

P.E.R.C. NO. 98-160

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FAIR LAWN,

Respondent,

-and-

Docket No. CO-H-95-230

PBA LOCAL NO. 67,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the request of PBA Local No. 67 to withdraw an unfair practice charge it filed against the Borough of Fair Lawn. A Complaint was issued on the charge and a Hearing Examiner has recommended dismissing the Complaint. The Borough opposes the PBA's request to withdraw the charge, maintaining that it has an interest in knowing that it justifiably disciplined one of its officers for violating departmental policies. The Commission concludes that a withdrawal and dismissal with prejudice is appropriate. A dismissal with prejudice after the issuance of the Hearing Examiner's report is a final adjudication on the merits and the PBA is prevented from filing another charge alleging that the same actions violated the Act.

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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Charging Party.

Appearances:

For the Respondent, Stanton, Hughes, Diana & Zucker,
attorneys (Richard M. Salsberg, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella &
Nowak, attorneys (Edward H. O'Hare, of counsel)

DECISION

On March 3, 1998, PBA Local No. 67 requested permission to withdraw its unfair practice charge, with prejudice. The charge, filed on January 17, 1995 and amended several times thereafter, alleges that the Borough of Fair Lawn violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),^{1/} when it removed patrol

^{1/} These provisions prohibit public employers 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. (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.

officer and former PBA president John Ietto from a supervisory patrol, reprimanded him for not paying a just debt to the Borough, denied him a copy of a report in his personnel file, and reprimanded him for leaving his shift early although he had allegedly followed a unit-wide practice and procedure in so doing. The charge included other counts which were withdrawn by the PBA after a Complaint and Notice of Hearing issued on September 22, 1996. The Hearing Examiner granted the Borough's motion to dismiss a 5.4a(7) allegation.

If its request to withdraw the charge is denied, the PBA requests an extension of time to file exceptions to the Hearing Examiner's January 22 report and recommended decision. That report recommended dismissing the Complaint. H.E. No. 98-22, 24 NJPER 178 (¶29089 1998). The Hearing Examiner found that Police Chief William Gormanns was hostile toward several actions Ietto had taken as PBA president. However, the Hearing Examiner concluded that Gormanns had non-pretextual business reasons for the above-noted actions.

The PBA maintains that withdrawal is appropriate because Gormanns, the individual who allegedly retaliated against Ietto, has relinquished his duties as chief and is on terminal leave in anticipation of retirement.^{2/} The PBA argues that the issues in the case are now largely academic.

^{2/} Gormanns went out on sick leave after the charge was filed but before the recommended decision issued.

The Borough opposes the PBA's request. It maintains that after three days of hearing and voluminous post-hearing briefs, it has a significant interest in knowing that it justifiably disciplined one of its officers for violating departmental policies. It argues that it would eviscerate the purposes of the Act to allow the PBA to withdraw a charge after an unfavorable recommended decision by the Hearing Examiner and after Commission resources have been expended.

N.J.A.C. 19:14-1.5(c) controls withdrawal requests after the filing of an Answer:

Except as provided by (b) above, a charge may be withdrawn by the charging party, and any complaint dismissed and the case closed, only with the consent of the Director of Unfair Practices, or if a hearing examiner's report and recommended decision has issued, with the consent of the Chairman. Unless otherwise provided by the Chairman or the Director of Unfair Practices, a withdrawal and dismissal under this subsection is without prejudice.

In applying this rule, we consider whether the public interest will be served in permitting withdrawal. See Rutgers, the State Univ., P.E.R.C. No. 88-1, 16 NJPER 631 (¶18235 1987), aff'd NJPER Supp.2d 196 (¶175 App. Div. 1988). We are mindful that our statutory mandate is to prevent and promptly settle labor disputes, N.J.S.A. 34:13A-2, and that N.J.S.A. 34:13A-5.4c requires that a charging party prosecute a charge. Compare 29 U.S.C. 153(d) (unfair practice charges are prosecuted by the General Counsel under the federal Labor-Management Relations Act); see also Rutgers (Appellate Division cited N.J.S.A. 34:13A-5.4c in

holding that there was no legal purpose or necessity in requiring the charging party to prosecute an unfair practice complaint when it did not want to do so).

Under all the circumstances of this case, we conclude that a withdrawal and dismissal with prejudice is appropriate. The PBA believes that Gormanns' sick leave and anticipated retirement eliminate the impetus for pursuing the charge. We see no basis to require the PBA to litigate a dispute that it believes is resolved and will not recur. The allegations in the charge, and the Hearing Examiner's recommended decision, are fact-specific and do not involve legal issues requiring Commission review. Nor is a Commission decision required to govern the parties' future relationship. See Rutgers.

We appreciate that the Borough desires a final Commission determination that it did not commit an unfair practice. But the Borough has already received a Hearing Examiner's report in its favor. And a dismissal with prejudice after the issuance of the Hearing Examiner's report is a final adjudication on the merits. R. 4:37-2(d); Velasquez v. Franz, 123 N.J. 498, 507-508 (1991). That final adjudication prevents the PBA from filing another charge alleging that the same actions violated the Act. See Velasquez (dismissal with prejudice bars subsequent suit on same issue, where operative facts are identical); see also N.J.S.A. 34:13A-5.4c (no complaint shall issue based on any unfair practice occurring more than six months prior to the filing of the charge, unless person was prevented from filing the charge).


We recognize that Gormanns went on sick leave before the Hearing Examiner issued his report and that the PBA could have asked to withdraw the charge then. But there is no prohibition against a party asking to withdraw a charge after a Hearing Examiner report and, indeed, N.J.A.C. 19:14-1.5(c) provides for withdrawal requests at this stage. Based on the facts in this case, we see no compelling reason to expend additional agency resources. Cf. North Brunswick Tp. Ed. Ass'n, P.E.R.C. No. 91-23, 16 NJPER 492 (12/21/15 1990) (withdrawal would only be permitted with prejudice where three days of hearings had been held).

For all these reasons, we grant the PBA's request to withdraw the charge, with prejudice.

ORDER

The PBA's request to withdraw the charge with prejudice is approved. The Complaint is dismissed with prejudice.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: June 25, 1998
Trenton, New Jersey
ISSUED: June 26, 1998

H.E. NO. 98-22

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

In the Matter of

BOROUGH OF FAIR LAWN,

Respondent,

-and-

Docket No. CO-H-95-230

PBA LOCAL No. 67,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss unfair practice charges against the Borough of Fair Lawn filed by PBA Local No. 67. Though the PBA established a prima facie case under Bridgewater, the Hearing Examiner finds that the Borough would have removed the past PBA President from a preferred supervisory patrol; refused to give him a copy of an internal affairs report; and reprimanded him for leaving a shift early without permission and for not paying a just debt; even in the absence of protected conduct.

The Hearing Examiner also finds that the Borough did not unilaterally change an established practice when it docked the former PBA President time in connection with his leaving a shift thirty minutes early.

