

P.E.R.C. NO. 86-145

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MINE HILL,

Respondent,

-and-

Docket No. CO-86-227-126

MINE HILL PBA LOCAL NO. 279,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Township of Mine Hill violated the New Jersey Employer-Employee Relations Act when its Mayor threatened PBA Local No. 279 with reprisals if it attempted to proceed to interest arbitration and then introduced an ordinance reducing the number of sergeants in the Police Department.

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MINE HILL PBA LOCAL NO. 279,
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Appearances:

For the Respondent, Wiley, Malehorn & Sirota, Esqs.
(John G. Geppert, Jr., of Counsel)

For the Charging Party, Loccke & Correia, Esqs.
(Leon B. Savetsky, of Counsel)

DECISION AND ORDER

On February 24, 1986, the Mine Hill PBA Local 279 ("PBA") filed an unfair practice charge against the Township of Mine Hill ("Township"). The charge alleged the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(2),(3),(5) and (7),^{1/} when its

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority

mayor threatened that there would be layoffs in the police department and cuts in the police budget and that police department members would suffer if the PBA petitioned for interest arbitration. The charge further alleged that the Township introduced an ordinance reducing from three to one the number of sergeants on the police force and this was "undertaken to demote two of the three members of the PBA's negotiating committee in reprisal for exercising their rights under the law."

On February 28, 1986, a Complaint and Notice of Hearing issued. On March 13, 1986, the Township filed its Answer. It denied that it threatened to retaliate against the PBA if it proceeded to interest arbitration. It admitted introducing an ordinance reducing the number of sergeants, but denied that the ordinance was introduced in reprisal against the PBA. Rather, it contended the ordinance was pursuant to its statutory responsibility to reduce its police force for economy reasons. It further contended that the Commission does not have jurisdiction to determine the ordinance's validity and that the charge is not ripe for consideration because the ordinance had not yet been adopted.^{2/}

1/ Footnote Continued From Previous Page

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; and (7) Violating any of the rules and regulations established by the commission."

2/ On June 6, 1986, Hearing Examiner Howe granted the PBA's request to order the Township to "repeal the ordinance it adopted on June 5, 1986" and restrain "publication of the said ordinance."

On April 16 and 17, 1986 Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On May 9, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-54, 12 NJPER __ (¶ ____ 1986). He found that the Township violated subsections 5.4(a)(1) and (3) of the Act when the mayor threatened the PBA with reprisals if it attempted to proceed to interest arbitration and then introduced the ordinance reducing the number of sergeants in the police department.

On May 27, 1986, the Township filed exceptions. It contends the Hearing Examiner erred in (1) not crediting the mayor's denial that he said there were "too many sergeants;" (2) not finding that the ordinance was introduced for economy reasons; (3) finding that the Commission has jurisdiction and (4) not finding that the charge was premature.

We have reviewed the record. The Hearing Examiner's findings of fact (3-10) are accurate. We adopt and incorporate them here.

We first consider whether we have jurisdiction over this matter. The Township contends we do not because it claims it acted pursuant to N.J.S.A. 40A:14-143 which permits a municipality "to decrease for reasons of economy...the number of members and officers of the police department or force of their grades or ranks." It also relies on Patrolmen's Benev. Assoc. v. City of Elizabeth, 146 N.J. Super. 257 (App. Div. 1976) ("Elizabeth"), where the Court

found that the Civil Service Commission should decide, under the circumstances of that case, whether layoffs and the decrease in the number of members and officers of the fire and police departments or their grades and ranks were "necessary for reasons of economy."

We have jurisdiction to decide this case. The PBA has the statutory right to make salary proposals in collective negotiations and to invoke interest arbitration. N.J.S.A. 34:13A-5.3 and 16. The Legislature has proscribed as unfair practices actions that interfere with these rights and has vested in us, in plain and unmistakable terms, the "exclusive jurisdiction" over such practices. N.J.S.A. 34:13A-5.4(c). Subsection 5.4(a)(1) protects against threats which interfere with the exercise of rights; subsection 5.4(a)(3) protects against discrimination in terms and conditions of employment because employees exercised rights protected by the Act; subsection 5.4(a)(5) protects against negotiations in bad faith. The claims issued in this case go to the heart of our jurisdiction: the PBA makes a salary proposal and suggests interest arbitration and the mayor allegedly threatens demotions in violation of subsection (a)(1), allegedly institutes the process for demotions in violation of subsection (a)(3) and allegedly negotiates in bad faith by making threats during negotiations in violation of subsection (a)(5). The Township's defense that it introduced the ordinance for reasons of economy pursuant to a certain statute does not divest us of jurisdiction we otherwise would have. Rather, that claim is really a defense to the

