

P.E.R.C. NO. 88-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

Docket No. CI-86-75-5

MICHAEL J. FRIEL, JR.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Township of Bloomfield violated the New Jersey Employer-Employee Relations Act when it did not promote Michael J. Friel, Jr. to deputy chief in retaliation for his activity in filing a representation petition for the Captains Association. The Commission orders that he be permanently appointed to deputy chief and receive back pay and interest.

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MICHAEL J. FRIEL, JR.,

Charging Party,

Docket No. CI-86-75-5

and-

FRANK PROSS, ARTHUR DRURY, FRANK MAGLIONE,

Intervenors.

Appearances:

For the Respondent, John A. Bukowski, Jr., Esq.

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman,
LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

For the Intervenors, Fox and Fox (David I. Fox and Dennis
J. Alessi, of counsel)

DECISION AND ORDER

On April 18, 1986, Michael J. Friel filed an unfair practice charge against the Township of Bloomfield. The charge alleges the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(3),^{1/} when it (1) did not appoint Friel acting deputy

^{1/} This subsection prohibits public employers, their representatives or agents from: "(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."

chief, (2) did not promote Friel to deputy chief assigned as "training officer" and (3) downgraded the training officer position to captain to deprive Friel of a promotion. The charge alleges these actions were retaliation against Friel because he filed a representation petition which led to the severance of Bloomfield's fire captains from a unit of firefighters.

On July 10, 1986, a Complaint and Notice of Hearing issued. The Township did not file an Answer until the first day of hearing.^{2/} It admitted that the fire captains formed a separate negotiations unit, but denied the Complaint's remaining allegations.

On November 5 and December 15, 1986 and February 6, 1987, Hearing Examiner Alan R. Howe conducted a hearing. Friel examined witnesses and introduced exhibits. The Township did not. Both parties waived oral argument but filed post-hearing briefs.

On July 27, 1987, the Hearing Examiner issued his recommended decision. H.E. No. 88-7, 13 NJPER 679 (¶18253 1987). He concluded that the Township unlawfully discriminated against Friel when it promoted William Gehringer instead of Friel "in the latter part of 1985 and 1986" to the positions of "Acting Deputy Chief, provisional Deputy Chief or Deputy Chief." He recommended that the Township promote Friel to "the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief" and pay him back pay and interest. He recommended that these appointments be retroactive from April 1, 1986 since that was the day a deputy chief retired.

^{2/} This violated N.J.A.C. 19:14-3.1, but Friel did not object.

The Hearing Examiner informed the parties that exceptions were due on or before August 10, 1987. The Township was granted an extension to file exceptions, but did not. Friel also did not file exceptions.

On August 10 and September 11, 1987, fire captains Frank Pross, Arthur Drury and Frank Maglione moved to intervene. They state that they have taken a promotional examination for the vacant deputy chief position and contend that Friel's permanent appointment will deprive them of a chance to compete for that position. They assert they did not receive notice of the Commission proceeding and did not have "the opportunity to have their interests represented in the matter." They ask that the matter be remanded for a new hearing before the Department of Personnel, where they would present evidence "regarding the attrition rate of deputy chiefs in the department, [and] the age and retirement status of the current deputy chiefs."

The proposed intervenors have also filed exceptions to the Hearing Examiner's recommended decision. They contend that Friel failed to establish that his protected activity was "a motivating or substantial factor" in the decision not to promote him. It cites this evidence: the Township promoted others who were active in Friel's Association; Friel's protected activity and the evidence of hostility were remote in time from the decision not to promote, and the Chief had the discretion to appoint anyone as provisional deputy chief after the Department of Personnel list expired in April, and

therefore "it was immaterial that the Township's past practice was to promote from numerical order from the Department of Personnel list." They also except to Friel receiving a permanent appointment because the vacancy had been filled with a provisional appointment and Friel should not be placed in a better position; the Department of Personnel promotional list had expired; only the Department of Personnel may make a permanent appointment, and only it should consider the remedy.

We first consider whether the request for intervention should be granted. N.J.A.C. 19:14-5.1 provides:

A motion for leave to intervene shall be filed in writing together with proof of service of copies thereof upon the other parties, or if made at the hearing, made orally on the record, stating the grounds upon which an interest in the proceeding is claimed and stating the extent to which intervention is sought. The Commission, the Director of Unfair Practices, or the Hearing Examiner, as the case may be, may by order permit intervention to such extent upon such terms as may be deemed just.