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

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Appearances:

For the Respondent,
Stanton, Hughes, Diana, Zucker & Salsberg, P.C.
(Richard M. Salsberg, Esq., of counsel; Matthew J.
Giacobbe, on the brief)

For the Charging Party,
Loccke & Correia, P.C.
(Joseph Licata, of counsel)
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Edward H. O'Hare, on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 17, 1995, the Fair Lawn PBA Local No. 67 ("PBA" or "Charging Party") filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission ("P.E.R.C." or "Commission") against the Borough of Fair Lawn ("Borough" or "Respondent"). The charge was amended several times on January 20,

^{1/} "C" refers to Commission exhibits received into evidence at the hearing. "J" refers to documents jointly submitted into evidence by the PBA and Borough. "CP" refers to Charging Party's exhibits and "R" refers to Respondent's exhibits received into evidence.

1995, February 21, 1995, July 26, 1995 and November 29, 1995 (C-1), and alleges that the Borough violated certain subsections of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On February 6, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the charge as amended (C-1). On February 20, 1996, Respondent filed an Answer (C-2) denying it violated the Act and asserted affirmative defenses. After attempts to settle the entire controversy failed, the Charging Party informed the Hearing Examiner and Respondent by letter dated September 22, 1996, that only Counts II, III and XI of the charge, as amended, would proceed to hearing (C-3) and that all other Counts alleged were withdrawn (1T8).^{2/}

Counts II, III and XI allege that the Borough violated provisions 5.4a(1), (3), (5) and (7) of the Act^{3/} when it removed Patrolman John Ietto from a supervisory patrol, Post 5; reprimanded

^{2/} Transcripts from the hearing days are designated "1T" for the first day of hearing, "2T" for the second day and "3T" for the third day of hearing.

^{3/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

Ietto for not paying his just debt to the Borough concerning an overtime payment dispute; denied Ietto a copy of a report contained in his personnel file in contravention of the parties' contract and reprimanded Ietto for leaving his midnight to 8 a.m. tour early though he followed unit-wide established practice and procedure.

Hearings were held on October 23, 1996, December 17, 1996 and March 6, 1997 during which the parties examined witnesses and presented exhibits. At the hearing, Respondent proffered a motion to dismiss subsection 5.4(a)(7) allegations on the ground that the Charging Party had not provided specific violations of Commission rules. The Charging Party did not oppose the motion which I granted (1T11-1T12).

The parties simultaneously filed post-hearing briefs on July 22, 1997. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Borough is a public employer and the PBA is an employee representative within the meaning of the Act (1T10-1T11).
2. The applicable contract covers the period of January 1, 1992 through December 31, 1995 (J-1).

Background

3. John Ietto has been employed by the Borough as a police patrolman since 1979. He is a member of the PBA serving as its vice-president from 1987-1988 and as its president from 1988 until September 1994 when he stepped down (2T5).

4. When Ietto first became president of the PBA, the Police Department was headed by Chief Polhemus. Chief Polhemus retired in 1990. During the years Ietto was PBA president and Polhemus was Police Chief, their relationship was pleasant. There were some minor disputes, but they were always worked out. Ietto was never disciplined under Polhemus' tenure as Chief of Police (2T6).

5. William Gormanns has been employed by the Borough for thirty-one years (3T3). He was appointed Chief of Police in July 1990 (3T4). Over the years, Gormanns served as president of the PBA for two terms and served on various PBA committees such as the negotiating committee, scholarship committee and liaison committee (3T5). To this day, Gormanns continues his fraternal membership in the PBA (3T4).

6. Prior to becoming PBA president, Ietto had a pleasant relationship with Gormanns (2T6). After Gormanns became Police Chief, their relationship deteriorated over time (3T137).

7. Shortly after becoming Chief of Police in 1990, Gormanns began revising a manual on work rules and regulations (1T29). He requested that certain key personnel review them and solicited their suggestions (3T68). The officers asked to review the drafts were Captain Christopher Freitag, who was in charge of the patrol division and performed administrative duties, Lieutenant Anthony Serrao, representative of the Superior Officers Association ("SOA") and Ietto as PBA president (1T24, 1T30, 1T133, 1T135, 2T7).

Chief Gormanns put a considerable amount of time into preparing the revised manual (1T30 and 3T134). The work rules and regulations contained in the manual were never promulgated and adopted because the PBA and SOA opposed them. Ietto, as PBA president, was the principal objector (3T134). Ietto's objections to the draft manual were that he was given segments to review piecemeal and he wanted the completed draft to review for internal inconsistencies, and many of the proposed work rules were, in his view, mandatorily negotiable subjects of employment (2T8-2T9). Gormanns was upset at Ietto's objections and Captain Freitag recalled the Chief saying that the PBA was trying to run the police department in response to this dispute (1T32, 2T8).

8. Sometime in late 1990 or early 1991, Ietto asked Gormanns about the administration of a PBA death and burial fund which provides money to its members upon death or retirement to help with the cost of burial (1T34, 2T16). Gormanns was the treasurer of the fund (1T35). Members of the PBA could join the fund, but were not automatically members of the fund by virtue of PBA membership (1T34).

Ietto questioned whether Gormanns was properly running the fund (2T17). A dispute arose over whether the fund should be under the control of the local PBA or whether it is a separate entity (3T75). The PBA eventually filed a lawsuit against Gormanns, though after Ietto's term as president (2T64). Litigation is pending regarding the operation of the fund, but a judge has ruled that the fund and PBA are two separate entities (3T138).

9. Michael Messina is a Borough police officer. He succeeded Ietto as PBA president in 1994 (2T132). Beginning with Ietto's term as PBA president and continuing into Patrolman Messina's term as PBA president, there was an increase in the number of grievances filed by the PBA (1T64; 3T11). In the beginning of Gormanns' tenure as Police Chief, he was more cooperative about the processing of grievances. For example, he would meet with Ietto to discuss a filed grievance (2T11).

As time went on, Gormanns became less cooperative in processing grievances and was unhappy about both the number of grievances filed and their accompanying confrontational tenor (1T51; 2T11; 3T79). While Ietto was PBA president, Gormanns never sustained a single PBA grievance (2T11). PBA President Messina, however, has settled a number of grievances with the Chief, though the record was unclear at which step(s) of the grievance procedure they were settled (2T149).

In 1992, in connection with the filing of a grievance involving Officer Macissac, Ietto interviewed a police dispatcher (2T13). Gormanns ordered Ietto to provide him with a copy of the dispatcher's statement (2T14). Ietto, believing that the statement was privileged PBA work product, refused to give Gormanns a copy of the statement (2T14). As a result, Ietto was brought up on departmental charges by Gormanns (2T15). The matter was ultimately dismissed and the dispatcher statement considered to be PBA work product (2T15).

10. Captain Freitag was the liaison officer to the Auxiliary Police (1T24; 1T52). He ran their training program which included a precedent-setting rearming effort of several auxiliary officers (1T52). During the time Freitag was on leave prior to his actual retirement, between January 14, 1995 and July 1, 1995, he was authorized to hire police officers to assist in the training (1T23, 1T53-1T54). Though the auxiliary police were not part of the Police Department, the police officers who assisted in the training would be compensated out of the overtime budget of the Police Department (1T54).

