P.E.R.C. NO. 84-151

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISION

In the Matter of

TOWNSHIP OF MANTUA,

Respondent,

-and- Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 676,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting the recommended conclusions of a Hearing Examiner, holds that the Township of Mantua violated the New Jersey Employer-Employee Relations Act when it terminated an employee from its Streets and Roads Department and refused to reemploy him as a police dispatcher, all because he had led an organizational drive among Township employees for the International Brotherhood of Teamsters, Local 676. The Commission awards the employee back pay from the date of his termination -- May 13, 1981 -- through February 14, 1982, but does not reinstate him because he would have been laid off anyway on that date. The Commission also dismisses that portion of the Complaint which had alleged a refusal to negotiate in good faith.

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-and- Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 676,

Charging Party.

Appearances:
For the Respondent, Boakes, Lindsay & Smith, Esqs.
(John J. Lindsay, of Counsel)

For the Charging Party, Tomar, Parks, Seliger, Simonoff & Adourian, Esqs.
(Barry M. Bennett, of Counsel)

DECISION AND ORDER

On July 7, 1981, the International Brotherhood of Teamsters, Local 676 ("Local 676") filed an unfair practice charge against the Township of Mantua, Streets and Roads Department ("Township") with the Public Employment Relations Commission. The charge alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (3), and (5),[1/] when on or about May 12, 1981, it terminated Jed Mercer in retaliation

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; (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; and (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."

for his organizational activities on behalf of Local 676.

On October 6, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On October 13, 1981, the Township filed an Answer. It averred that the supervisor of the Streets and Road Department and the Director of Public Works laid off Mercer because there was not enough work for the five men in the department and Mercer had the least seniority.

On October 30 and November 12, 1981, Commission Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. During the hearing, Local 676 amended its charge to allege also that the Township violated subsections 5.4(a)(1) and (3) of the Act when, after laying Mercer off from the Streets and Roads Department, it refused to reemploy him as a police dispatcher.

On January 4, 1982, the Hearing Examiner issued a report recommending that the Complaint be dismissed, H.E. No. 82-25, 8 NJPER 79 (¶13032 1982) (copy attached). He based this recommendation, in part, on Mercer's rejection of a settlement offer.

On January 22, 1982, Local 676 filed exceptions and a supporting brief. Local 676 specifically took exception to the Hearing Examiner's consideration of the Township's settlement offer and Mercer's rejection.

The Commission, after reviewing the record and considering the exceptions, remanded the case for a new hearing.

In re Township of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302 (¶13133 1982). We found that the Hearing Examiner had impermissibly considered evidence of a settlement proposal and rejection and that this error might have influenced the essential credibility determinations underlying his decision. We concluded that "a new hearing is the only way to insure that the Charging Party's allegations of unfair practices receive consideration solely on their merits." Id. at p. 303. We did not consider the merits of the Township's alleged violations in laying off Mercer or in failing to reemploy him.

On September 10 and October 12, 1982, Hearing Examiner Joan Kane Josephson conducted the hearing we ordered. The parties examined witnesses and presented exhibits. They waived oral argument, but submitted post-hearing briefs.

On July 20, 1983, the Hearing Examiner issued her report and recommended decision, H.E. No. 84-7, 9 NJPER 508 (¶14208 1983) (copy attached). Applying the standards set forth in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) ("East Orange"), she found that Mercer's union organizing was a motivating factor in the Township's decisions to lay him off and to refuse to offer him reemployment and that the Township would not have taken these actions but for Mercer's organizing. She therefore concluded that the Township had violated subsections 5.4(a)(1) and (3).[2/] As a remedy, she recommended that

2/ She found no evidence to support the Association's allegation of a subsection 5.4(a)(5) violation and recommended that that portion of the Complaint be dismissed.

the Township be ordered to: (1) make Mercer whole for lost wages (plus 12% interest), less income that should be credited in mitigation for the period of May 12, 1981 to February 1, 1982; (2) place Mercer's name on file and, should a vacancy occur for which he is qualified, offer him employment prior to taking applications for the vacancy; and (3) post a notice of its violations and the remedial actions taken.[3/]

On August 26, 1983, after receiving an extension of time, the Township filed exceptions. Specifically, the Township maintains that the second Hearing Examiner made findings of fact which the first Hearing Examiner did not, and requests that the Commission review the testimony from both hearings in order to make its own findings of fact. The Township further contends that it laid off and refused to reemploy Mercer for legitimate business reasons.

On September 15, 1983, after receiving extensions of time, Local 676 filed a response and cross-exceptions. Local 676 argues that the Hearing Examiner only erred in not recommending that Mercer be awarded back pay as a police dispatcher from February 12, 1982 to the present and that Mercer be immediately placed in that position.

We have reviewed the record. Under all of the circumstances contained in the record,[4/] we hold that the Township

3/ She recommended that the Township not be ordered to pay lost wages after February 1, 1982 since on that date, the Township laid off an employee in the Streets and Roads Department to meet the cap law and had Mercer still been employed in the department at that time, he, as the least senior employee, would have been the employee laid off.

4/ The record in this case consists of the testimony and exhibits introduced at the hearing on remand and does not include the (Continued)

violated subsections 5.4(a)(1) and (3) when it laid off Mercer and then failed to offer him reemployment because of his organizing efforts on behalf of Local 676.

The New Jersey Supreme Court has recently confirmed that this Commission has been using the proper legal standards for analyzing allegations that an employer has discriminated against an employee in order to discourage protected activity. In re Township of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1983) aff'g App. Div. No. A-859-81T2 (6/21/82), affm'g P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), mot. for recon. den. P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981) ("Bridgewater"). There, the Supreme Court, in affirming the Commission's determination that an employee had been illegally transferred and demoted, articulated these standards:

> ...Under that test, the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [NLRB v. Transportation Management, ___ U.S. at ___, 113 LRRM 2851 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely

4/ (Continued)
testimony and exhibits introduced at the first hearing. We specifically attach no weight to the credibility determinations of the first Hearing Examiner since we found that these determinations might have been infected by impermissible considerations and that a new hearing was thus necessary.

requires the employer to prove an affirmative defense. Id.5/
(Slip Opinion at pp. 9-10)

We first consider whether Mercer's organizing efforts were a substantial or motivating factor in his layoff and inability to secure reemployment. In the absence of direct evidence of anti-union motivation for these personnel actions, Local 676 must establish that Mercer engaged in protected activity; the Township knew of this activity; and the Township was hostile toward the exercise of the protected rights. Bridgewater; In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443 (¶11227 1980). Based upon our review of the record, as set forth in the following summary of the facts and the ensuing discussion, we conclude Local 676 has met this burden.

