December 28, 1999 letter from Iacono indicating that his rink duties and responsibilities were no longer required (4T32-4T33, 4T155-4T156; CP-7).

Gonnelli never recommended to Iacono or any other Town official that McAdam's title or stipend be taken away, and was not involved in the decision to do so. The Town did not remove McAdam's title as retribution for the overtime grievance he had filed over a year earlier (5T185-5T187). Local 11 never filed a grievance challenging this action by the Town, or alleging this action was not in accordance with the contract (2T49, 5T217-5T218).

21. At McAdam's request, on February 25, 1999, McAdam, the Local 11 shop steward, and Gonnelli met to review McAdam's personnel file. A December 29, 1998 memo from Gonnelli was destroyed along with six other reprimands that McAdam had been unaware of. These other six reprimands were for prior incidents and, in fact, one dated back to February 1996, had not been addressed to McAdam but were simply placed in his file without him first being given a copy (4T45-4T49, 4T51, 4T139-4T14, 6T57-

6T60; CP-9, CP-10; R-12).

McAdam's Alleged Change in Duties and Assignments

22. McAdam perceives that his duties and responsibilities have changed since he filed his grievance in September 1998 through June 2000, when his charge was filed. Specifically, he claims he has been assigned with temporary/seasonal, non-union employees rather than the usual fellow full-time union employees. Further, he asserts he receives more menial duties, such as picking up garbage, raking leaves, and weed whacking; whereas previously, he had been assigned what he describes as more significant duties such as those involving storm lines, sanitary lines, concrete, asphalt, catch basins, landscaping, and recycling duties (4T64-4T66, 4T152).

These perceived new assignments and duties, however, have not resulted in lower pay or benefits for McAdam. McAdam, nevertheless, claims that being assigned to work with non-union men and being assigned these new menial duties have resulted in a loss of overtime opportunities, specifically, lunch time overtime (4T65, 4T152-4T153).

The working through lunch and receiving overtime practice has been in effect for 14 years, but is not included in the contract (4T153-4T155). Lunch time overtime occurs sometimes periodically and sometimes frequently. There are certain assignments which may permit this overtime during the regular

work day such as recycling detail when the recycling crew may have to work through lunch in order to complete their detail before the recycling plant closes. It also may occur on asphalt detail when a crew is dumping hot asphalt and cannot stop for lunch because the asphalt would cool and become unusable (5T138-5T139). However, even when these duties may result in lunch time overtime, sometimes not all of the crew members may be entitled to it because one of the crew might work through lunch to dump a truckload while the other two crew members take a lunch break (5T198-5T199, 6T10). In any event, if the assigned work can be completed within the regular work day, lunch time overtime is not permitted (4T153-4T155).

McAdam claims he had no problem with the lunch time overtime practice until he filed his grievance in September 1998. However, while McAdam claims lunch time overtime is not being distributed evenly, neither he, nor Local 11, has filed a grievance about this (6T117-6T119).

23. In 1997, McAdam earned approximately $5000 in overtime by working through lunch, working snow detail and working standby. Although McAdam worked through lunch often in 1997, this does not account for the bulk of his overtime earnings. Most DPW overtime is earned while on standby, when an employee is on-call 24 hours a day, seven days a week. McAdam acknowledges that the overtime in 1997 was for various reasons, and was not

just lunch time overtime (5T211, 6T121-6T126; CP-17).

Gonnelli reviews employees overtime reports before they are reported to payroll. According to Town overtime earnings records for the period immediately after McAdam filed his grievance, specifically, October - December 1998, McAdam was one of the top five earners in overtime hours at the DPW and for 1999, he was one of the top ten earners, out of the over 37 employees. Specifically in 1999, McAdam had 114 overtime hours while the average DPW employee had approximately 80 overtime hours. McAdam earned this much overtime during 1998 and 1999, although he declined some overtime opportunities (5T212-5T215; R-21).