merits of the charge and is a defense that we are required to consider under In re Bridgewater Tp., 95 N.J. 235 (1984). See also Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316 (1979); Hunterdon Cent. High Sch. v. Hunterdon Cen. High., 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981); Sure Tan, Inc. v. NLRB, 467 U.S. ___, 81 L.Ed.2d 732, 104 S.Ct. ___ (1984). Finally, we also note that this case does not involve filings in two or more forums so there is no predominant interest question under City of Hackensack v. Winner, 82 N.J. 1 (1980). Given all this, we conclude that we have jurisdiction to consider this unfair practice case.^{3/} Indeed, our jurisdiction over such issues mandates us to consider whether the mayor, in fact, introduced the ordinance pursuant to economy reasons since such reasons would furnish a business justification defense. Bridgewater, supra; New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979) (standard to determine violations of 5.4(a)(3) and (a)(1)).

We now consider the merits. We agree with the Hearing Examiner that the Township violated the Act when its mayor

^{3/} Elizabeth is distinguishable. There, the sole issue was whether the municipality did in fact exercise its managerial authority in good faith for reasons of economy and there were no specific allegations directly tying the layoffs to protected activity. 146 N.J. Super. at 262. Here, in contrast, we must determine whether the Township violated our Act based on the claim that it threatened employees for engaging in union activity.

threatened retaliation and introduced an ordinance to reduce the number of sergeants in the police department. An employer violates subsection 5.4(a)(1) if it engages in activities which tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. New Jersey Sports and Exposition Authority. There can be no question but that the mayor, as representative of the Township, did just that.^{4/} During contract negotiations, the mayor threatened that "if the PBA went to arbitration, the police department would suffer cuts in the budget," and that the number of sergeants would be reduced. He then attempted to fulfill this threat by introducing an ordinance to reduce the number of sergeants from three to one. It is quite evident that this ordinance was directed at the PBA and specifically its negotiations committee: two of its three members were sergeants.

We reject, under the circumstances of this case, the employer's defense that the ordinance was introduced for economy reasons. The Township had a surplus of \$100,000 and no evidence has been introduced to show why the ordinance was necessary despite that surplus. Indeed, the mayor testified that no savings would have

^{4/} The Hearing Examiner credited Oster and Canfield's testimony and a councilman's corroborating testimony and did not believe the mayor's denials. We will not disturb this determination.

been realized. Further, the timing is simply too suspect for us to ignore. The ordinance was introduced approximately one week after the mayor made his threats at a negotiations session.

In short, this is a case where a public employer's authorized representative threatened public employee representatives with reprisals for engaging in protected activity. In fact, he took the first step to fulfill his threat by introducing the necessary ordinance to carry it out. The purported business justification was a sham. Such conduct, therefore, violates subsection 5.4(a)(1).^{5/}

We do not, however, believe that the mayor's statement and introduction of the ordinance violated 5.4(a)(3) of the Act. This subsection prohibits discrimination in regard to hire or tenure of employment or any term and condition of employment. On the record before us, no employees have been discriminated against in regard to hire or tenure of employment or any term and condition of employment. Although certain employees have been threatened with

^{5/} We contrast this situation to one where the public employer makes noncoercive statements of opinion. For instance, a statement that the Township could not afford a huge wage increase and that such an increase might lead to personnel layoffs would not, without more, violate our Act. Such a comment would be an acceptable statement of opinion. See Black Horse Pike Regional Board of Education, P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981). The mayor's comments here, in contrast, constituted an illegal threat. Mercer County, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985).

demotions, the Township has not formally acted and therefore no employee's term and condition of employment has been affected. See Gorman, Basic Text on Labor Law, at 337 (employer action which interferes with concerted activity but does not involve discrimination regarding working conditions may be challenged only under subsection (a)(1)). Therefore, we dismiss the 5.4(a)(3) allegation.^{6/}