5/ These standards stem from Mount Healthy City Bd. of Ed. v. Doyle, 419 U.S. 274 (1977) and were first articulated in adjudicating questions of federal constitutional violations and remedies. The National Labor Relations Board, with the endorsement of the United States Supreme Court, then applied these standards in adjudicating unfair labor practice charges. Wright-line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980), modified 661 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. 102 S.Ct. 1612 (1982) ("Wright-Line"); NLRB v. Transportation Managemet Corp., ___ U.S. ___, 113 LRRM 2857 (1983). At the same time, this Commission and the appellate courts of this state had adopted and were applying the Wright-Line standards. See East Orange; Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36, 37 (¶14017 1982); In re Logan Twp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd App. Div. No. A-696-82T2 (10/7/83). Bridgewater now confirms the applicability of the Wright-Line standards in the New Jersey public sector.

Jed Mercer first began working for the Streets and Road Department ("Road Department") in 1977. He worked there for five months before being transferred to the Police Department as a radio dispatcher. He worked in that position for 18 months and then requested and received a transfer back to the Road Department where he worked until he was laid off on May 13, 1981.

Although the employees in the Road Department were not represented, they had been operating under a "working agreement" for several years prior to 1981. In 1981, the other Road Department employees selected Mercer to be a member of its negotiating team. Mercer only attended one meeting (on January 28, 1981); there, a dispute occurred which led to a suspension for Mercer.

When no agreement was reached, Mercer talked to his co-employees about joining a union. After receiving their support, Mercer called Local 676 from the office of his supervisor, Charles Keller. Keller and the Road Department employees were present during the phone call.

Local 676 sent Mercer organizational material and Mercer then spoke with employees of the Road Department and Township radio dispatchers as well as employees of the Mantua Utilities Authority. These discussions were held openly before various Township supervisors. Five employees in the Road Department signed authorization cards and in late March 1981, Local 676 filed a Petition for Certification of Public Employee Representative on behalf of the Road Department employees.

A representation election was scheduled for May 5, 1981. About two weeks before the election, John T. Lindsay, a Township Committeeman and Director of the Road Department, met with department employees and showed them an exhibit comparing salaries of other such employees, both unionized and non-unionized, in other municipalities in the area.

Commission representatives conducted the representation election as scheduled. Mercer served as Local 676's observer. The employees voted 4-1 in favor of Local 676's representation and Mercer signed the tally of ballots.

On May 12, 1981, only one week later, Lindsay recommended, and the other committee members agreed,that Mercer should be laid off.[6/] Keller informed Mercer of the layoff the next day; there had been no prior indication to employees of any possible layoff. He further told Mercer to leave work immediately. Although the Township had the option of giving two weeks severance pay or two weeks notice, this incident was the only time in the Township's history where an employee had been told to leave work immediately. This immediate dismissal preceded Local 676's certification of majority representative and the resumption of negotiations which had been held in abeyance pending the representation proceedings.

6/ On the same day, Lindsay wrote a memorandum to the Road Department employee who had been the most active Local 676 organizer besides Mercer. The memorandum warned the employee that he would lose his entitlement to Class III employment if he did not obtain a driver's license in 30 days. This employee, who became a shop steward on January 27, 1982, was laid off on February 1, 1982.

The Township Code contains the following personnel policy:

> §33-5. Abolition of position; effect
>
> A position may be abolished or the number of personnel reduced by the Township Committee for reasons of economy or for reasons of a reorganization within a department or departments, except the Department of Police, where such events shall be governed by the provisions of N.J.S.A. 40A:14-143. Every effort shall be made to reassign any affected permanent employee to another position in the township service for which the employee may be qualified. If no such position is available immediately, the name of the affected employee shall be kept on file, and should a vacancy occur in a position for which he is qualified, he shall be offered employment prior to taking applications for the vacancy. If an employee is demoted because of economy or departmental reorganization, he shall be placed in a new salary grade in the same step he held in his prior position before the demotion. (Emphasis added)

After his layoff, Mercer found out that there was an opening in the Police Department for a radio dispatcher position.[7/] On June 1, 1981, his attorney notified the Acting Chief of Police and the Mayor of his interest in that position pursuant to the Township Code and on June 29, 1981, he formally applied. He was one of five applicants interviewed. Mercer did not get the job, despite his previous experience as a dispatcher, and the individual hired was not a laid off employee. Later, another vacancy for a radio dispatcher was announced. On November 9, 1981, Mercer applied for this position. The Township did not interview him or offer him the position.

Under all these circumstances, we find that Mercer's protected activity was a substantial and motivating factor in the

7/ This opening was announced at the Township Committee's public meeting on May 12, 1982.

Township's decisions to detach him from the workforce and keep him detached. The Township was well aware of Mercer's leadership role in negotiations, in organizing the Road Department and the Police Department, and in representation election activities. Its officials further knew that he was displeased with the Township's position during negotiations for the Road Department's working agreement, and the Township negotiators were in turn displeased with Mercer's negotiations behavior. The mere one week period between the representation election and the layoff, the timing of the layoff just before certification and negotiations with the new union, the immediate implementation of the layoff order contrary to the usual practice, and the refusal to apply the Township ordinance on re-employment rights all demonstrate a motivation to punish Mercer for his organizing and to isolate him and his beliefs from the workforce.[8/]

We now consider whether the Township has met its burden of showing under Bridgewater that it would have laid off Mercer and refused to reemploy him absent his organizing, negotiating, and representation election efforts, thus entitling it to have the Complaint dismissed. In particular, the Township's Director of the Road Department, John T. Lindsay, testified that he believed the Road Department had too many employees; that

8/ The facts in Bridgewater which established that anti-union animus was a substantial and motivating factor in the employee's transfer and demotion are comparable to the facts here. For example, in Bridgewater, as here, the personnel actions in question came soon after the employee's organizing and negotiating activity. Further, in both cases, the public employers deviated from their usual personnel policies and practices in a manner which immediately and suspiciously separated the union organizers from the colleagues they had helped organize.

there was not enough work for them to do; and that Mercer was laid off to save the Township money. Based upon our review of the record, as set forth in the following summary of facts and the ensuing discussion, we do not credit these explanations and conclude that the Township would not have laid off Mercer or refused to reemploy him absent his protected activity.