In August 1999, McAdam wrote to a law firm complaining how the Town prevented him from working through lunch and earning overtime; however, he admitted in the letter that despite being denied lunch time overtime, the assigned work, nevertheless, was completed within regular work hours; thus there was no need for lunch time overtime (4T89-4T94; R-6).

In 2000, McAdam received different assignments that resulted in overtime, including recycling. However, McAdam had a significant decrease in overtime because he declined standby overtime on election day 2000. If he had not refused it, he would have had the same amount of overtime as the average employee that year (5T211-5T217; R-21). Declining standby opportunities results in a significant decrease in overtime

earnings because the majority of overtime is incurred while on standby. McAdam acknowledges that refusing overtime, specifically, standby opportunities, reduces his earnings (5T206-5T207, 6T45, 6T122; R-20).

For the first half of 2001, McAdam has earned at least as much overtime as the average employee (5T217; R-21).

24. As Superintendent, Gonnelli has the right to assign work under the agreement and tries to match workers up depending on need. Gonnelli determines what job assignments McAdam receives and tries to assign him duties Gonnelli believes McAdam does well (6T10-6T12, 6T43).

McAdam never asked Gonnelli or any other supervisor why the nature of his assignments and responsibilities changed as he alleges (4T66). According to Gonnelli, the nature of McAdam's job duties have not changed since 1998 (6T10-6T12).

Gonnelli explained that all DPW employees often get assigned with seasonal/temporary, non-union employees and, in fact, during the summer, the Town work force doubles with seasonals (5T189-5T190, 5T208). Some regular DPW employees even work with seasonal employees everyday (5T190, 6T40). Specifically, there is one regular and two seasonal employees on the litter crew and during the summer five seasonal employees work with one regular full-time employee at Buchmuller Park (5T191, 6T40).

On any given day, the Town has seven crews that consist of

one regular employee and two or three seasonal employees. Thus, it would not be unusual for McAdam to work with temporary or seasonal employees and he has done so even before his September 1998 grievance and while he worked at the rink (5T189-5T192, 5T208-5T209, 6T39-6T43).

Specifically, as to McAdam's assignments, Town records reflect that on most days in 1999 and 2000, McAdam was assigned to work with a regular full-time employee, except in the summer, when the Town doubles its workforce with seasonal employees (5T208-5T209; R-19).

McAdam, however, also prepared records of who he worked with from October 12, 1999 through May 2, 2002, both full-time union employees and part-time employees, and the details he was assigned. According to McAdam, his records were not totally consistent with the Town's. For example, the Town lists McAdam working with Joe Hartwig, union employee, on November 3, 1999, when he instead worked with Jesse Hartwig, a part-time non-union employee (6T85-6T91, 7T5, 7T7-7T14; CP-16A, CP-19, CP-20, R-19).

Further, according to McAdam's records, in the year 2000, there were many employees below him in seniority that are receiving more overtime hours during lunch. McAdam concludes that this means that employees who are not as qualified as him, because they have less seniority, are receiving the details that permit lunch time overtime whereas before, McAdam, the more

qualified individual, would receive these assignments (6T79-6T84; CP-14, CP-15).

McAdam, however, admits he is not qualified as a supervisor and lacks authority to evaluate the qualification of employees. Moreover, he believes he is more qualified then some employees who are more senior than him (6T112-6T114). His observations, therefore, regarding the relative qualifications of co-workers are unsupported by the factual record.

June 2000 - September 2000

25. Hartwig and Elwell had another conversation in June 2000. According to Hartwig, Elwell came to his house and told him to stay away from McAdam and not to get into trouble. Hartwig claims Elwell told him this because he liked him and did not want him to lose his job (3T160-3T164). However, Hartwig later testified that this conversation took place as he ran into Elwell while Elwell was coming out of the ice cream parlor next to his house (3T169-3T170).