Part of the training included the use of chemical sprays and aerosols. Freitag wanted to use the most qualified police officer in the department to do the chemical spray training, which in his view, was Ietto (1T54). Another officer, Lieutenant Sudol, had background in the use of chemical sprays and aerosols, but his training was not as recent or as extensive as Ietto's training (1T112).

Ietto instructed the auxiliary police in chemical sprays and aerosols. As agreed to by Freitag, Ietto was to be compensated eight hours for course development and instruction (1T58). When Ietto submitted an overtime slip for compensation in April 1995, Gormanns initially refused to pay him and investigated the whole matter (1T59, 1T62). What was at issue was four hours allocated to course preparation (1T60). Gormanns held up payment of the entire eight hours because he felt that payment for the four hours of

preparation time set a bad precedent. He felt that instead of being paid for preparation time, Ietto should have been given time to prepare while on duty (3T77). Eventually, Ietto was paid for the entire eight hours because of the arrangement with Freitag (1T60).

Approximately one month before Ietto submitted his overtime slip for course preparation and instruction, Freitag submitted his own a four hour overtime slip for course preparation. Gormanns approved Freitag's request for payment without question and Freitag was paid without incident (1T61-1T62).

11. Prior to the training of auxiliary police in chemical sprays and aerosols, regular police officers of the department were going to undergo the same training and certification. Freitag recommended to Gormanns that Ietto serve as chemical training officer for the police department (1T55-1T56). Gormanns response to this suggestion was that "he didn't have to do anything for somebody he considered a pain in the ass" (1T56; 3T76-3T77). Gormanns, instead, assigned Sudol to conduct this training (1T56).

On direct examination, Gormanns did not deny making the "pain in the ass" declaration about Ietto (3T77). Gormanns testified that Ietto was a pain in the ass not because he filed grievances, but because "he seems to center himself in the spotlight of wrongdoing" (3T77). When asked what he meant by this, Gormanns stated that "basically these incidents we have discussed today, you know, many of them no one else does, it just seems to fall to him" (3T78).

While I found Chief Gormanns' testimony to be credible in many respects, I find his explanation about why he considered Ietto "a pain in the ass" to be vague, self-serving and suspect. Though the record is unclear on exactly when Gormanns made this statement to Freitag, it had to be uttered sometime before the training of auxiliary police which commenced on or around January 14, 1995. At this point of his testimony, Gormanns had discussed fully on direct examination all of the charges brought against the Borough in the instant matter. This included the March 8, 1995 early departure from Post 2 incident and the failure to pay just debt incident centered around an arbitrator's award of July 11, 1995 (both of these matters are more fully discussed hereinbelow). When Gormanns testified that "these incidents we have discussed today," he impliedly included these two significant events which did not occur until after his "pain the ass" utterance to Freitag, and therefore, could not have been the basis for Gormanns' opinion. For the foregoing reasons, I do not credit Gormanns' explanation of this remark.

12. As PBA president, Messina has filed quite a few grievances (2T149). Gormanns was just as unhappy about the number of grievances filed and the confrontations that ensued under Messina as he was under Ietto's tenure as PBA president. Gormanns complained to Freitag that there was no difference between the two, Ietto and Messina (1T28-1T29; and 3T79). Nevertheless, Gormanns has not taken any adverse action against Messina since he became PBA

president in 1994 (2T148). In fact, Gormanns has appointed Messina to leadership positions such as field training officer and Post 5 road patrol supervisor as well as affording him training opportunities regarding right-to-know laws and 911 training (3T8-3T9).

13. John Anezone is the state PBA delegate in the Borough police department. Chief Gormanns has appointed him to positions of leadership (3T9-3T11).

14. Lieutenant Serrao represents the Superior Officers Association and is on its negotiations committee (1T133). He was involved with Ietto in opposing the adoption of the new work rules and regulations developed by Gormanns (1T135-1T136). Serrao has also filed grievances on behalf of the SOA (3T7). In spite of his filing grievances and leadership role in the SOA, Gormanns has appointed him to important positions within the police department (1T147-1T148; 3T7). Gormanns appointed Serrao to train the Auxiliary Police and serve as field training officer supervisor while he acted in a leadership role for the SOA (1T148). The auxiliary police position pays a \$300 stipend and allows Serrao to accumulate compensatory time ("comp time") which can be converted to dollars at the end of the year (1T148-1T149).

Removal from Post 5

15. Post 5 is a police motor patrol assignment which covers the entire Borough (1T36; 2T66; 3T14). The officer assigned

to Post 5 acts as a road supervisor and back up officer for all other officers out on patrol (1T69). As such, the Post 5 assignment requires a great deal of judgment and police experience (1T70; 2T68; 3T15). Officers patrolling the other posts go to the Post 5 officer for advice (2T66). The Post 5 officer directs the other patrolmen and exercises a great deal of discretion (3T15).

If no lieutenants or sergeants are available for Post 5 assignment, senior patrolmen are assigned to Post 5 (1T36). Senior patrolmen are those officers with at least 10 years experience and who are often, but not necessarily, on the promotional list for sergeant (1T37; 3T15).

The Post 5 assignment does not pay any more money than a regular patrol post but gives an officer an opportunity to display his supervisory skills (1T37). In addition, because the Post 5 officer patrols the entire town, he is involved in more incidents which leads to more overtime pay opportunities (2T67). Post 5 is a status position (2T66).

As a senior patrol officer, Ietto was assigned to Post 5 on and off for several years (1T37; 2T21). In September of 1994, he was removed from his Post 5 assignment on orders from Gormanns without warning and within a week of his stepping down as PBA president (1T38; 2T22).^{4/}

^{4/} Unrebutted evidence showed that Gormanns had ordered Ietto to be removed from Post 5 at the end of 1993/early 1994 shortly after the high school incident. Ietto, however, was not permanently removed from Post 5 until September, 1994 (3T31, 3T32, 3T102).

Gormanns testified that Ietto was removed from Post 5 because he exhibited poor judgment in handling three matters: (a) the Fingeroth incident; (b) the psychiatric distress incident, and (c) the high school incident (3T16-3T17). For the reasons discussed below, I find that Gormanns had legitimate bases on which to conclude that Ietto had exhibited bad judgment while working on and off of Post 5.

(a) Fingeroth Incident

16. On December 5, 1993, Acting Borough Manager Bertrand N. Kendall requested that Chief Gormanns investigate the appropriateness of two summonses issued by Patrolman Ietto to two residents, Mr. and Mrs. Fingeroth. Both summonses had been dismissed by the Borough Municipal Court and were subsequently reissued by Ietto. Kendall wanted to know whether the reissuance of the summonses was normal procedure or a case of harassment. One summons was for putting garbage out earlier than when is permitted by local ordinance (R-1).