Lindsay testified that he met with Keller sometime in March and told Keller that one man from the Road Department would be laid off at the end of the snow season because there was no longer a need to carry an extra man. Keller testified that the discussion with Lindsay occurred "a matter of days, maybe a couple of weeks" prior to the filing of Local 676's petition with the Commission, but stated that he was aware of employee interest in Local 676 prior to Lindsay's informing him that a petition had been filed. Keller also testified that until the Mercer layoff, he was the one who made layoff recommendations to the Township Committee and that prior to March 1981, Lindsay had not raised reducing the Road Department work force with him. When Lindsay and Keller discussed reducing the work force, Lindsay inquired which employee had the least seniority; Keller responded that Mercer did. Keller heard nothing more about the layoff from the time he first spoke with Lindsay until the evening the Committee approved Lindsay's recommendation to lay off Mercer. Thus, Mercer's layoff was handled in a unique top-down fashion, with the decision being made by the official in charge of negotiations.

As discussed above, the procedural aspects of Mercer's layoff vary singularly from the way in which layoffs were accomplished before and after his layoff. In all other cases, laid

off employees were given two weeks notice and expected to work. Mercer was instead told to leave immediately. Lindsay testified that Mercer was dismissed immediately for the morale of the remaining employees and to enable Mercer to look for another job. These reasons are not convincing when in every other case, both before and after Mercer's layoff, these concerns for employee morale and the employee's need to look for another job were not present. The more convincing explanation is that the presence of Local 676's chief organizer was unwelcome after the election and immediately before certification and negotiations.

Keller, the person in charge of the Road Department's daily operations, testified that the department's work had continued at the same rate throughout Mercer's employment. He testified that after Mercer was laid off, previously done work had to be cut because the staff of the Road Department was no longer able to accomplish that work. In addition, Mercer testified, without contradiction, that after his layoff, Keller told him that the workload was backing up and that the Road Department was falling behind. On this record, it appears that Road Department work was reduced after, but not before, Mercer was laid off. We agree with the Hearing Examiner that a lack of work did not lead to Mercer's layoff.

Lindsay's testimony concerning the hiatus between deciding to lay Mercer off and actually laying him off is also doubtful. He stated that he did not recommend Mercer's layoff to the Committee in March, when the decision was allegedly made, because he wanted to wait until the end of the snow removal

season. This rationale may explain why Mercer would not actually be laid off in March, but it does not explain why the matter would not have been placed on the agenda of any of the many meetings before May 12 so that the committee would have had ample time to consider the need for a layoff and Mercer would have had more notice if a decision to lay him off was reached.[9/] Instead, the matter appeared on the agenda immediately after the election.

Finally, Lindsay testified that Mercer was laid off to save the Township money. He admitted, however, that the Township had sufficient funds in its budget to continue to employ him and that economy was not the motivating factor.

Under all these circumstances, we do not believe that the Township has proved by a preponderance of the evidence that it would have laid Mercer off absent his protected activity. The Hearing Examiner did not credit the testimony of the Township's witnesses nor do we. The Township decided to lay Mercer off only after his organizing and negotiations behavior became known; the Township deviated from its previous practice of having Keller make layoff recommendations in the first instance; there was no demonstrated need to lay Mercer off for business reasons and in fact the Township's services became less efficient; the layoff followed immediately after a representation election victory for Local 676 and came immediately before certification and the resumption of negotiations (presumably with Mercer); and the Township deviated from its otherwise unbroken practice of requiring employees to

9/ The Committee met at least twice a month, but with individual committee meetings and personnel meetings, especially early in the year, it sometimes met as often as three times a week.

work for two more weeks (and receiving the benefits of their service) after a layoff notice.

We now consider the Township's failure to reemploy Mercer as a police radio dispatcher. Section 33-5 of the Township Code states that when an employee is laid off either for reasons of economy or departmental reorganization,

> "...Every effort shall be made to reassign any affected permanent employee to another position in the township service for which the employee may be qualified. If no such position is available immediately, the name of the affected employee shall be kept on file, and should a vacancy occur in a position for which he is qualified, he shall be offered employment prior to taking applications for the vacancy..."

Despite this provision, the Township declined to reemploy Mercer in either of two vacant police dispatcher positions.

The Township offered one reason why it failed to rehire Mercer as a radio dispatcher and two reasons why it had no obligation to rehire him under the Township Code. It first states that because Mercer had expressed an interest in being transferred back to the Road Department should an opening subsequently occur, he was not a desirable employee for the Police Department. We believe, however, that Mercer's preference for Road Department work is not a credible reason to deny him the radio dispatcher position. The Township was not bound by Mercer's preference and was free to deny a subsequent transfer for legitimate business reasons.

The Township further claims that the Township Code concerning the reemployment of laid off employees does not technically apply because, it asserts, Mercer was not laid off either for reasons of economy or because of a departmental reorganization.

The Township claims that a layoff can only be deemed "economic" when an employee is dismissed because there is not enough money in the budget for his position; there was enough money for Mercer's position. For the reasons stated by the Hearing Examiner, we reject this unduly technical interpretation of the Code. Further, regardless of whether Mercer had a technically enforceable right to reemployment under the ordinance, it appears to us that the ordinance bespeaks the Township's recognition that qualified employees who have been laid off for reasons unrelated to job performance should be given a preference. Here, Mercer was indisputably qualified to be a radio dispatcher, but the Township spurned his first application and did not even interview him for the second position. Given Local 676's showing that the Township laid off Mercer to retaliate for his protected activity and given our rejection of the reason the Township proffered for not reemploying Mercer, we cannot conclude that the Township has met its burden of proving that it would have refused to reemploy Mercer absent his previous organizing. Instead, we believe that the decision not to reemploy him was part of the overall design to separate Local 676's lead supporter from the Township workforce and to keep him away from all Township worksites, specifically including the police department where Mercer had previously attempted to organize employees. 10/

10/ The Township also argues that because the job opening concerned a position within the Police Department, the Code was inapplicable and thus his rehiring could not have been governed by the Code. It relies on the underlined portion of this statement from the Code:

> A position may be abolished or the number of personnel reduced by the Township Committee for reasons of a reorganization within a department or departments, <u>except the Department of Police, where such events shall be governed by the provision of N.J.S.A. 40A:14-143</u>...