Intervention in administrative proceedings is within the agency's sound discretion. In re White, 171 N.J. Super. 493, 499 (App. Div. 1979); Witt v. Shannon Outboard Motor Sales, Inc., 166 N.J. Super. 319, 323 (App. Div. 1979). We believe that the factors deemed relevant by the court are relevant here: the applicant's claimed interest in the suit's subject; whether the suit's disposition may as a practical matter impair or impede his ability to protect that interest; whether the applicant's interest is adequately represented by existing parties; whether the intervention will unduly delay or

prejudice the adjudication of the parties' rights; whether application is prompt; whether intervention will result in further undue delay; whether intervention will eliminate the probability of subsequent litigation, and whether intervention may further complicate litigation. R. 4:33-2 and 2 and comments. See also State v. Lanza, 39 N.J. 595 (1963); In re White; Government Security Co. v. Waire, 94 N.J. Super. 586 (App. Div. 1967); In re App. For Certif. of Pub. Convenience, 134 N.J. Super. 500 (App. Div. 1975).

Applying these principles, we deny the intervenors' request for a new plenary hearing. The issue before us is whether the Township discriminatorily refused to promote Friel. Evidence on this question was within the Township's control. See Bridgewater at 243. The three intervenors have not claimed that their participation would aid the fact-finder in deciding whether the Township unlawfully failed to promote Friel or that the Township's defense would not of necessity protect the interests of other would be promotees. Because of this and the undue delay that would be caused, we deny the request for a remand. See In re App. of Jersey Cent. Power and Light Co., 130 N.J. Super. 394, 400 (App. Div. 1974).^{3/}

We will, however, allow these employees to file exceptions to the recommended decision and remedy. They have an interest in

^{3/} Intervenors have suggested that they would present evidence that their future promotional opportunities would be affected if Friel were permanently appointed. A hearing is not necessary for this purpose. We accept this as a fact.

this case's outcome: if Friel receives a permanent appointment, there will no longer be a deputy chief vacancy to vie for. Nor can it be said that their interest is adequately represented by the Township. See Saginario v. Attorney General, 87 N.J. 480, 494 (1981). Accordingly, we grant the request to intervene for the purpose of filing exceptions.

We now review the record. The Hearing Examiner's findings of fact (pp. 4-9) are accurate. We adopt and incorporate them here.

We first consider liability: Did the Township violate the Act when it did not promote Friel? Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the charging party has met this burden and the employer has not presented any evidence of a legal motive 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 a motive unlawful under our Act and another motive not unlawful under our Act both contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would

have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Friel established that his protected activity was a motivating factor in his not being promoted. He engaged in protected activity when he participated in the Captains' Association severance petition. The Township knew it. Our key finding, virtually compelled by this uncontroverted record, is that the Township, specifically Fire Chief Melillo, was hostile to that activity. Melillo stated to Friel, "You're a cancer and I'm going to cut you out." This hostile statement was directed at Friel's protected activity: it was said during a conversation discussing the Association's representation petition. Melillo was against it, Friel was for it. This was not the only evidence of hostility. The uncontradicted testimony was that the Township had, with the one exception of the fire chief position, appointed the first ranked employee on the Civil Service promotional list to the vacant position. But in Friel's case, the Township waited for the list to expire and then appointed another employee to the position provisionally. This unexplained departure from a prior practice is classic evidence of discriminatory intent. E.g., University of Medicine & Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 449 (¶16156 1985).

We do not believe the evidence of animus was too remote from the promotional decision to establish a causal connection. Melillo did not become chief until 1984. He immediately transferred Friel to a less favorable position and thereafter denied him his first promotional opportunity. There is no evidence that the other employee promoted was more qualified than Friel. In fact, the Department of Personnel exam results demonstrate that Friel was the most qualified applicant and there was no evidence to the contrary. Nor does the fact that other supporters of the Captains' Association did not suffer discrimination mean that Friel did not. The essential fact is that Friel established a strong case of discrimination based on both direct and indirect evidence. The burden then shifted to the Township to establish it would not have promoted him anyway. It did not even attempt to do so.