On December 7, 1993, Gormanns requested that Freitag investigate the matter (R-2), for Freitag conducted internal affairs investigations from time to time (1T25). By inter-office correspondence dated December 8, 1993, Freitag advised Gormanns that he had completed the investigation and found no improper conduct on the part of Ietto, that the summonses were issued well within the purview of the law and that the allegation of harassment was not substantiated (R-3). On R-3, Freitag noted the documents he reviewed to arrive at this conclusion.

Notably absent from the list of documents was an Incident Report dated November 1, 1993 (R-7), which was the basis for Gormanns' opinion that Ietto had used bad judgment in the processing of the summons regarding setting the trash out early (3T18). Ietto had told the police dispatcher to include on the Incident Report (R-7) a statement allegedly made by Mrs. Fingeroth at the time the ticket was issued (1T81). The alleged declaration contained in R-7 states: "After summons issued Mrs. Fingeroth stated to a neighbor it was no big deal she will give it to the Boro Manager and he will take care of it. She than [sic] stated these son of a bitches are assholes."

Gormanns believed that the inclusion of the opprobrious language attributed to Mrs. Fingeroth on R-7 was inappropriate and exhibited bad judgment. R-7 is subject to public view. Gormanns felt that the alleged Fingeroth statement should have been recorded on an investigative report which is not subject to public scrutiny or review (3T19, 3T20). In his thirty-one years as a police officer, Gormanns had never seen foul language contained in a report such as R-7 (3T143).

Freitag did not see R-7 at the time he issued his report (R-3) concluding that there was no improper conduct on the part of Ietto in reissuing the trash summons. The first time Freitag saw R-7 was at the hearing before me (1T89, 1T124, 1T125). After carefully reviewing R-7, Freitag acknowledged that there were more confidential ways of reporting the incident (1T86). However,

Freitag testified that in a few instances, depending on the circumstances, it is appropriate to include profane language in a report such as R-7 (1T74, 1T87). Under the circumstances confronting Ietto, where a citizen stated she had influence over the Borough Manager, Freitag did not think it was inappropriate for Ietto to include the statement in the incident report (1T87, 1T88).

There was a good faith difference of opinion between Gormanns and Freitag over whether it was appropriate for Ietto to include Fingeroth's alleged statement on R-7. Reasonable minds could differ on whether it was appropriate for Ietto to include foul language in R-7. Freitag, himself, testified that it would take a rare circumstance to justify the inclusion of such language on a report like R-7. Therefore, I find that Gormanns' reliance on the Fingeroth incident as one example of Ietto's poor judgment to be reasonable and credible.

17. Paragraphs 34.02 and 34.03 of the contract between the Borough and PBA (J-1) provide:

34.02 - Any member of the Police Department may by appointment review his personnel file, but his appointment for review must be made through the Chief of Police or his designated representative. In addition, the personnel file may be reviewed once a year by the Employee with his Commanding Officer at the request of the Employee.

34.03 - Whenever a written complaint concerning an Officer or his actions is to be placed in his personnel file a copy shall be made available to him, and he shall be given the opportunity to rebut it if he so desires, and he shall be permitted to place said rebuttal in his file.

Periodically, Ietto reviews his personnel file (2T73). During one such inspection, Ietto discovered Freitag's internal affairs investigative report (R-3) regarding the Fingeroth matter (1T42). Pursuant to the contract, Ietto asked Freitag for a copy of the report (1T43). Freitag told Ietto that he would have to get permission from the Chief (1T43).

At first, Gormanns granted permission to Freitag to give Ietto a copy of the report (1T43; 3T33). Then, upon realizing it was the internal affairs report that Ietto wanted, the Chief declined to give him the report (3T33). That report should never have been placed in Ietto's personnel file to begin with (1T42; 3T33, 3T34). It was placed there in error (3T35). Internal investigation reports are supposed to go into a confidential file which is different and separate from an employee's personnel file (1T43; 3T35). The Chief removed this report from Ietto's personnel file (3T36).

The Chief, however, still refused to give Ietto a copy of the internal affairs report. He refused to give him a copy because the Chief believed that Ietto was not entitled to it under the contract (3T37). The Chief would have treated any officer the same way under similar circumstances (3T37).

As a result of Gormanns' refusal to give Ietto a copy of the internal investigation report, the PBA filed a grievance. The grievance was ultimately settled when the Borough agreed to give policemen copies of these documents (3T36).

(b) Psychiatric Distress Incident

18. On December 20, 1993, Patrolmen Ietto and Bastinck responded to a psychiatric distress incident in Fair Lawn. Ietto was the senior officer and on Post 5 during the detail (R-8). As a result of the officers response to the call, the complainant was taken to Fair Lawn Mental Health Building. No police report was made of the incident as required by departmental procedure (R-8).

Gormanns requested that Freitag investigate the matter (3T28). Freitag investigated the matter and by report dated December 31, 1993 concluded:

Ptl. Ietto acted properly in his handling of the matter and went, perhaps, a step further than Department Policy would dictate for same. Where he obviously was remiss was in his lack of proper documentation of the incident which is procedurally required. He corrected this for the particular incident by submitting a report after my telling him to do so.

1. Ptl. Ietto advised verbally by me of the need and requirement for reports whenever police action is taken or the incident procedurally requires documentation. He was advised that his length of service and experience should show that he is well aware of this and that there should be no repetition of this in the future.

2. I will speak with Ptl. Ietto's immediate supervisors, Sgt. Helmers and Sgt. Rose in regard to this matter and advise them to closely monitor Ptl. Ietto's reporting practice in the future (R-8).

Freitag, a PBA witness, concurred with Gormanns that Ietto's failure to file a report on this incident exhibited bad judgment, especially in light of Ietto's length of service and experience (1T91; 3T30, 3T31). Consequently, Freitag recommended to

Gormanns that Ietto attend a course on remedial report writing (1T91; 3T28).

(c) High School Incident

19. On December 21, 1993, Ietto, again while on Post 5 duty, responded to a call at the Fair Lawn High School ("High School") (R-13; 3T141). Also responding to the call was a junior officer, Patrolman Cannici (R-13; 3T141). The incident involved a fight between two students, which may have been racially motivated (2T129; R-13).

When Ietto and Cannici arrived at the High School, the two students involved in the altercation along with a witness who was also a student, were in Principal Elizabeth Panella's office. By the time the officers had arrived, the altercation had ceased (R-13; 2T128; 3T22). One student's face was swollen (R-13; 3T105). Ietto called police headquarters and told the desk sergeant that there was no need for police intervention (2T128; 3T21). After the desk sergeant inquired as to why the police were called in the first place, Ietto hung up the phone, returned to the principal's office and handcuffed the juveniles so that they could be transported down to police headquarters (R-13; 3T21).

Principal Panella asked the officers to wait for the juveniles' parents to come to the school to get their children, but the officers instructed Panella to tell the parents to retrieve their children at police headquarters. Ietto and Cannici then brought all three students down to headquarters in handcuffs where

they were released into their parents custody (R-13; 1T104; 2T73; 3T108).