(continued)

We now consider the Hearing Examiner's recommended remedy. Only one portion of her recommendation is in dispute: Local 676 claims that Mercer should receive back pay as a radio dispatcher from the time (February 1982) he would have been laid off from the Road Department until the present and that he should be reemployed immediately as a police dispatcher, thus displacing an incumbent employee. We disagree.

Under Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secy., 78 N.J. 1, 11 (1978), the primary purpose of a back pay order is to make the aggrieved employee whole for losses suffered as a result of the employer's illegal action. We believe the Hearing Examiner's recommended back pay order satisfies this goal. If the employer had not acted illegally, Mercer would have remained in the Road Department. As the least senior employee, he would then have been laid off in February 1982 when a layoff was genuinely necessitated. At that time, there were no openings in the police dispatcher force or in other Township positions so Mercer would only have been entitled to reemployment if a vacancy subsequently opened up. The Hearing Examiner's recommended back pay order, with one minor modification, places Mercer in exactly the same position he would have occupied if the Township had not acted illegally.[11/] Local 676's recommended remedy would place

10/ (continued) It appears from the wording of this section that only the abolishment of a position or a reduction in staff is governed by N.J.S.A. 40A:14-143 and not the subsequent reemployment of an employee, even though N.J.S.A. 40A:14-143 also establishes the procedure by which employees in the Police Department are to be reemployed. Here, the person hired instead of Mercer was not a previous member of the Police Department anyway, so this statutory procedure was not considered.

11/ The award for back pay should cover the period May 13 (not 12) 1981 through the last shift prior to February 14 (not 12) 1982 since the record indicates that the relevant layoffs were effective on the corrected dates.

Mercer in a better position (and an incumbent radio dispatcher in a worse one) since it would give him double protection against the risk of layoff all Township employees ran. Thus we approve this aspect, and all other aspects, of the Hearing Examiner's recommended remedy.

ORDER

IT IS HEREBY ORDERED that:

A. 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 laying off Jed Mercer in retaliation for his union activity and refusing to offer him reemployment when a vacancy occurred in the Township.

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 rights guaranteed to them by the Act, particularly by laying off Jed Mercer in retaliation for his union activity and refusing to offer him reemployment when a police dispatcher vacancy occurred.

B. The Respondent take the following affirmative action:

1. Forthwith make Jed Mercer whole for lost wages as a Road Department employee, less income that should be credited in mitigation, for the period of May 13, 1981 to February 14, 1982 or the end of the last shift prior to February 14, 1982 plus interest from May 13, 1981 at a rate of 12% per annum.

2. Forthwith place Jed Mercer's name on file, consistent with seniority rights of other laid off employees, and

should a vacancy occur for which he is qualified, offer him re-employment prior to taking applications for the vacancy.

3. 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 having been signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

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

That portion of the Complaint alleging a violation of subsection 5.4(a)(5) is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Butch was not present.

DATED: Trenton, New Jersey
June 25, 1984
ISSUED: June 26, 1984

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 employees in the exercise of the rights guranteed to them by the Act.

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 rights guaranteed to them by the Act, particularly by laying off Jed Mercer in retaliation for his union activities.

WE WILL forthwith make Jed Mercer whole for lost wages as a Road Department employee, less income that should be credited in mitigation, for the period of May 13, 1981 to February 14, 1982 or the end of the last shift prior to February 14, 1982 plus interest from May 13, 1981 at a rate of 12% per annum.

WE WILL forthwith place Jed Mercer's name on file, consistent with seniority rights of other laid off employees, and should a vacancy occur for which he is qualified, offer him reemployment prior to taking applications for the vacancy.

TOWNSHIP OF MANTUA
(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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. NO. 82-25

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

In the Matter of

TOWNSHIP OF MANTUA,

Respondent,

-and-

Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Local 676,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Township did not violate Subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it terminated Jed Mercer according to seniority on May 13, 1981 as a result of a reduction in force, notwithstanding that Mercer had been active in organizing employees on behalf of the Charging Party and served as a observer at a Commission-conducted election prior to his termination. The Hearing Examiner was persuaded that the Township was not illegally motivated by anti-union animus toward Mercer and that it exercised its legitimate managerial prerogative in deciding to reduce its work force by one employee. Further, the Hearing Examiner concluded that the Township was not illegally motivated when it refused thereafter to hire Mercer as a Police Dispatcher in May and November 1981. Mercer had voluntarily declined an offer of employment as Police Dispatcher during settlement discussions at the first day of hearing on October 30, 1981.

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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Appearances:

For the Township of Mantua
Boakes, Lindsay & Smith, Esqs.
(John J. Lindsay, Esq.)

For the Charging Party
Tomar, Parks, Seliger, Simonoff & Adourian, Esqs.
(Barry M. Bennett, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 7, 1981 by the International Brotherhood of Teamsters, Local 676 (hereinafter the "Charging Party" or "Local 676") alleging that the Township of Mantua (hereinafter the "Respondent" or the Township") had 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 the Respondent on or about May 12, 1981 discriminated against Dewey DiPiero and Jed Mercer in retaliation for their union organizational activities by issuing a notice of lay-off to DiPiero and by terminating the employment of Mercer, and further, on the same day the Respondent unilaterally altered the terms of conditions of employment of DiPiero without negotiating with Local 676 by requiring DiPiero to obtain a drivers license or be terminated, all of which was alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1), (3) and (5) of the Act.[1/]

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 October 6, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 30[2/] and November 12, 1981[3/] in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by December 30, 1981.

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 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 Mantua is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The International Brotherhood of Teamsters, Local 676 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

1/ These Subsections prohibit public employers, their representatives of 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."

2/ The claim of Dewey DiPiero was settled amicably during the hearing on October 30, 1981 and thereafter the case proceeded on the claim of Jed Mercer only.