Finally, we believe the mayor's conduct during negotiations constituted a refusal to negotiate in good faith under subsection 5.4(a)(5). It is of no moment that the PBA had the right to proceed to interest arbitration. The statute does not provide that the availability of interest arbitration relieves the public employer of its duty to negotiate in good faith. Threatening members of a negotiating committee with reprisals during negotiations is a refusal to negotiate in good faith.^{7/}

^{6/} By contrast, it was not premature to consider the subsection 5.4(a)(1) allegations because the mayor's threats, in themselves, were illegal. It is not necessary that these threats have been carried out or even that employees were in fact coerced to find a violation. e.g. Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd, App. Div. Dkt. No. A-1642-82T2 (decided 12/8/83). Moreover, we emphasize that the Borough would violate our Act if its enactment of the subject ordinance was tainted by the mayor's illegal motivation and we, as a remedy, are enjoining such conduct. Further, since we have determined that the ordinance was introduced to interfere with the PBA's protected activity, we order that it be withdrawn.

^{7/} We agree with the Hearing Examiner that the allegations that the Township violated subsections 5.4(a)(2) and (7) should be dismissed.

ORDER

The Township of Mine Hill is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening the representatives of the PBA and the members of the Township police department, with adverse personnel action, if the PBA initiates interest arbitration proceedings.

B. Refusing to negotiate in good faith with the PBA, particularly by threatening the representatives of the PBA and the members of the Township police department, with adverse personnel action, if the PBA initiates interest arbitration proceedings.

II. Take the following affirmative action:

A. Withdraw the ordinance introduced on February 6, 1986.

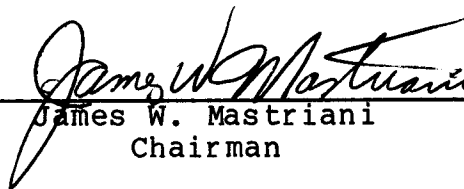
B. Negotiate in good faith with the PBA concerning terms and conditions of employment of employees in that unit.

C. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
June 25, 1986
ISSUED: June 26, 1986

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening the representatives of the PBA and the members of the Township police department, with adverse personnel action, if the PBA initiates interest arbitration proceedings.

WE WILL cease and desist from refusing to negotiate in good faith with the PBA, particularly by threatening the representatives of the PBA and the members of the Township police department, with adverse personnel action, if the PBA initiates interest arbitration proceedings.

WE WILL withdraw the ordinance introduced on February 6, 1986.

WE WILL negotiate in good faith with the PBA concerning terms and conditions of employment of employees in that unit.

TOWNSHIP OF MINE HILL

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, Trenton, NJ 08608, (609) 292-9830.

STATE OF NEW JERSEY
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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated §§5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when the Township through its Mayor threatened the representatives of the Charging Party that there would be severe cuts in the budget of the police department and that there were "too many sergeants" if the representatives of the PBA insisted on proceeding to interest arbitration. These statements by the Mayor were made in two negotiations meetings in December 1985 and January 1986. The PBA filed for interest arbitration on February 11, 1986 at or about the same time the Mayor introduced an ordinance in the City Council, the effect of which was to reduce the number of sergeants from three to one "for reasons of economy." The Hearing Examiner found that the Mayor's action in introducing the ordinance was in retaliation for the exercise by the PBA representatives of protected activity, namely, seeking to invoke interest arbitration, and that there was no "economy" involved.

By way of remedy, the Hearing Examiner ordered the Township to cease and desist from enacting the above ordinance unless and until such time as there exists the need to reduce the police department's budget for "reasons of economy."

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.

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For the Respondent
Wiley, Malehorn & Sirota, Esqs.
(John G. Geppert, Jr., Esq.)