Elwell acknowledges a conversation took place with Hartwig in June 2000, as he ran into Hartwig outside of an ice cream parlor next to Hartwig's house. According to Elwell, he asked how things were with respect to a problem Hartwig was experiencing with a fellow tenant in his building; Elwell had made a complaint to the property owner on Hartwig's behalf. Hartwig became belligerent and complained about his job and

Gonnelli, who he had previously praised. He stated that Gonnelli was ruining the job. This shocked Elwell because when he had approached Gonnelli in the past about job problems with Hartwig, Gonnelli had been sympathetic and had even saved Hartwig from being suspended on the prior Christmas Eve. Hartwig stated his job used to be good but now it wasn't. Elwell replied, "Joey, you know, if you don't like the job, then maybe you should consider another career. But remember this, you now have two children, and I don't know that you'll ever find a benefit package like you have" (5T77-5T80, 5T83 5T89-5T90).

The conversation ended there, with Hartwig walking away. Elwell never threatened Hartwig. Nor was McAdam's unfair practice raised (5T80, 5T83).

I credit Elwell; specifically that the conversation was simply in the context of a chance meeting and that he did not threaten Hartwig but merely gave him advice. Hartwig's testimony on this conversation was not convincing. It was inconsistent and unclear. Further, as stated previously, it was not uncommon for Elwell to give advice to Hartwig about his job (5T79-5T80).

26. Also, in June 2000, McAdam and his wife learned of a contaminated stream that migrated towards their home. The pair became vocal about the contaminants near their house and the information that was being withheld. Shortly thereafter, his wife announced her candidacy for the council seat in her ward

(2T57-2T58, 2T61, 4T67, 4T80, 4T95, 4T158; R-6). At the same time, McAdam filed the instant unfair practice charge, but the charge was unrelated to his wife's candidacy (4T80-4T81). According to McAdam, the job harassment he received and the events that occurred, are partially attributable to him and his wife being vocal about the contaminants, the way the Town was handling the problem and how Town officials were concealing information (4T95-4T96; CP-3, CP-4, R-6).

27. In July 2000, Hartwig told a local newspaper reporter about the alleged incidents of intimidation by Elwell and Gonnelli with respect to the McAdam arbitration. This was the first time he made them public (3T139, 3T149-3T151, 3T167; CP-5).

28. In September 2000, Teamsters President Peter McGourty, Iacono and McAdam met at a restaurant. McAdam had called McGourty and requested the meeting with him and Iacono to discuss events that had occurred with his job since 1998; specifically, his grievance, his loss of the rink position, and patterns that had formed (2T26-2T31, 4T69-4T71).

Iacono noted that the meeting was "off the record." Iacono then told McAdam that Gonnelli still felt that McAdam hated him; McAdam denied it. Iacono advised McAdam to communicate that to Gonnelli (4T71). McAdam and Iacono both agreed that some distance and dislike had developed between McAdam and Gonnelli (2T27-2T29). Iacono wanted to know how he could help the

situation (2T26-2T27).

McAdam also told Iacono that he was not getting his fair share of overtime. Iacono explained to McAdam that although he had looked at the numbers and it appeared overtime was being distributed on a fair basis, he would again look into the overtime numbers to make sure that his conclusion was correct (2T22, 2T29). The three also discussed McAdam's loss of stipend and his work attitude (2T26-2T31, 4T69-4T91).

McAdam's version of the conversation then differs from Iacono's. According to McAdam, in addition to the three items mentioned by Iacono, the parties discussed several other matters relating to the settlement of outstanding grievances/unfair practice charges against the Town (4T71-4T73). Specifically, McAdam relates that Iacono then mentioned how the Town had offered McAdam half of the overtime to settle the standby grievance. McAdam, however, noted that he had to first blame the two individuals who had illegally switched, and not management. According to McAdam, Iacono then advised him to write a letter to Gonnelli dropping all charges; McAdam would then be "put back in the mainstream" with regard to assignments and overtime. McAdam then asked about his lost rink position. Iacono replied that he could not change that but when another promotion arose, McAdam could apply and would be considered. McAdam explained that he had unsuccessfully applied for a promotion to the position of

grounds/maintenance coordinator in May 2000; Iacono indicated that that hiring had been "political." McAdam claims Iacono further stated that he would restore Hartwig's week suspension if McAdam dropped the charges and advised him to stay out of Hartwig's business (4T71-4T73).