Ietto testified that he did not exercise poor judgment in his handling of the high school incident (2T73). Under the circumstances of the case^{5/} and the standard procedures^{6/} then in effect, Ietto believed that handcuffing the students and bringing them down to police headquarters was appropriate (2T120).

In Gormanns' view, however, Ietto had showed poor judgment in bringing the students to police headquarters in the first place, let alone in handcuffs, under the circumstances (3T116). Ietto's handling of this matter was out of the ordinary (3T114). When juveniles are in school, they are under school supervision. The school principal is in charge of the students. As long as the students are under control, officers should just take a report and then it would be up to the parents or school officials to follow up with a criminal complaint (3T117). Here, the police reports

^{5/} Ietto testified that when he returned to Principal Panella's office after calling headquarters the altercation started back up and turned into a bias-type incident (2T129). No other evidence on the record supports this claim. All other evidence indicates that the fight had ceased before the officers arrival and that any racial slur that may have been uttered was prior to or during the altercation, not when the students were in the principal's office. In any event, a determination of this fact is not necessary to my finding that the Chief had a legitimate basis to conclude Ietto had exhibited poor judgment.

^{6/} Subsequent to this incident, on March 29, 1994, Chief Gormanns issued a revised standard procedure for taking juveniles into custody while they are under school supervision (R-13; 3T110).

indicated that the assaultive behavior had stopped and the school principal had specifically requested that the students remain in her custody until their parents had arrived (R-13).

Captain Freitag agreed with Gormanns that Ietto had acted inappropriately by handcuffing and transporting the students to police headquarters. After personally investigating this matter for the Chief, Freitag went with Gormanns to apologize to school officials for the way in which Ietto and Cannici handled this case (1T104, 1T105; 3T22).

As senior officer in charge, Ietto was reprimanded for the high school incident. Cannici was not disciplined for his role in the matter (3T141).

Despite Ietto's opinion about his own judgment, I find that the Chief reasonably concluded that Ietto exhibited bad judgment while on Post 5 when he handcuffed and took the three juveniles down to police headquarters. Both PBA witness Freitag and Chief Gormanns agreed that Ietto's handling of the matter was out of the ordinary and inappropriate. I will not substitute my judgment or Ietto's judgment about his own behavior for the judgment of two superior officers with many decades of law enforcement experience, one of whom was called to testify on behalf of the PBA.

Post 5 is a leadership position that requires good judgment. The incidents and investigations relied on by Gormanns to illustrate Ietto's poor judgment transpired during a short period of time, from November 1993 through January 1994. The clustered and

cumulative effect of these incidents led Gormanns to conclude that Ietto did not possess the requisite judgment to be assigned to Post 5. Based on the record as a whole, I find that Gormanns' asserted reason for removing Ietto from Post 5--Ietto's lack of judgment on and off of Post 5--was credible.

Post 2 Reprimand

20. Regular police patrol shifts in the Borough run from: (a) 7:00 a.m. through 3:00 p.m., (b) 3:00 p.m. to 11:00 p.m., and (c) 11:00 p.m. through 7:00 a.m. All of the patrol posts, except Post 2, adhere to the regular shift schedule. Post 2 is an overlap shift to ensure that there is patrol coverage during shift changes. The hours for Post 2 shifts are: (a) 8:00 a.m. to 4:00 p.m., (b) 4:00 p.m. through 12:00 a.m., and (c) 12:00 a.m. to 8:00 a.m. (1T45, 1T46; 3T37). Post 2 patrol is also known as the "late shift" and the Post 2 officer is also known as the "late man" (3T39).

The official policy for all shift posts are that officers are to arrive for their shift by 10 minutes before the hour and are not to return to headquarters from their patrol earlier than 10 minutes prior to the end of their shift (R-14; 2T98). At the end of a shift, an officer prepares his daily report, gives it to the commanding officer for sign-off, changes out of uniform back into civilian attire and is dismissed for the day. Depending on the extent of paperwork for the day, this routine typically takes about 10 minutes so that under the policy the officer is free to go home on the hour (R-14 and 1T143).

21. All patrol officers are assigned to a specific patrol car. Three officers are assigned to a car. The three officers assigned to a car do not necessarily work the same post during their respective shifts. For example, on March 8, 1995, Officers Ietto, Dudziak and Callones were assigned to car number 904 (2T80). On that day Ietto worked from midnight to 8:00 a.m. on Post 2 while Dudziak worked 7:00 a.m. to 3:00 p.m. patrolling Post 3 (CP-3, CP-4; R-14). There is a distinction, therefore, between post relief and car relief. Post relief is when the officer who works the same assignment as another officer comes on duty and takes over for the officer who worked the earlier shift. Vehicle relief is when a patrol car is turned over to another officer who shares the vehicle, but does not necessarily mean that the officer relinquishing the vehicle is off duty (1T47, 1T151; 2T80). When officers work the same post but in succeeding shifts and also share the same patrol car, the on coming officer may relieve the officer on duty of both his post and vehicle.

Post 2 is an overlapping shift to cover emergencies during the shift change of all other posts (3T39). Typically, after 7:15 a.m., the shift change is completed, and the other posts are fully manned. The Post 2 officer only gets police calls after 7:15 a.m. when absolutely necessary because if he gets tied up it could cost the Borough overtime pay (1T142; 2T80).

22. Normally, an officer patrols his post until relieved by the next officer assigned to that post (1T106, 1T107, 1T153).

Otherwise, the post would be vacant and there would not be a full complement patrolling the Borough (1T139; 3T48). Nevertheless, officers that work the midnight to 8:00 a.m. Post 2 shift have been known to leave work early. With the permission of the shift commander, the late man has returned to headquarters from patrol as early as 7:40 a.m. and left for home around 7:50 a.m., without being required to make any special notation on his daily report or use accumulated comp time (1T140). On occasion, Post 2 officers have left before 8:00 a.m. because their cars were assigned to officers coming on at 7:00 a.m. (1T47). However, the regular practice of the officers and departmental policy is for the officer coming on duty at 7:00 a.m. to ride with the late man, if they shared a car, until the late man was relieved of his post (1T153; 3T124; R-14).

23. In order for a patrolman to leave early under any circumstance, he must affirmatively get permission from his shift commander. The patrolman cannot merely walk out (1T107, 1T154).

24. An officer that leaves 30 minutes or more before the end of his shift must note the time he left duty on his daily report and should use comp time to cover the time he was scheduled to work (1T48, 1T108, 1T154; 3T48).

25. By memorandum dated April 11, 1995 (R-14), Ietto received a written reprimand for leaving his midnight to 8:00 a.m. Post 2 assignment early on March 8, 1995 without the permission of his shift commander, failing to note the early departure on his daily report and for not using comp time to cover the early departure. He was also docked time for leaving early (CP-7).

26. On March 8, 1995, Ietto was assigned to the midnight to 8:00 a.m. Post 2 shift and Patrolman Dudziak was 7:00 a.m. to 3:00 p.m. Post 3 shift. Both men shared the same patrol car (CP-3, CP-4; R-4; 2T80). Sergeant Douglas Helmers was the shift commander that day during the 7:00 a.m. - 8:00 a.m. hour (2T28; R-14).