For the Charging Party
Loccke & Correia, Esqs.
(Leon B. Savetsky, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 24, 1986 by the Mine Hill PBA Local No. 279 (hereinafter the "Charging Party" or the "PBA") alleging that the Township of Mine Hill (hereinafter the "Respondent" or the "Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that during the course of contract

negotiations on December 24, 1985, the Mayor, in response to a disagreement by PBA representatives with the salary increase offered by the Township, threatened that if the PBA sought interest arbitration there would be layoffs of personnel in the police department and cuts in the police budget, adding that there were "too many sergeants"; that thereafter on January 28, 1986, during negotiations, the Mayor stated that if the matter went to arbitration it would be members of the police department who would suffer; and thereafter on February 6, 1986, while contract negotiations were still pending, the Township introduced an ordinance reducing the number of sergeants from three to one; and although the ordinance has yet to be adopted, the reduction in the number of sergeants affects the PBA's three-member negotiating committee, two of whom are sergeants; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7) of the Act.^{1/}

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (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; and (7) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 28, 1986. Pursuant to the Complaint and Notice of Hearing, hearings were held on April 16 and April 17, 1986 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Each party argued orally and, additionally, filed post-hearing briefs by May 2, 1986.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument and post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Township of Mine Hill is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Mine Hill PBA Local No. 279 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
- 3.

The most recent collective negotiations agreement between the parties was effective during the term January 1, 1984 through

December 31, 1985 (CP-1). Appendix "A" of this agreement, entitled "Salaries and Wages," which is located immediately after Article V of CP-1, sets forth by name and amount the salaries and wages of each officer in the police department for the years 1984-1985. Following the defeat of a public referendum to exceed the cap in mid-1984, Mayor Stephen Young persuaded the employees in the police department to give back 8% of their salaries for the year 1984, which resulted in an amendment to CP-1 in or around August 1984 (CP-2). This amendment to CP-1 provided for a new schedule of salaries and wages for 1984 beside the name of each officer in the police department and concluded with the Township's promise "...to make every effort possible to repay each officer the money given back in 1984 at the beginning of the year 1985..." (CP-2). When the Mayor refused to authorize payment, the PBA filed a grievance and the Council voted to do so over the Mayor's opposition.

4. The PBA's negotiating committee for the successor agreement to CP-1, supra, consisted of Charles F. Canfield, the chief negotiator, Jeffrey A. Oster, the President of the PBA, and Charles Spetz. Under date of November 1, 1985, Canfield sent a letter and a proposed form of agreement to Mayor Young, requesting a mutual date for negotiations (CP-3, CP-4). In this letter to the Mayor, Canfield explained that the proposed changes had been highlighted in yellow and that if the Mayor had any questions he should contact Canfield.

5. A significant proposal by the PBA for the successor agreement to CP-1 was that Appendix "A" - Salaries and Wages, contain salaries by rank rather than by names (compare Article V in CP-1 with Article V in CP-4). The Mayor testified that he had no problem as such with payment by rank instead of by name except that he objected to the size of the proposed increases by rank in CP-4.

6. The first negotiations meeting for a successor agreement took place on December 24, 1985. Present for the PBA were its three negotiators: Canfield, Oster and Spetz. Present for the Township were Mayor Young, Councilman Ernest Benner and Chief of Police Robert Magnussen. The Mayor was the principal spokesman for the Township, who questioned the PBA's "figures." On behalf of the Township, the Mayor offered as a bottom line increases of 3.5% and 4% for each year of a two-year agreement. Canfield, who had negotiated six contracts since 1972 on behalf of the PBA, asked Councilman Benner if the Township's offer was "set in stone," to which Benner replied that it was open for negotiations. Benner testified that he said that the offer made by the Mayor was "negotiable." According to Benner, Spetz said that the PBA might have to go to interest arbitration. Mayor Young stated that this would not be good for the Township. However, Oster and Canfield testified that the Mayor said that if the PBA went to arbitration the police department would suffer cuts in the budget,^{2/} to which,

^{2/} While the Mayor denied stating that the PBA would suffer if it went to arbitration, he did testify that the Town would suffer, referring to the expenses of arbitration.

according to Oster, the Chief of Police said to the Mayor, "Are you telling me I have to lose more cops." Chief Magnussen testified that the Mayor said that arbitration would result in the police department bearing the brunt and confirmed that he asked the Mayor what he was telling him insofar as police department staffing was concerned. Oster testified that shortly thereafter the Mayor stated that there were going to be a lot of changes this year and that there were "too many sergeants," speaking in a firm voice. Canfield testified that the Mayor used the phrase "too many sergeants," referring to the PBA going to arbitration. Canfield also testified that it was at this point that Chief Magnussen asked the Mayor if he was telling him that he was going to lose more men. While Councilman Benner did not recall the Mayor saying "too many sergeants," Benner did recall that the Mayor said something to that effect although "not exactly that way." Benner also testified that the Mayor said that arbitration would be detrimental to the police department and that restructuring would have to be made. The Hearing Examiner does not credit the denial of Mayor Young that he never employed the phrase "too many sergeants" at this meeting. This adverse credibility determination as to the Mayor is based upon the credible testimony of Oster and Canfield, supra, coupled with the foregoing testimony of Benner that the Mayor said something like it although not exactly that way. The meeting continued with the Mayor asking why the PBA wanted to be paid by rank instead of name and thereafter the parties continued going through the PBA's