Finally, McAdam claims Iacono said that McAdam was supposed to take "half the money, blame it on the men and take if off Mr. Gonnelli's shoulders"; McAdam said he would consider it and get back to Iacono. McAdam later told Iacono that he would not do it (4T72-4T73).

I have two different versions of the September 2000 conversation. The conversation regarding settlement discussions is uncorroborated. Teamsters President McGourty did not testify. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. McCormick, Evidence 272 (3rd ed. 1984); International Automated Machines Inc., 285 NLRB 1122, 129 LRRM 1265 (1987). Here, it can be assumed that the Teamster President would corroborate the testimony of a union member (McAdam). Therefore, I draw an adverse inference and credit Iacono's description of the meeting.

Moreover, it is unlikely that Iacono would offer to "put [McAdam] back in the mainstream" with regard to overtime and

assignments when he did not believe initially that McAdam had been treated unfairly and his subsequent review of Gonnelli's records confirmed his conclusions. Also, Iacono is not likely to be discussing settling charges involving Hartwig without either Hartwig or his representative being present.

Additionally, even if I credited McAdam in this regard, evidence of settlement negotiations, including offers of compromise, is generally inadmissible to prove a party's liability for a claim. N.J.R.E. 408. Such evidence is excluded because it is not relevant to the question of liability and because its admissibility would discourage parties from attempting to settle claims out of court. See generally, Aberdeen Tp. v. PBA, Local 163, App. Div. Dkt. No. A-4553-94T2 (1/17/96). Moreover, considering such evidence (offers of settlement) would defeat the public policy goals of the Act by discouraging prompt settlement of labor disputes.

After the meeting, and at the union's request, Iacono received from Gonnelli DPW overtime information for the past two years. The information demonstrated that over the past two years, some employees had received more overtime than McAdam but the majority of them received less. The overtime information was then submitted to Local 11; after this, there were no further discussions between McAdam and Iacono (2T29, 2T35). Neither McAdam nor Local 11 filed a grievance alleging that overtime has

not been equally distributed , in violation of the contract (6T117).

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 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 proved, 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.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER * 115, 116 (¶18050 1987).

In this case, there is insufficient direct evidence that the alleged adverse actions were based on union animus. Consequently, I must look at the circumstantial evidence to determine whether the Act was violated. I find that McAdam has not met his burden under Bridgewater. I find that the Charging Party has proved the first two Bridgewater elements - McAdam engaged in protected activity and the employer knew it, when he filed his September 9, 1998 grievance. However, I find that McAdam has not proven that the Town was hostile towards his protected activity, as Bridgewater requires.

While McAdam claims that after he filed his September 9, 1998 grievance, he was demoted, lost overtime opportunities and suffered adverse employment conditions, I find that none of the

alleged adverse actions were motivated by union animus.

First, the Town's decision to demote McAdam from his rink position was based on legitimate business reasons and was unrelated to his grievance. Changes in the rink occurred which resulted in it being operational for a longer period of time and for more events; thus, the Town determined a new full-time position was needed at the rink. At the same time, the Town determined it needed an individual with welding and fabricating experience on staff to meet its needs at the rink and at other Town facilities. As a result, the Town posted the new position of recreational facilities maintenance worker in March 1998. McAdam did not apply for the position; Gary Voss, an individual with welding and fabricating experience, did and was hired in April 1998. A significant amount of money was saved as a result of no longer subcontracting the welding/fabricating functions. (See Finding No. 6.) All of these actions were within the Town's managerial prerogative and occurred several months prior to McAdam's September 9, 1998 grievance.