At 7:20 a.m., Ietto was relieved of his vehicle when he turned it over to Dudziak who was commencing his shift. Ietto, at this point, however, was not relieved of duty (2T27; R-14).

27. Ietto testified that after being relieved of his car he gathered his gear, entered police headquarters, prepared his paperwork for the day and submitted it to Sgt. Helmers for sign-off. He then went downstairs to the locker room, changed into his civilian clothing and left for the day. By assessing how long it normally takes him to complete these steps, Ietto estimated that his time of departure was 7:40 a.m. (2T28, 2T85, 2T86).

Ietto further testified that as he exited police headquarters he said good-bye to Helmers and Chief Gormanns who were in the radio room. While Ietto did not specifically ask permission to leave early, Ietto testified that Helmers acknowledged his departure, but Gormanns did not respond (2T29, 2T99). Though both Helmers and Gormanns were both aware that Ietto was leaving early, neither of them tried to stop him (2T35, 2T124).

Ietto did not note the actual time of departure on his daily report or debit his comp time account because he believed that it was unnecessary under the circumstances (2T86, 2T88, 2T123, and

2T124). Ietto believed that his behavior was in compliance with departmental policy as practiced by other officers (2T88-2T91). Ietto testified that he did not do anything differently on March 8, 1995, with regard to his departure, filling out his daily report and use of comp time than he had done under similar circumstances over the past eighteen years (2T35, 2T115).

Helmets, by inter-office memo to Chief Gormanns dated March 30, 1995 (part of R-14), denied observing Ietto leaving headquarters on March 8, 1995. In explaining why Ietto's daily report and comp time account did not reflect his early departure, Helmets maintained that Ietto never requested to leave early and that Helmets was unaware that Ietto had in fact left early that day (R-14).

Gormanns testified that he observed Ietto enter headquarters on March 8, 1995 at 7:24 a.m. in uniform and depart from headquarters in civilian attire at 7:30 a.m. Gormanns stated he was certain of the time because he had checked his watch (2T42, 2T43). To further support his assertion that it only took Ietto six minutes to complete his exiting routine, Gormanns testified that Ietto had very little paperwork to complete that day because he had made no arrests and had issued no summonses (3T49-3T51). At the time Ietto departed, Gormanns stated he did not know whether Ietto was leaving early from Post 2 or leaving late from another post assignment (3T43).

Based on the evidence, I find that Ietto departed at 7:30 a.m. on March 8, 1995 without the expressed permission of his shift

commander, Helmers. Whether Helmers acknowledged or observed Ietto's early departure is not controlling. Under all versions of the events that transpired, including Ietto's, Ietto never requested permission to leave early. He simply walked out.

Further, I find that Ietto exited at 7:30 a.m., not 7:40 a.m., as he maintained. Ietto testified in terms of rough time estimates without a firm basis. Gormanns, on the other hand, testified with certainty and specificity based on his clear recollection of looking at his watch.

I also find that Ietto did not note his early departure on his daily report or use comp time to compensate for the time not worked.

28. By inter-office correspondence dated April 10, 1995 (part of R-14), Sergeant Helmers was also given a written reprimand for failing to properly supervise on March 8, 1995. Helmers is not a union official (3T53). Specifically, Helmers was reprimanded for allowing Ietto to be relieved of field duty when he turned his vehicle over to Dudziak and failing to review Ietto's daily report before he left for the day, which consequently permitted Ietto to leave early without following departmental policy (R-14).

According to Gormanns, instead of allowing Ietto to turn his vehicle over to Dudziak at 7:20 a.m., Helmers should have either (a) instructed Dudziak to take a spare vehicle and change to his regular car later, (b) instructed Ietto to change to a spare vehicle and resume patrol of his post or (c) have both officers double up in

one vehicle (3T124; R-14). Helmers' decision to allow Ietto to be relieved of both his post and vehicle resulted in his post not being covered until the next Post 2 man came on duty (3T48, 3T49; R-14).

29. Other than Helmers and Ietto, no other officers have been disciplined for early departures (1T141; 2T36; 3T123). However, until the March 8, 1995 incident, Gormanns was unaware that the midnight to 8:00 a.m. late man would occasionally be permitted to go home earlier than 8:00 a.m. The first time he observed some one leave early without following departmental procedure, Gormanns took corrective action (3T54, 3T125).

Since Helmers and Ietto have been reprimanded for the March 8 early departure, no one leaves early. All officers now leave on the hour at the end of their shift. While there was always a policy when to report on and off duty, since the reprimands, adherence to the policy is more strict (1T157, 1T158).

Just Debt Reprimand

29. On September 19, 1994, Ietto appeared in court in connection with a lawsuit that also involved the Borough and other Borough police officers. Ietto put in for overtime and was paid three hours overtime for his court appearance (3T61; J-2). No other officer requested to be paid overtime for appearing in court (3T65).

Subsequently, Chief Gormanns learned that no Borough official instructed Ietto to appear in court on September 19, 1994 (3T61, 3T131; J-2). The borough attorney informed Gormanns that

standard procedure is not to have borough employees come to court until it is certain that the matter is sent out to trial (J-2). Consequently, Gormanns advised Ietto that he would have the Finance Department deduct three hours from a future check to compensate the Borough for the three hours it had already paid Ietto (3T61).

On October 8, 1994, Ietto worked four hours overtime (2T154; J-2). By memorandum dated October 27, 1994, the Borough notified Ietto that three hours overtime was deducted from his check thereby reducing his four hour overtime to a one hour overtime payment (J-2). As a result, the PBA filed a grievance protesting the deduction, which culminated in binding arbitration (2T37, 2T149; 3T61; J-2).

The Arbitrator's Opinion and Award dated July 11, 1995 found that "the Borough of Fair Lawn was not obligated to pay [Ietto] overtime for a September 19, 1994 court appearance." (J-2). The arbitrator also found, however, that the Borough's method of attempting to recoup monies already paid to Ietto for the September 19 court appearance was improper. Therefore, the arbitrator ordered the Borough to make Ietto whole for the three hours overtime he worked on October 8, 1994 (J-2).

31. Pursuant to the Arbitrator's Opinion and Award, Borough Attorney Lustgarten, by letter dated July 17, 1995 (R-16), advised Ietto that the three hours of overtime previously deducted would be added to his August 3, 1995 paycheck. In the same letter, Lustgarten requested that Ietto repay the Borough the sum of

\$121.65, which represented the three hours overtime pay, by August 20, 1995 or the Borough would institute a lawsuit to collect the money. Based on the Arbitrator's Opinion and Award, it was the Borough's position that Ietto was not entitled to the three hours overtime pay (3T142; R-16).

Ietto did not return the money to the Borough or otherwise respond to Lustgarten's letter (2T103; 3T62, 3T63; R-16). Lustgarten twice more requested in writing that Ietto reimburse the Borough the money he was not entitled to (correspondence dated September 8, 1995 and October 12, 1995) or face a court action (R-16). Ietto ignored these requests too (2T103; 3T62, 3T63; R-16). While Ietto usually responded to Chief Gormanns' requests, he did not respond when Gormanns asked him to repay the money (2T101, 2T102).