proposed agreement (CP-4, supra). The atmosphere at the meeting, which lasted about 1-1/2 hours, was characterized by Benner and the Mayor as hostile.

7. The second negotiations meeting was held on January 28, 1986, with the same three PBA representatives present and the Mayor, Benner and another Councilman, Elliott Bruen, present for the Township. The Mayor again restated the Township's economic proposal of 3.5% and 4% per year for a two-year agreement. The response of the PBA representatives was that they intended to file for interest arbitration, to which the Mayor responded, according to Canfield, that it would "not be a good move" and that "the members of the police department would suffer." Oster's testimony confirmed that of Canfield as to what the Mayor stated.

8. A third negotiations meeting was scheduled for February 4, 1986 but never took place due to the Township's cancellation, resulting from a snow storm.

9. A regular meeting of the Township Council was scheduled for February 6, 1986. Oster and Canfield each checked the agenda in advance of the meeting and, since no police matters were set forth on the agenda (CP-5), they decided not to attend the meeting. At the meeting, Mayor Young presented an ordinance for adoption on first reading, which provided, inter alia, that for "reasons of economy" the police department shall consist of one Chief of Police, one sergeant, one detective and five patrolmen (CP-6). At the time of this meeting the police department consisted

of three sergeants: Oster, a patrol sergeant; Richard Lansing, a patrol sergeant; and Canfield, a detective sergeant.^{3/} Thus, the effect of the proposed ordinance was to reduce without regard to name the number of sergeants from three to one.^{4/} The council voted 3-2 in favor of the proposed ordinance on February 6, 1986 on the first reading. Although the Mayor stated that the ordinance had been prepared in January, Councilman Benner testified that he saw it for the first time at the meeting on February 6th. Benner testified that the Mayor said that the ordinance would not result in any reduction in salaries and Benner relayed this to Oster the following day. The Mayor testified that the purpose of the ordinance was to eliminate the ratio of 1-1/2 sergeants per patrolman and insisted that the ordinance responded to the PBA's demand for payment by rank. The Mayor did not deny stating to Benner that there would be no reduction in salaries as a result of the ordinance but testified, however, that the purpose of the ordinance was for reasons of "economy," citing N.J.S.A. 40A:14-143, "Decrease of Force for Reasons of Economy."

^{3/} At the time of the hearing the staffing of the police department included the Chief, three sergeants and two patrolmen.

^{4/} The two junior sergeants in terms of seniority were Oster and Canfield, both members of the PBA's negotiating committee, which must have been known to Mayor Young.

10. A public hearing on the proposed ordinance (CP-6, supra) was held on March 20, 1986,^{5/} following which a formal vote took place at a regular Council meeting on April 3, 1986. The ordinance was not adopted due to a tie vote of 2-2. At the hearing in this matter the Mayor stated that he would reintroduce the ordinance at the next Council meeting on April 17, 1986.

11. Aside from the testimony regarding the hostile atmosphere in negotiations, supra, Oster testified that during Mayor Young's term of office, commencing January 1, 1984, the relationship between the Mayor and the PBA has been "a battle." The Mayor testified as to having been ticketed by Oster for having a dog without a leash and having been ticketed by Spetz for parking at the City Hall. Oster and Spetz filed a charge against the Mayor for "offensive touching" at a carnival in August 1985, with Oster having prevailed in court, and the Mayor having since appealed. In October 1984, the Mayor stated to Oster that he runs the town and that the PBA is not going to get its way. On another occasion the Mayor said to Oster that as PBA President he had better "watch out" for other officers. On May 1, 1985, the then attorney for the PBA sent a letter to the Mayor, protesting his remarks as contained in the Newark Star Ledger, in which he allegedly accused the Township's police officers of breaking into the Township hall office and

^{5/} Chief Magnussen testified that at the public hearing he was told by the Treasurer, Jeffrey Lowcher, that the Township had a current surplus of \$113,000.

causing flat tires on the Mayor's car (CP-7).^{6/} The Mayor testified that he did not introduce the ordinance (CP-6, supra) in retaliation for the PBA's having filed for interest arbitration on February 11, 1986.