Additionally, McAdam continued to be paid for his rink position after Voss' hiring. However, McAdam did not receive a rink assignment after 1998 and, as of March 1999, never reported to the rink. McAdam was no longer needed there because of Voss; nevertheless, he continued to be paid for these rink duties he no longer performed until December 1999. At that time, the Town

Administrator, as part of his budget review, learned of McAdam's rink stipend and investigated. The Town, thereafter, determined that McAdam's rink position was no longer required and thus it was not fiscally sound for it to continue. The Town, then, after consultation with counsel, exercised its managerial prerogative and eliminated McAdam's rink position. Legitimate business considerations and not union animus were the reasons for the Town's action. In fact, Local 11 never filed a grievance over the elimination of this position.

McAdam, however, claims that the timing of his removal from this position is suspect. He points out that although Voss was hired in April 1998, it was not until December 1999, after McAdam's grievance was pursued to arbitration and the arbitrator's December 3, 1999 decision was rendered, that he was removed from the position.

I, however, disagree that the timing of his removal was suspect or related to the arbitrator's decision. In fact, the arbitrator ruled in favor of the Town so it cannot be deduced that the Town retaliated against McAdam because of the decision. Rather, the decision to remove McAdam came after a December 1999 budget review by the Town Administrator and was based on legitimate business reasons. A budget review revealed that McAdam was being paid to do a job he was no longer performing. Moreover, McAdam's supervisor, Gonnelli, did not even attempt to

remove McAdam from the position, as he "did not want to take anything away from him". (See Finding No. 20.)

McAdam further argues that union animus is demonstrated by the fact that Town representatives Gonnelli and then Councilman Elwell intimidated his witness, Joseph Hartwig, on the date of the arbitration which resulted in Hartwig not testifying on his behalf. I, however, did not find Hartwig to be a credible witness. In any event, Hartwig's arbitration statement/testimony was inconsequential. He was simply confirming a fact that the Town was not contesting, namely that Moss and Sallick had switched standby duty without providing Snyder a written notification. Further, McAdam's attorney never claimed at the arbitration that Hartwig had been interfered with or asked for an adjournment to take Hartwig's testimony. (See Findings No. 15, 16, 17 and 18.)

In any event, there is no evidence that even if Hartwig had testified on McAdam's behalf, the arbitration would have gone in McAdam's favor, as Hartwig's statement was read into the record at the arbitration and thus considered by the arbitrator. Finally, although McAdam wanted to appeal the arbitrator's decision because of the alleged intimidation to Hartwig, his attorney advised him to forget it, that it was not worth doing. (See Findings No. 18 and 19.)

McAdam further asserts that hostility by the Town is

evidenced by virtue of his July 29, 1999 meeting with Gonnelli and Gonnelli's August 5, 1999 memo (CP-12). First, I do not find any unlawful motive for the meeting or even any connection between the meeting and McAdam's grievance, as the meeting took place almost a year after the grievance was filed. See City of Millville, P.E.R.C. No. 98-99, 24 NJPER 120 (¶29061 1998). Moreover, as Gonnelli explained, the meeting was simply meant to be a conversation between a supervisor and his employee. Gonnelli called the meeting after learning that McAdam was dissatisfied with his job and with management and after complaints and observations regarding his attitude. (See Findings No. 11, 12 and 13.) As supervisor, Gonnelli had the right to call the meeting to address such issues.

In any event, Gonnelli did not threaten, fire or take any disciplinary action against McAdam. Nevertheless, McAdam filed harassment charges against him. The August 5, 1999 memo by Gonnelli was simply a response to McAdam's harassment charges. Gonnelli had the right to respond to such allegations. Gonnelli copied the mayor and council on the response, because they had received a copy of McAdam's charges from McAdam.