32. On October 25, 1995, the Borough filed a Complaint in Bergen County Superior Court, Special Civil Part, Small Claims Section, to recover the \$121.65 (CP-12).

33 Ietto was given a written reprimand by Chief Gormanns dated November 3, 1995, for refusing to pay just debts (CP-12).

34. On May 6, 1996, the Bergen County Superior Court found in favor of the Borough and ordered Ietto to pay the Borough \$121.65 plus interest and costs (2T39, 2T133 and J-3). Ietto still refused to pay the Borough the money he owed believing that the Superior Court was wrong in the order it entered (2T104). Ietto did not appeal the Court Order nor did he ever voluntarily pay the Borough

(2T103). The monies due and owing were eventually recovered by the Borough through a wage execution on September 13, 1996 (2T103; 3T64).

35. In his thirty-one years as a police officer, Gormanns never knew of a patrolman who owed the Borough money and refused to pay it after three written requests by the borough attorney (3T65).

36. With regard to the just debts written reprimand, the PBA contended that it was prematurely and unfairly issued by Gormanns on November 3, 1995. The PBA maintained that the Arbitrator's Opinion and Award does not specifically direct Ietto reimburse the Borough for the three hours overtime and until the Bergen County Superior Court ordered him to repay the money on May 6, 1996, there was no just debt due and owing (2T39, 2T133, 2T167; 3T132, 3T133). As a result, the PBA filed a grievance on Ietto's behalf contesting the reprimand.

37. Chief Gormanns regularly posts filed grievances and his responses in a glass enclosed bulletin board located in the police briefing room so that all members of the department are aware of his position on any given grievance (3T71). As is his practice, Chief Gormanns posted the grievance regarding the just debts reprimand on the bulletin board on Friday, December 1, 1995, between 3:00 p.m. and 4:00 p.m. (2T40; 3T73). The glass case is kept locked and Chief Gormanns has the key (2T40, 2T105).

Though the just debts grievance and other documents were also posted on the bulletin board, the reprimand itself was displayed in full view (2T115, 2T161; 3T71). This was the first

time that a written reprimand was posted in plain view (2T41, 2T114, 2T138). In the past, all other grievances that had been posted in the glass case had to do with issues affecting all members of the police force or concerned information known or easily accessible by all unit members (2T130, 2T137, 2T162, 2T163). Grievances regarding individual personnel matters had never before been posted on the bulletin board (2T114, 2T130, 2T138, 2T162).

38. The briefing room that housed the bulletin board is accessible to all police officers in the department (2T114, 2T157). It is used as a briefing and debriefing room as well as a lunch room by the officers. In addition, the Bergen County Prosecutor's Office has used this room for evidence documentation (2T158).

The briefing room is visited by the public during tours of the police department. Tours have been conducted for the cub scouts, girl scouts, parents and teachers, and school children (2T114, 2T158). At the time, the door to the briefing room was never locked and rarely closed making anything displayed in the glass case readily accessible (2T159).

39. On the night of December 1, 1995, then PBA President Messina was informed that the just debts grievance and reprimand was displayed in the glass case (2T42, 2T136; 3T74). Some time after 11:00 p.m., Messina telephoned an advisor to the Bergen County Prosecutor's Office to get advise on how to handle the posted reprimand. Each police department in Bergen County has an advisor in the prosecutor's office to call for advice (2T163, 2T164).

Upon hearing what was at issue, the advisor referred to Messina to First Assistant Prosecutor Puccio (2T164). Puccio told Messina to call Chief Gormanns and advise him to remove the reprimand from the display or Puccio would come to police headquarters and have the reprimand removed himself (2T140). Messina so advised Gormanns and Gormanns came right to headquarters, at approximately 2:00 a.m. on the night of December 1, and removed the reprimand from the glass case (2T42, 2T166).

ANALYSIS

The PBA contends that the Borough, through its Police Chief, Gormanns, removed PBA President Ietto from a preferred, supervisory patrol, Post 5; reprimanded him for leaving his Post 2 assignment early; refused to give him a copy of an internal affairs report filed in his personnel file; and reprimanded him for not paying a just debt; in retaliation for Ietto's exercise of protected activity under the Act. In addition, the PBA argues that the Borough unilaterally changed a term and condition of employment when it refused to pay Ietto for a full eight-hour shift after he left work early on March 8, 1995.

Anti-Union Animus a(3) Allegations

With regard to the alleged a(3) and derivative a(1)^{7/}

^{7/} The Charging Party has not alleged an independent 5.4a(1) violation.

violations, the PBA maintains that all of the Chief's personnel actions against Ietto must be viewed in light of the confrontations the two had while Ietto was PBA President. Further, the PBA claims that taken collectively the alleged violations clearly demonstrate a pattern of discriminatory conduct toward Ietto for this union activity.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court held that no violation of 5.4a(3) will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer does 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 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.

Applying Bridgewater, I find that Ietto's protected activity was a motivating factor in the adverse actions, but that the adverse actions would have taken place absent the protected conduct. Hence, I do not find that the Borough violated 5.4a(3) of the Act.

The Charging Party established that Ietto engaged in protected activity and that Gormanns was aware of the activity. As PBA President, Ietto filed numerous grievances with Gormanns, objected to the revised manual prepared by Gormanns and challenged Gormanns' administration of the PBA death and burial fund.

Establishing the third element of the Bridgewater test - hostility toward the exercise of protected activity - is the more difficult task. The record showed that Gormanns was not anti-union in general. He was a past PBA President, had served on various PBA committees and continues his membership in the PBA. Though Gormanns was just as unhappy about the number of grievances filed and the confrontations that ensued under Ietto's successor as PBA President, Messina, Gormanns has never taken any adverse action against Messina. In fact, Gormanns has appointed Messina to leadership positions since becoming PBA President.

Similarly, though Gormanns has had many run-ins with Serrao in his capacity as an SOA leader, Gormanns has appointed him to important positions within the department. He has done the same for Anezzone, the PBA state delegate for the Borough.

While there was evidence that Gormanns was not anti-PBA in general, there was evidence that he was hostile to the way Ietto ran the PBA as President. Gormanns did not adequately explain away his "pain in the ass" comment about Ietto. He may have had some legitimate reasons for feeling this way. However, I conclude that he considered Ietto bothersome and annoying in part because of his zealous pursuit of grievances, challenging the proposed revised manual and meddling in the death and burial fund.

Taken together with his "pain in the ass" reference, I find Gormanns' statements that the PBA was trying to run the police department under Ietto's leadership (see finding 7) and that there was no difference between Messina and Ietto in the filing of grievances (see finding 12) to also support an inference of hostility. Finally, Gormanns' willingness to bring Ietto up on departmental charges when Ietto refused to provide the Chief with a dispatcher's statement in connection with the Macissac grievance, demonstrates hostility to the exercise of protected activity.