DISCUSSION AND ANALYSIS

The Township Violated §§5.4(a)(1) And (3) Of The Act When It Retaliated Against Members Of The PBA Who Lawfully Expressed An Intention To File For Interest Arbitration In Collective Negotiations.

The record evidence establishes that, beginning with the first collective negotiations meeting on December 24, 1985, Mayor Young, on behalf of the Township, made clear that if the PBA followed through on its stated intention to file for interest arbitration the police department budget would suffer cuts and that there were going to be a lot of changes this year, including the threat that there were "too many sergeants." This threat by Mayor Young is essentially confirmed by the testimony of Councilman Benner and, thus, the Hearing Examiner has not credited the denial of Mayor Young that he employed the phrase "too many sergeants" at the first meeting on December 24th.

^{6/} The Hearing Examiner finds as a fact that the foregoing evidence of the parties is neither probative nor relevant to the issue of animus, which inheres in the allegations of the Unfair Practice Charge. However, other evidence does implicate animus as will be apparent hereinafter.

At the second negotiations meeting on January 28, 1986, the PBA again stated its intention to file for interest arbitration due to the inadequacy of the Township's economic proposal for a two-year agreement whereupon the Mayor, according to Canfield, said it would "not be a good move" and that "the members of the police department would suffer." The foregoing is based upon the testimony of Oster, which was confirmed by Canfield. The Mayor having failed to deny this testimony, the Hearing Examiner credits the evidence adduced by the PBA as to what the Mayor said at the second negotiations meeting.

Solely at the instance of the Mayor, an ordinance was placed on the agenda for first reading at a regular meeting of the Township Council on February 6, 1986. Although Councilman Benner said that he had never seen it before that meeting, the Mayor testified that he had instituted its preparation in January 1986, during the course of collective negotiations. The ordinance (CP-6) was couched in terms of "reasons of economy," consistent with N.J.S.A. 40A:14-143, which permits a municipality "for reasons of economy" to "decrease the number of members and officers of the police department...or their grades or ranks." The substantive terms of the proposed ordinance was that the police department would consist of one chief, one sergeant, one detective and five patrolmen. Thus, the number of sergeants would be reduced from three to one, two of whom included Oster and Canfield, members of the PBA's negotiating committee. Although this ordinance passed a

first reading by a vote of 3-2 it has not since been adopted, notwithstanding a public hearing on March 20th and a formal vote on April 3, 1986.

Significantly, the Mayor stated to Benner that there would be no reductions in salaries as a result of the ordinance, notwithstanding that it was proposed for "reasons of economy." Further, the credited testimony is that the Township is currently enjoying a surplus of an excess of \$100,000, again raising a question of the need for "economy" in the police department whose budget constitutes about one-third of the municipal budget.

In determining whether or not the Township has violated §§5.4(a)(1) and (3) of the Act by its conduct as set forth above, the Hearing Examiner must necessarily apply the test enunciated by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984) in a dual motive case. In assessing public employer motivation, the charging party must make a prima facie showing sufficient to support an inference that protected activity was "substantial" or a "motivating" factor in the employer's decision to interfere with the exercise of protected activity; and once this is established, the employer has the burden of demonstrating that it would have taken the same action even in the absence of the exercise of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the test in dual motive cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that

the employer was hostile towards the exercise of the protected activity (95 N.J. at 246).^{7/}

It is crystal clear that the PBA has made a prima facie showing under Bridgewater, supra. It requires no citation of authority for the Hearing Examiner to find and conclude that a statement of intention to take collective negotiations into interest arbitration under Chapter 85 of our Act constitutes protected activity. Essentially, any lawful conduct engaged in by parties in collective negotiations is prima facie protected activity. The PBA representatives, having stated at the first and second meetings of collective negotiations in December and January, that they intended to file for interest arbitration in response to what they deemed an inadequate economic proposal by the Mayor, were engaging in protected activity. Further, the response of the Mayor, threatening to visit economic retribution on the police department, coupled with his statement about there being "too many sergeants," clearly manifested animus on the part of the Township toward the PBA's representatives engaging in the exercise of the protected activity in seeking to file for interest arbitration. The final manifestation of animus was, of course, the Mayor's introduction of the ordinance on February 6, 1986, the plain result of which was to reduce Oster and Canfield, members of the PBA's negotiating