3/ On November 12 the Charging Party amended its Charge to allege further that the Township discriminatorily refused to hire Mercer as a Police Dispatcher in June and November 1981, notwithstanding that Mercer was offered the said position at the October 30 hearing.

3. Until his termination on May 13, 1981 Jed A. Mercer had been an employee of the Township for three and one-half years. He commenced employment as a CETA employee and thereafter was a Police Dispatcher for one and one-half years. In November 1979 Mercer voluntarily transferred to the position of a Class III employee in the Streets and Roads Department. His duties there included road repairs, mowing, painting, and operating equipment such as trucks, plows, etc.

4. In January 1981 Mercer was one of two negotiators on behalf of the Streets and Roads Department employees. There was no union involved. At the first meeting on January 29, 1981 Mercer was involved in an altercation and the negotiations ceased with Mercer being suspended for five days. Thereafter there was a second negotiations meeting, at which Mercer was not present.

5. In February 1981 Mercer contacted the Charging Party regarding self-organization. This contact was made by telephone from the office of the Streets and Roads Department where four other employees were present plus Charles Keller, the Supervisor of the Streets and Roads Department, whose title is Project Coordinator.

6. Mercer subsequently received authorization cards from Howard Greeley of the Charging Party. Mercer signed up four other employees for membership in the Charging Party. Mercer testified that Keller was frequently present when authorization cards were being signed and that he spoke to Keller regarding the "union." Keller said that a union was "OK" with him as he had worked in places with and without union and had no objection to a union.

7. A Petition for Certification of Representatives was filed with the Commission by the Charging Party late in March 1981 and an election was conducted on May 5, 1981, at which Mercer was the Charging Party's observer. The vote was 4-1 in favor of representation (CP-1).

8. In the beginning of April 1981 John T. Lindsay, Deputy Mayor of the Township, called a meeting of the Streets and Roads Department employees, at which he explained the fringe benefits that other Towns in the area of Mantua were receiving. Lindsay

testified credibly that he expressed no preference at the meeting regarding the employees' desire to organize a union. At the time of the meeting Lindsay was aware that a representation petition had been filed with the Commission. Keller was also present at this meeting.

9. In March or early April 1981 Keller raised with Lindsay the possibility of a reduction in force in the Streets and Roads Department due to the Township's progress in the "pot hole" program. Thereafter Lindsay took this matter to the Township Committee and it was agreed that one employee in the Streets and Roads Department would be laid off. In accordance with past practice the Township followed seniority and Mercer, being the junior employee in seniority, was laid off on May 13, 1981. Mercer was given two weeks' pay in lieu of notice and was paid the vacation time due him.

10. Keller testified credibly that he has laid off other employees in the four years that he has been the Project Coordinator in the Streets and Roads Department. For example, several years ago the Township decided to subcontract its trash and garbage function and as a result five employees were laid off.

11. Keller and Lindsay testified credibly that they never attempted to discourage employees from organizing a union and, in fact, Keller testified that from his vantage point it was easier to work with a union than not inasmuch as there is a contract which serves as "bible" to the employees. Mercer acknowledged on cross-examination that no representative of the Township had ever interfered with his activities on behalf of the Charging Party and that no threats had ever been made by Lindsay.

12. On June 29, 1981 and on November 9, 1981 Mercer applied for the position of Police Dispatcher with the Township, a position that he had previously held for one and one-half years. Notwithstanding that the Township did not hire Mercer in response to his June 29, 1981 application, the Township offered this position to Mercer during the course of the October 30, 1981 hearing in this matter, which Mercer declined. A Police Dispatcher earns $2200 per year more than Mercer had been earning.

THE ISSUES

1. Did the Respondent Township violate Subsections(a)(1) and (3) of the Act[4/] when it terminated Jed Mercer on May 13, 1981 as an employee in the Streets and Roads Department?

2. Did the Respondent Township violate Subsections(a)(1) and (3) of the Act when it refused to hire Jed Mercer as a Police Dispatcher in May and November 1981?

DISCUSSION AND ANALYSIS

The Respondent Township Did Not Violate Subsections(a)(1) And (3) Of The Act When It Terminated Jed Mercer On May 13, 1981 As An Employee In The Streets And Roads Department

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Township's termination of Jed Mercer violated Subsection(a)(3) of the Act, i.e., the Township's conduct was not discriminatory as to Mercer and was not motivated, in whole or in part, by a desire to encourage or discourage Mercer in the exercise of the rights guaranteed to him by the Act, nor did the Township's conduct have the effect of so encouraging or discouraging Mercer: Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modified, 82 N.J. 1 (1980).[5/]

4/ The Charging Party failed to adduce any evidence that the Respondent violated Subsection(a)(5) of the Act by its conduct herein and the Hearing Examiner will, accordingly, recommend dismissal of this aspect of the Unfair Practice Charge.

5/ There was no proof of "anti-union animus" having been manifested toward Mercer nor was the Township's conduct "inherently destructive" of rights guaranteed by the Act: City of Hackensack, supra, 3 NJPER at 144. See also Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd, App. Div. Docket No. A-4824-77 (1980).

Further, there was no proof by a preponderance of the evidence of an independent violation by the Respondent of Subsection(a)(1) of the Act: Compare, Salem County Board for Vocational Education v. McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239, 240 (1979), aff'd. as to violations of Subsections(a)(1) and (3) of the Act but rev'd as to the non-award of interest and remanded, App. Div. Docket No. A-3417-78 (1980).

For a Subsection(a)(3) violation to be found the actions of the public employer must have been committed with a "discriminatory motive:" Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45, 46 (1980). The Hearing Examiner is, of course, persuaded overwhelmingly that the Charging Party preliminarily proved that Mercer was exercising rights guaranteed to him by the Act by his open circulation of authorization cards and serving as observer at the election, and that the Respondent Township had actual knowledge of such activity: Haddonfield, supra (3 NJPER at 72). The failure of the Charging Party's proofs goes to the question of anti-union animus and discriminatory motive not having been established by a preponderance of the evidence.

The Charging Party contends that the timing of Mercer's termination coming one week after the election is suspect, and that from this the Hearing Examiner should infer a discriminatory motive based upon Mercer's earlier protected activity on behalf of the Charging Party. The Hearing Examiner recognizes that there is an argument to be made that the Township's timing is suspect due to the fact that the initial conversation between Keller and Lindsay regarding a lay-off for lack of work first occurred in March or early April 1981, and that the final termination on May 13, 1981. However, the Hearing Examiner must weigh the "timing" against the legitimate exercise of a managerial prerogative to reduce its work force.