After reviewing the record as a whole, on balance, the Charging Party established hostility. The personnel actions complained of in the charge must be viewed in this context.

Under Bridgewater, I must next consider whether the Borough would have removed Ietto from Post 5, denied him a copy of the internal affairs report, and reprimanded him for leaving Post 2 early and for failing to reimburse the Borough for overtime even in the absence of his protected activity. For the reasons set forth below, I conclude that the Borough would have taken these actions anyway.

As an overall objection to each adverse action taken against Ietto, the PBA asserts that Ietto was singled out for unprecedented scrutiny and punishment, and the Borough's justifications are not legitimate and should be rejected as pretextual.

With regard to the Post 5 removal, the PBA contends that Ietto did not exhibit poor judgment in the three incidents relied upon by Gormanns (the Fingerroth, psychiatric distress and high school incidents) and that he was removed one week after he stepped down as PBA President. Furthermore, other officers were involved in the psychiatric distress and high school incidents and they were not subjected to reprisal. Therefore, the PBA reasons, Gormanns' basis for removal is pretextual and Ietto was treated disparately.

The evidence does not support the PBA's contention. It was uncontested that the Post 5 assignment is a leadership position requiring good judgment. I credited Gormanns' testimony that he removed Ietto for showing bad judgment in the handling of three matters which happened over a two-month period. Two of the

incidents occurred while Ietto was on Post 5. Freitag, the PBA's own witness, agreed with the Chief that Ietto had exhibited poor judgment by not filing a report in connection with the psychiatric distress incident and by handcuffing students and bringing them down to headquarters in the high school incident. In fact, Freitag recommended that Ietto attend a remedial report writing class and apologized to school officials as a result of Ietto's handling of these matters while on Post 5 duty.

Additionally, unrebutted evidence showed that while Ietto was not permanently removed from the Post 5 assignment until September 1994, Gormanns issued the order shortly after the third episode, the high school matter, at the end of 1993/beginning of 1994. The evidence also demonstrated that any disparate treatment Ietto received for the psychiatric distress incident and the high school incident was because he was the supervisory officer in charge on Post 5 assignment at the time. Consequently, unlike the junior officers involved, Ietto should have known how to properly handle the situations in light of his length of service and experience.

For the foregoing reasons, I find that Gormanns' reason for removing Ietto from Post 5 assignment was not pretextual and was based on legitimate business concerns.

As for the Chief's refusal to provide Ietto with a copy of Freitag's internal investigative report regarding the Fingeroth matter, the evidence showed that the report was erroneously placed in Ietto's personnel file and that the Chief would have refused to give

the report to any officer under the same circumstances. Thus, Ietto was not treated disparately and the Chief would have taken the same action even in the absence of protected activity. In any event, the grievance concerning this dispute has already been settled in the PBA's favor.

Regarding the Post 2 reprimand, the Charging Party maintains that Ietto's early departure was in conformity with an established practice and subjected to unparalleled scrutiny and investigation. Further, Ietto was the only officer to ever have been disciplined for leaving early under similar circumstances.

As shall be discussed more fully under the a(5) allegation section, Ietto's early departure on March 8, 1995 did not conform to the purported "established practice." The fact of the matter is that Ietto left his shift early without the express permission of his shift commander. Until this incident, Gormanns was unaware that the late man on the midnight to 8 a.m. shift may have been leaving early on occasion. As soon as Gormanns became aware that officers were not following departmental procedure, he took evenhanded corrective action. Gormanns also gave the shift commander, Sergeant Helmers, a written reprimand for this incident. There was no evidence to suggest that Helmers was a union official or activist, which supports the conclusion that Gormanns would have taken the same action in the absence of protected activity.

In the just debt reprimand, Gormanns reasonably relied on the arbitrator's award and borough attorney's opinion that a just

debt was due and owing to the Borough. The reprimand was issued when it became apparent Ietto had no intention of repaying the money and only after three written requests by the borough attorney and one request from the Chief were ignored.

Again, the PBA argues that Ietto was singled out for disparate treatment and that the posting of the reprimand evidences animus. The evidence demonstrated, however, that nothing quite like this had ever occurred so there is no basis to measure disparate treatment. Furthermore, the posting happened approximately one month after the reprimand was issued and cannot serve as a basis for Gormanns' mind-set in issuing it in the first instance.^{8/}

Ietto testified that he usually responded to Gormanns' requests, but did not respond at all when asked to repay the \$121.65. Ietto never attempted to communicate with the Chief or the borough attorney his reasons for not repaying the money. Instead of ignoring the situation, Ietto could have paid the \$121.65 and then filed a grievance to recover it. At this point of the analysis animus is a given, but I find that Gormanns also had a legitimate business reason for issuing the just debt reprimand.

^{8/} The posting of the just debt reprimand was not plead as an independent a(1) violation by the Charging Party. It was presented by the PBA only to support the a(3) violations. Hence, even though the posting may tend to interfere with or chill employee participation in protected activity, I cannot go beyond the Charging Party's pleadings and presentation to find an independent a(1) violation. See Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982)

In sum, with regard to the alleged a(3) violations, I conclude that Gormanns had non-pretextual business justifications for each action taken, and based on the record as a whole, would have taken these adverse actions absent Ietto's protected conduct. Therefore, I recommend that the a(3) allegations be dismissed.

Unilateral Change a(5) Allegation

In its charge, the PBA alleged that the Borough unilaterally changed a consistently applied practice when it reprimanded Ietto and docked his pay for leaving his Post 2 shift early on March 8, 1995. The PBA has the burden to prove the existence of a practice. City of Elizabeth, P.E.R.C. No. 82-74, 8 NJPER 121 (¶13052 1982). Though alleged, the PBA's mention of this practice was in the context of attempting to establish its a(3) case. The evidence on the record did not establish a consistently applied practice. The PBA's post-hearing brief does not argue the a(5) violation independently of the a(3) context and omits any reference to the a(5) violation by concluding: "For all the foregoing reasons, it is respectfully submitted that the Hearing Examiner should find that the Borough and Chief Gormanns violated 5.4a(1) and (3) of the Act and should issue the appropriate remedy."

In any event, the Charging Party did not prove the existence of a practice which would permit Ietto to leave his Post 2 assignment 30 minutes early without the expressed permission of his shift commander and excuse him from noting the time he left on his

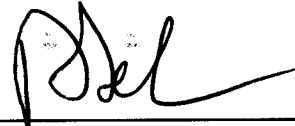
daily report or using comp time to cover his early departure.
Hence, I recommend that the a(5) allegation be dismissed.

CONCLUSION OF LAW

Accordingly, the Borough did not violate 5.4a(3), a(5), and derivatively, a(1) of the Act when it removed Ietto from Post 5 assignment, denied him a copy of the internal affairs report and reprimanded him for leaving his Post 2 assignment early and failing to pay a just debt to the Borough.

RECOMMENDATION

I recommend that the complaint be dismissed.



Perry O. Lehrer
Hearing Examiner

Dated: January 22, 1998
Trenton, New Jersey