^{7/} On the instant facts the Hearing Examiner could also use the sham-pretext analysis set forth in Bridgewater (95 N.J. at 241, 244).

committee, from sergeants to patrolmen. The case for animus could not be clearer and, thus, all requisites of the prima facie showing required in Bridgewater have been met.

The Hearing Examiner now considers the legitimate business justification defense of the Respondent, which is the second part of the Bridgewater test, to wit, has the Township met the burden of proof by a preponderance of the evidence that its action in introducing the ordinance (CP-6) would have taken place even in the absence of the PBA's representatives' protected activity of seeking interest arbitration. The Township first cites N.J.S.A. 40A:14-143, which provides that a municipality, if it deems necessary "for reasons of economy," may decrease the numbers or ranks of members of its police department with any demotion being in inverse order of appointment.

The first thing that the Hearing Examiner notes is that the Township through its Mayor acknowledges that there will be no reduction in salaries in the police department as a result of the proposed ordinance (CP-6). It strains credulity to contend that the ordinance was introduced to effect "reasons of economy" when its admitted effect is to produce no reduction in salaries in the police department. Further, it is conceded by all concerned that the Township had a current surplus of in excess of \$100,000 in 1986 when the ordinance was introduced. There was no testimony elicited that reductions were taking place in other departments of the Township, which would appear logically to follow from a surplus of in excess

of \$100,000. Based on the foregoing, the Hearing Examiner concludes that the ordinance (CP-6) was not introduced "for reasons of economy."

Next, the Respondent Township contends that the Hearing Examiner, and the Commission, have no jurisdiction of the subject matter of this action under a decision of the Appellate Division in Patrolmen's Benevolent Ass'n. v. City of Elizabeth, 146 N.J. Super. 257 (App. Div. 1976). In that case several labor organizations in the City of Elizabeth brought an action against the City challenging its laying off and demoting members of the fire and police departments for reasons of economy. The Appellate Division held that it was the Civil Service Commission, which should decide whether or not the layoffs and decrease in ranks were actually "necessary for reasons of economy." Our Commission was held to have had no jurisdiction, even under the 1974 amendments to our Act, which provided for unfair practice jurisdiction. The Appellate Division ordered that a prompt and full hearing be held before the Civil Service Commission on the challenged municipal action of the City of Elizabeth.

It is apparent that there was no contention or proof of anti-union animus on the part of the City of Elizabeth brought forward by the police and fire labor organizations in the above case. Thus, that case is absolutely no bar to the assertion of jurisdiction by the Commission over the instant case, which plainly involves anti-union animus on the part of the Respondent Township

through the statements of the Mayor in connection with the PBA's representatives having stated that they intended to proceed to interest arbitration.

It is clear that the Commission has jurisdiction to remedy discrimination involving the denial of a promotion of a patrolman to sergeant, notwithstanding that the offending employer may have to enact an ordinance to effect the promotion: Twp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd. App. Div. Docket No. A-3230-79 (1981).

Further, notwithstanding that a public employer has a managerial right to discharge an employee, a right not dissimilar from the right which the Township asserts here to reduce the number of sergeants, the Commission in Logan Twp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd. App. Div. Docket No. A-696-82T2 (1983) held that where the discharge was in retaliation for the exercise of protected activities then it was violative of the Act.

A significant case, in contradistinction, is that of Jackson Twp., P.E.R.C. No. 81-71, 7 NJPER 31 (¶12013 1980) where the Commission affirmed its Hearing Examiner in H.E. No. 81-12, 6 NJPER 533, 536 (¶11272 1980). In that case the mayor threatened the police department with layoffs if they did not accept a lower wage increase and thereafter the layoffs of three officers occurred, coupled with a reduction in rank of other officers. The Commission and its Hearing Examiner held that there was no evidence of

anti-union animus on the part of the Township nor had the representatives of the charging party engaged in any protected activity. Plainly, this case is distinguishable from that of Jackson Twp. since there is here ample evidence of anti-union animus and the exercise of protected activity. Cf. Borough of Highland Park, P.E.R.C. No. 83-27, 8 NJPER 556 (¶13255 1982), which involved the absence of anti-union animus in the case of transfers, which are a recognized managerial prerogative under Ridgefield Park Ed. Ass'n. v. Ridgefield Bd. of Ed., 78 N.J. 144 (1978).