The Hearing Examiner credits Keller's testimony that there was a need for

one less employee in the Streets and Roads Department due to the Township's progress in the "pot hole" program. When the actual reduction took place it is noted that the Township, in accordance with past practice, followed seniority and that Mercer being the junior employee in seniority was the one designated for lay-off on May 13, 1981. The Hearing Examiner attributes no significance to the fact that the Township elected to give Mercer two week's pay in lieu of notice rather than permitting him to work two additional weeks. The Township elected to penalize itself by not receiving services for the two-week period.

With respect to the absence of anti-union animus on the part of the Township, the Hearing Examiner notes that Mercer's organizational activities took place with the full knowledge and actual observation of Keller. Keller testified credibly that he had worked in both union and non-union setting elsewhere, and that from his vantage point it was easier to work with a union since the contract served as "bible" for the employees. Mercer acknowledged on cross-examination that no representative of the Township had ever interfered with his activities on behalf of the Charging Party and that no threats had ever been made by Lindsay. (See Finding of Fact No. 11, supra). Finally, it is noted that at the meeting with employees in the beginning of April 1981 Lindsay merely compared the fringe benefits of other towns to those in the Township's Streets and Roads Department and expressed no preference at the meeting regarding the employees' desire to organize a union (see Finding of Fact No. 8, supra).

The Hearing Examiner, having concluded that there was no proof of discriminatory motive or anti-union animus by the Township toward Mercer, must recommend dismissal of the Subsection(a)(3) allegations in the Charge. Further, no proof of an independent violation of Subsection(a)(1) having been adduced, the Hearing Examiner must recommend dismissal of this aspect of the Unfair Practice Charge.

The Respondent Township Did Not Violate Subsections(a)(1) And (3) Of The Act When It Refused To Hire Mercer As A Police Dispatcher After His Termination On May 13, 1981

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Township was illegally motivated when it refused to hire Jed Mercer as a Police Dispatcher in May and November 1981, as alleged in the amended Unfair Practice Charge. 6/

The Charging Party adduced no evidence with respect to the amended Charge except that Mercer filed an application for the position of Police Dispatcher in May and November 1981 (CP-6 and CP-7). There was nothing to indicate that the Township was illegally motivated in not having given the Police Dispatcher job to Mercer. His application was one among many and he was not awarded the position. The Personnel Policies in the Code of Mantua Township (CP-5) do not, in the opinion of the Hearing Examiner, invest in Mercer any superior rights to be hired over other applicants merely because Mercer was once been employed as a Police Dispatcher and had been terminated from the Streets and Roads Department as a result of reduction in force on May 13, 1981.

Finally, the Hearing Examiner would be less than candid in reaching his conclusion herein if he did not take note of the fact that Mercer was offered the job of Police Dispatcher at the first day of hearing on October 30, 1981 during settlement discussions off the record but declined the Township's offer. Mercer's reason for so declining was his disatisfaction with the failure of the Township to offer him back pay since

6/ The Hearing Examiner rejects the Charging Party's argument that the Township acted illegally in allegedly interfering with Mercer's effort to obtain employment with the Mantua Utilities Authority inasmuch as there was no allegation in the initial Unfair Practice Charge or the subsequent amendment regarding Respondent's conduct in this regard.

his termination on May 13, 1981. It is noted that the Police Dispatcher position pays $2200 more per year than the position from which Mercer was terminated on May 13, 1981. Mercer must live with the decision that he made on October 30, 1981.

Accordingly, the Hearing Examiner will recommend dismissal of the amended Unfair Practice Charge.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it terminated Jed Mercer from the Streets and Roads Department on May 13, 1981 and thereafter refused to hire him as a Police Dispatcher in May and November 1981.

2. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: January 4, 1982
Trenton, New Jersey

H. E. No. 84-7

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

In the Matter of

TOWNSHIP OF MANTUA, STREET
AND ROADS DEPARTMENT,

Respondent,

-and-

Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 676,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the respondent violated §5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it laid off Jed Mercer in retaliation for organizing the respondent's employees. He was laid off four days after the PERC election, and refused re-employment rights guaranteed by the respondent's municipal code. The Hearing Examiner found the charging party had established that the protected activity was a motivating factor in the layoff and that the respondent did not then establish that the layoff would have occurred absent the protected activity.

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.

H. E. No. 84-7

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

In the Matter of

TOWNSHIP OF MANTUA, STREET
AND ROADS DEPARTMENT,

Respondent,

-and- Docket No. CO-82-4-37

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 676,

Charging Party.

Appearances:

For the Respondent
Boakes, Lindsay and Smith, Esqs.
(John J. Lindsay, Of Counsel)

For the Charging Party
Tomar, Parks, Seliger, Simonoff & Adourian, Esqs.
(Barry M. Bennett, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on July 7, 1981 by the International Brotherhood of Teamsters, Local 676 (the "union" or "Local 676").

The Charge alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A- 1 et seq. (the "Act") specifically subsection 5.4(a)(1), (3) and (5). 1/ It

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; (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 employees in that unit, or refusing to process grievances presented by the majority representative."

appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, the Director of Unfair Practices, on October 6, 1981, issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Township filed an answer denying that it had violated the Act by its actions. A hearing was held before Commission Hearing Examiner Alan Howe. On January 4, 1982, the Hearing Examiner issued his Recommended Report and Decision, H. E. No. 82-85, 8 NJPER 79 (¶13032 1982). Exceptions were filed to this decision, and on May 5, 1982, the Commission remanded the charges for a new hearing, P.E.R.C. No. 82-99, 8 NJPER 302 (¶13133 1982).

Pursuant to the remand, hearings were held on September 10, 1982 and October 12, 1982, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.

The charge alleged that the Respondent violated the Act when on or about May 12, 1981, it terminated Jed Mercer in retaliation for his union organizational activities, [2/] and then refused to re-employ Mercer as a police dispatcher because of his organizational activities.