In light of the circumstances, I find that neither the July 29, 1999 meeting nor Gonnelli's resultant August 5, 1999 memo responding to McAdam's charges, constitute proof of hostility by the Town.

I further disagree with McAdam's claim in his brief that Gonnelli's August 5, 1999 memo was the reason he did not receive a May 2000 promotion. This allegation is wholly unsupported. There is no evidence that McAdam did not receive the May 2000 promotion because of the memo written several months earlier. Finally, I note that the Town has the managerial prerogative to promote and assign employees.

McAdam also claims that the Town denied him overtime opportunities in retaliation for his 1998 grievance. He asserts that his records demonstrate that the Town assigned him menial duties and with seasonal/temporary employees, rather than full-time union employees, which resulted in him not acquiring as much lunch time overtime as he had before he filed his grievance (see CP-16, CP-17, CP-19, CP-20). I disagree. I do not find that McAdam has shown any connection between his grievance and the overtime he received thereafter.

In support of his claim, McAdam submitted documentation which he asserts shows that employees who are less senior than him and thus less qualified, are receiving the more significant details which permit lunch time overtime. However, McAdam admitted he is not a supervisor, therefore, does not evaluate other employees. Nevertheless, even if McAdam was able to objectively evaluate the relative qualifications of his co-workers, his theory is flawed, as he claims that he is more

qualified than some individuals who are more senior than him, thus acknowledging that more seniority does not necessarily mean more qualified and, thus, more significant details that would result in lunch time overtime. In any event, there is nothing in the parties' contract that provides for lunch time overtime. Lunch time overtime is not earned on any scheduled or rotational basis nor is it assigned based on union status; rather, it appears to be earned on certain assignments and only under certain conditions. In fact, an employee will not be permitted to work through lunch time and earn overtime when the work can be completed during the course of the work day. (See Finding No. 22.) Based on the record, I cannot conclude that McAdam has proven that the Town unlawfully denied him lunch time overtime or any other overtime because of his grievance.

In any event, Town records show that in October - December 1998, the quarter immediately after he filed his grievance, McAdam was one of the top five DPW employees in overtime hours and in 1999, he had significantly more than the average DPW employee in overtime hours. Although McAdam had a decrease in overtime hours in 2000, he would have had the same amount as the average DPW employee, if he had not refused standby overtime on election day of that year. Finally, in the first half of 2001, McAdam has earned at least as much as the average employee. I note that neither McAdam, nor Local 11, has filed any grievance

alleging a violation of the equal distribution of overtime clause in the agreement.

Moreover, I fail to find that McAdam has shown that the Town has adversely changed the nature of his job duties and his assignments since his September 1998 grievance. First, McAdam admits he has not suffered any loss of pay or benefits because of these alleged adverse details and assignments. Moreover, while he complains that he was assigned with seasonal/temporary employees, rather than union employees, this would not be unusual. In fact, some regular DPW employees work with seasonal/temporary help everyday and the Town work force doubles with them in the summer. In any event, as Superintendent, Gonnelli has the right to assign employees, including McAdam, and as he explained, he tries to match workers up depending on need. There is no showing that Gonnelli treated McAdam disparately in this regard. (See Findings No. 22 and 24.)

Finally, in his brief, McAdam appears to argue that he received an unwarranted reprimand in December 1998 because of his September 1998 grievance. McAdam, however, fails to present any proof of this. In any event, this reprimand as well as others that were received by McAdam prior to the filing of his grievance were removed from McAdam's personnel file by Gonnelli in February 1999. (See Finding No. 21.)

Based on the above, I do not find that the Town violated

5.4a(3) and, derivatively, 5.4a(1) of the Act.

CONCLUSIONS OF LAW

The Town did not violate 5.4a(1) or (3) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.

Wendy L. Young
Hearing Examiner

DATED: April 14, 2003
Trenton, NJ