It is noted in passing that the Respondent Township also contends that this case is not ripe for consideration because the ordinance (CP-6) has not been adopted. The Hearing Examiner concludes that it is sufficient for purposes of his adjudication that the Mayor introduced the ordinance and the Township Council passed it on the first reading by a vote of 3-2 on February 6, 1986. Although there had been no final disposition on the ordinance as of the second day of hearing, April 17, 1986, the Mayor stated in his testimony on that day that he intended to have the ordinance reintroduced thereafter.

Accordingly, the sword of Damocles still hung over the PBA as of the close of hearing in this matter and plainly affords the Hearing Examiner the opportunity to render a decision based on the continuing pendency of the ordinance and the threats implicit therein, namely, the reduction of number of sergeants from three to one, which necessarily involves Oster and Canfield as the junior members in seniority rank among the sergeants.

* * * *

As to the allegation that the Township violated §5.4(a)(2) of the Act, the Hearing Examiner concludes that the Charging Party has failed to adduce sufficient evidence to sustain its allegation: North Brunswith Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

Finally, the Hearing Examiner concludes that there has been no violation by the Respondent of §§5.4(a)(5) or (7) of the Act since, in this case, the employer's conduct in negotiations basically constitutes hard bargaining, coupled, of course, with the illegal retaliation heretofore found. Nor does this case involve any violation of the rules and regulations of the Commission.

In concluding that there is no violation of §5.4(a)(5), the Hearing Examiner notes that the PBA has had at all times the right to invoke interest arbitration in lieu of continuing the collective negotiations process and did so on February 11, 1986. Thus, the PBA not having sought to continue collective negotiations thereafter, and having become totally preoccupied with the ordinance process, cannot now claim that the Township on and after February 11, 1986 refused to negotiate in good faith.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by the conduct of Mayor Stephen Young in the negotiations sessions of December 24, 1985 and January 28, 1986 where threats were made by him if the PBA representatives attempted to initiate interest arbitration the police department would suffer and that there were "too many sergeants."

2. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(2), (5) or (7) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by threatening the representatives of the PBA and the members of the Township police department with economic retribution, including the reduction in the number of sergeants from three to one, if the PBA's representatives attempt or follow through with their effort to initiate interest arbitration.

2. 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 the Act, particularly, by threatening the representatives of the PBA and the members of the Township police department with economic retribution, including the reduction in the number of sergeants from three to one, if the PBA's representatives attempt or

follow through with their effort to initiate interest arbitration.

B. That the Respondent Township take the following affirmative action:

1. Forthwith cease and desist from attempting to enact the ordinance introduced on February 6, 1986 (CP-6) or any similar ordinance unless and until such time as it can be demonstrated that there exists the need to reduce the number of sergeants from three to one "for reasons of economy": N.J.S.A. 40A:14-143.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the allegations in the Unfair Practice Charge that the Respondent has violated N.J.S.A. 34:13A-5.4(a)(2), (5) and (7) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: May 9, 1986
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by threatening the representatives of the PBA and the members of the Township police department with economic retribution, including the reduction in the number of sergeants from three to one, if the PBA's representatives attempt or follow through with their effort to initiate interest arbitration.

WE WILL NOT discriminate 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 the Act, particularly, by threatening the representatives of the PBA and the members of the Township police department with economic retribution, including the reduction in the number of sergeants from three to one, if the PBA's representatives attempt or follow through with their effort to initiate interest arbitration.

WE WILL forthwith cease and desist from attempting to enact the ordinance introduced on February 6, 1986 (CP-6) or any similar ordinance unless and until such time as it can be demonstrated that there exists the need to reduce the number of sergeants from three to one "for reasons of economy": N.J.S.A. 40A:14-143.

TOWNSHIP OF MINE HILL

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618, Telephone (609) 292-9830