An unfair practice charge having been filed with the Commission, a question concerning alleged violations of the Act exists and, after hearing, and after consideration of the posthearing briefs of the parties, the matter is appropriately before the Com-

2/ The charge also alleged the respondent violated the Act when it altered terms and conditions of employment of employee Dewey DiPiero; however, those allegations have been withdrawn and are not before the undersigned Hearing Examiner for determination.

mission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

The Township of Mantua is a public employer within the meaning of the Act, and is subject to its provisions. The International Brotherhood of Teamsters, Local 676 is a public employee representative within the meaning of the Act and is subject to its provisions.

Jed Mercer was an employee of the Township for three and one-half years. He first spent five months as a CETA employee in the Streets and Roads Department and thereafter, for 18 months, was a police dispatcher. Then, in November 1979 he voluntarily transferred back to the Streets and Roads Department.

In 1980 Mercer was selected by the other employees as one of their two representatives to negotiate a "working agreement" on the employees' behalf. (Tr. p. 21) At a meeting held to discuss the working agreement Mercer was involved in an altercation with Committeemen John Lindsay and Roy Hodgen that ultimately resulted in a suspension for Mercer. Mercer testifed: "I was there negotiating for the welfare of my family and fellow workers, and I just thought more interest should have been showed in what we had to say, and I was foolish and lost my tempoer." (Tr. p. 28) Mercer was not involved in any further negotiations. No agreement was reached by the parties and Mercer contacted the charging party-union for assistance in formally organizing the employees. Mercer's initial

telephone communication to the union was made from the office of his supervisor, Charles Keller, the Project Coordinator for the Streets and Roads Department. Keller was present when Mercer made the call.

Mercer received authorization cards from the union and signed up other employees for the union. A Petition for Certification was filed with the Commission in late March 1981 and an election was conducted by a Commission election officer on May 5, 1981. Mercer was the union observer at the election. The vote was 4-1 in favor of representation.

Mercer reported to work on Wednesday morning, May 13, 1981, and he was advised by Keller that he was being laid off. He was given two weeks severance pay and was laid off immediately. He did not remain for the remainder of that day. In other Township layoffs, employees have always been given a two-week notice of impending layoff, and work the two weeks. (Tr. 38, 81 and Tr. 10/12/82--p. 21)

The decision to lay Mercer off was made by John T. Lindsay who was at that time a township committeeman and Director of the Streets and Road Department. Lindsay consulted the four other committee members and they agreed to the layoff. Lindsay advised Keller on May 12 that Mercer was to be laid off the following day. (Tr. 10/12/82--p. 19) 3/

The Township Code contains the following personnel policy:

§33-5. Abolition of position; effect

3/ Keller told Mercer the decision to lay him off had been made at a township committee meeting the prior evening. Lindsay testified that he contacted two committee members by telephone for approval and the other two were at a committee meeting. He was not clear on the dates of these events.

> A position may be abolished or the number of personnel reduced by the Township Committee for reasons of economy or for reasons of a reorganization within a department or departments, except the Department of Police, where such events shall be governed by the provisions of N.J.S.A. 40A:14-143. Every effort shall be made to reassign any affected permanent employee to another position in the township service for which the employee may be qualified. If no such position is available immediately, the name of the affected employee shall be kept on file, and should a vacancy occur in a position for which he is qualified, he shall be offered employment prior to taking applications for the vacancy. If an employee is demoted because of economy or departmental reorganization, he shall be placed in a new salary grade in the same step he held in his prior position before the demotion. (Emphasis added)
>
> [N.J.S.A. 40A:14-143 provides the procedure for re-employment of police officers in the event of a reduction in the force.]

In June 1981 there was a vacancy for a police dispatcher position and Mercer's attorney wrote the chief of police on June 1, 1981 requesting that the Township apply the above personnel policy and offer the position to Mercer (CP2 in Evid.) Mercer then filed an application for the position on June 29, 1981. (CP4 in Evid.) Mercer was one of five people interviewed for the position and did not get the job. Another dispatcher opening occurred in the fall of 1981. Mercer filed another application on November 9, 1981. He did not receive that appointment. He was not interviewed for that position. On February 1, 1982 the Township laid off another member of the Streets and Roads Department. The employee was given two weeks notice and advised he would be given preferential application status for future vacant positions. (CP9 in Evid.)

DISCUSSION AND ANALYSIS

In East Orange Public Library v. Taliaferro, 180 N.J.Super.

155 (App. Div. 1981), the Court followed the lead of the United States Supreme Court in Mount Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980) and recently affirmed in NLRB v. Transportation Management Corp., ____ U.S. _____ (June 14, 1983) in establishing the standards for determining whether an employer's motivation makes a personnel action illegal under our statute. The charging party must first establish that the protected activity was a substantial, i.e., a motivating factor in the employer's decision to take that personnel action. If the charging party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the charging party's protected activity. The factfinder must then resolve the conflicting proofs. See also Black Horse Pike Reg. Bd/Ed, P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1982).

The totality of the circumstances in this case leads the undersigned to recommend that the Commission find that Mercer's protected union activity was a motivating factor in his layoff. When Mercer was involved in the negotiations for the "working agreement" he was suspended because of his behavior at the table. 4/ These negotiations did not result in an agreement and Mercer organized

4/ While this event is included herein for background purposes, the undersigned notes that the Commission has accepted the principle that "wide latitude in terms of offensive speech and conduct must be allowed in the context of grievance proceedings to insure the efficacy of the proceeding...It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace." Hamilton Twp. Bd/Ed, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068, 1979). Hamilton arose in the context of a grievance hearing. Negotiations surely would be included within the ambit of a "labor dispute."

the employees for the charging party-union. Four days after the PERC election Mercer was laid off. He was told the decision was made the prior day. There had been no earlier indication that there was any intention to reduce the staff in the Streets and Roads Department. Mercer was given severance pay and laid off instantly, contrary to Township practice in any other layoff. On two subsequent occasions the Township refused to grant Mercer the benefit of a re-employment personnel policy contained in the Township Code, which states the laid-off employees will be offered employment prior to taking other applications. On the occasion of the first vacancy he was interviewed with other applicants and not appointed; and on the second vacancy, he filed an application and not even interviewed. Both openings were for police dispatcher, a position which Mercer had held for 18 months in Mantua previously.

Having found that the Charging Party has met its burden in the first part of the test, the undersigned is not convinced that the respondent has established that the layoff would have occurred absent Mercer's protected activity.

I am not persuaded by the Respondent's witnesses that the layoff had been planned for some time. Lindsay testified he decided in January to lay someone off when snow removal season ended but that was not then communicated to the Roads and Streets supervisor Keller who testified that it was he who normally made decisions to cut down on staff and recommended such decisions to the Township Committee. According to Keller, Lindsay spoke to him about the layoff "a matter of days, maybe a couple of weeks..." before receiving the petition from PERC. It was Lindsay who in-

formed Keller that the petition had been filed with PERC. (Tr. 10/12/82, p. 17) The Respondent was aware of the organizing campaign by Mercer from the beginning when Mercer made the initial contact with the Union from Keller's own telephone. I am not convinced by a preponderance of the evidence that the planned layoff was discussed long before the organizing activities, as Respondent argues.

Respondent notes the Township had the option to pay the severance pay or have Mercer work two weeks after having been given notice. This is the only time the Township has exercised this option. It had not been exercised before. In the next layoff following Mercer's it was not exercised. This manner of layoff by itself is not conclusive, but it must be considered with the other circumstances, including the decision not to rehire Mercer as a dispatcher.

The Respondent avers that the personnel policy is inapplicable because Mercer was not laid off because of any direct budgetary problem. Lindsay was asked at the hearing:

> Q Now, the purpose of that layoff was to save money, wasn't it?
>
> A Yes.
>
> Q So, it was at -- would you agree with the characterization of it as being for economic reasons?
>
> A Yes. If you consider saving money as economic, which is about the best definition around, okay, yes.
>
> (Tr. p. 95)

The Respondent argues nevertheless that this layoff is not contemplated within the personnel policy which states "personnel reduced by the Township Committee for reasons of economy." The Respondent

argues that the reasons of economy language applies to situations when "the Township cannot afford to continue employment." Lindsay himself testified as to the economic ramifications of the layoff. If the economic reasons for layoff are rejected, the implication that Mercer was laid off because of union activity is even stronger. The Township argues that Mercer was laid off because the Streets and Roads Department had less work, but Keller testified that after the layoff:

> I had to cut out extra little things...Instead of mowing our roads every month, we mow them twice... they've taken the street broom off the road, doing away with leaf collection..you just can't do it all..." (Tr. 10/12/83, p. 12)

Keller's testimony does not confirm that Mercer was laid off because the department had less work, and Lindsay's testimony does not confirm that the layoff was non-economic obviating the re-employment Township policy. The purpose of this personnel policy is to give laid-off Township employees the first opportunity when vacancies occur and Jed Mercer was denied that opportunity twice.

The Township argues that Mercer was not given the dispatcher appointment because he stated in the interview he preferred outdoor work in the streets department and if given the opportunity in the future would again transfer to the streets department as he did previously. This finding is not based on whether the Township was justified in not selecting Mercer over the other candidates. This finding is based on the plain language of the personnel policy of the municipal code which states the laid-off employee "shall" be offered the position for which "he is qualified...prior to taking applications."

Based on the above, I am not convinced that the Respondent has met its burden of establishing by a preponderance of the evidence that the personnel action would have occurred absent Mercer's protected activity.

CONCLUSION

Based on the entire record the undersigned recommends that the Commission find that the Respondent violated §5.4(a)(3) and derivatively (a)(1) when it laid off Jed Mercer on May 12, 1981 in retaliation for his union activity. 5/

As to the remedy I recommend that the Commission make Jed Mercer whole for lost wages, less income that should be credited in mitigation,for the period of May 12, 1981 to February 1, 1982, plus interest from May 12, 1981, at a rate of 12% per annum. I recommend Mercer be paid for lost wages only until February 1, 1982, because, according to uncontroverted evidence presented by the Charging Party, the Streets and Roads Department laid off an additional employee in order to meet the State-mandated cap law. As the least senior employee in the department, Mercer would have been laid off at that point. (CP9 in Evid.)

I also recommend that the Commission ORDER that the Township of Mantua place Jed Mercer's name on file and should a vacancy occur for which he is qualified, he should be offered employment prior to taking applications for the vacancy.

5/ No evidence was adduced as to the alleged violation of §5.4 (a)(5) and I recommend therefore that the Commission find there has been no violation of that subsection.

It is hereby recommended that the Commission issue the following

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 laying off Jed Mercer in retaliation for his union activity and refusing to offer him employment when a vacancy occurred in the Township pursuant to the Township Code.

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 rights guaranteed to them by the Act, particularly by laying off Jed Mercer in retaliation for his union activity and refusing to offer him re-employment when a vacancy occurred in the Township pursuant to the Township Code.

B. That the Respondent take the following affirmative action:

1. Forthwith make Jed Mercer whole for lost wages, less income that should be credited in mitigation, for the period of May 12, 1981 to February 1, 1982, plus interest from May 12, 1981 at a rate of 12% per annum.

2. Forthwith place Jed Mercer's name on file [6/] and, should a vacancy occur for which he is qualified, offer him employment prior to taking applications for the vacancy.

3. Post in all places where notices to employees

6/ The name should be placed on a list consistent with seniority rights of other laid-off 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 by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

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

C. That the Subsection (a)(5) allegations in the Complaint be dismissed in their entirety.

Joan Kane Josephson
Hearing Examiner

Dated: July 20, 1983
Trenton, New Jersey

Appendix "A"

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 laying off Jed Mercer in retaliation for his union activity and refusing to offer him employment when a vacancy occurs in the Township pursuant to the Township Code.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act, particularly by laying off Jed Mercer in retaliation for his union activity and refusing to offer him re-employment when a vacancy occurs in the Township pursuant to the Township Code.

WE WILL forthwith make Jed Mercer whole for lost wages, less income that should be credited in mitigation, for the period of May 12, 1981 to February 1, 1982, plus interest from May 12, 1981 at a rate of 12% per annum.

WE WILL forthwith place Jed Mercer's name on file 1/ and, should a vacancy occur for which he is qualified, offer him employment prior to taking applications for the vacancy.

1/ The name should be placed on a list consistent with seniority rights of other laid-off employees.

TOWNSHIP OF MANTUA, STREET & ROADS DEPARTMENT
(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, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.