We now consider the remedy. The Hearing Examiner recommended that Friel be promoted to the position of "Acting Deputy Chief, provisional Deputy Chief or Deputy Chief...retroactive to April 1, 1986." The Hearing Examiner apparently based this remedy on the fact that Gehringer was appointed to these positions and he found that Friel, not Gehringer, would have been promoted but for this protected activity. Intervenors strenuously argue, therefore, that Friel cannot be awarded a permanent appointment because Gehringer received only a provisional appointment. The Hearing Examiner's analysis and the intervenor's exceptions, under these circumstances and in particular given the regulations of the Department of Personnel, are not persuasive. The remedy for

the violation is not necessarily appointing Friel to that position occupied by Gehringer. Under Department of Personnel regulations, Gehringer could not have been appointed to a permanent position because there was an existing promotional list and he was not ranked first, second or third. N.J.A.C. 4:1-12.1. He received his appointment provisionally only after that list expired. N.J.A.C. 4:1-14.1. But Friel was in a different situation. He was number one on the promotional list and consistent with the Township's past practice would have been promoted absent his protected activity. Since he was on the list, it would have been to a permanent position. Since Deputy Chief Drone retired April 1, 1986, that is the appropriate date to make this remedy effective.

Intervenors have argued that such a remedy exceeds our authority because the promotional list has expired and only the Department of Personnel has the statutory authority to make permanent appointments. We are sensitive to these concerns and have deferred to the Department of Personnel's expertise where appropriate. See New Jersey Dept. of Health, P.E.R.C. No. 86-131, 12 NJPER 45 (¶17166 1986); State of New Jersey, P.E.R.C. No. 85-98, 11 NJPER 229 (¶16088 1985). Here, however, we have the statutory obligation "to take such reasonable affirmative action as will effectuate the policies of this act." N.J.S.A. 34:13A-5.4. This requires us, under this case's circumstances, to make Friel whole by placing him in the position he would have been absent the Township's

unlawful action. See Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd App. Div. Dkt. No. A-3230-79 (1/23/81); see also Terry v. Mercer Cty. Freeholder Bd., 86 N.J. 141 (1981) (Division of Civil Rights has authority to order that women discriminated against receive next available promotion even though it conflicts with civil service "rule of three"). The authority of the Department of Personnel to insure that promotions are based on merit has not been harmed by our remedy since Friel was number one on the promotional list. See Terry at 153 (promotion remedy is valid because plaintiffs scored highest on promotional exam and thus meet merit and fitness requirements).

We have considered the remedy's effect on the intervenors. They have devoted time and effort in preparing for a promotional exam based on their belief that they were competing for a vacant position. Because of our decision, that position is no longer vacant and their promotional opportunities will be more limited. In considering a remedy, we must consider its effects on innocent parties and must avoid achieving justice for one employee at the expense of others. Nevertheless, we believe that ordering Friel promoted permanently is the appropriate remedy. The intervenors had the opportunity to take the exam only because the Township discriminated against Friel. Therefore, our remedy is necessary to vindicate Friel's rights and our statutory responsibility. Cf. Walters v. City of Atlantic, ___ F.2d ___, 42 FEP Cases 387, 397-398 (11th Cir. 1986).

ORDER

The Township of Bloomfield is ordered to:

A. Cease and desist from:

1. 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 refusing to promote Michael J. Friel to Deputy Chief in retaliation for his activity on behalf of the Bloomfield Fire Captains Association.

B. Take the following affirmative action:


1. Forthwith give Michael J. Friel a permanent appointment to Deputy Chief.

2. Forthwith make Michael J. Friel whole by paying him back pay that he would have received had he been promoted on April 1, 1986 plus interest at the rate of 9.5% for 1986 and 7.5% for 1987.

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

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

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
October 22, 1987
ISSUED: October 23, 1987

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from 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 refusing to promote Michael J. Friel to Deputy Chief in retaliation for his activity on behalf of the Bloomfield Fire Captains Association.

WE WILL forthwith give Michael J. Friel a permanent appointment to Deputy Chief.

WE WILL forthwith make Michael J. Friel whole by paying him back pay that he would have received had he been promoted on April 1, 1986 plus interest at the rate of 9.5% for 1986 and 7.5% for 1987.

Docket No. CI-86-75-5

TOWNSHIP OF BLOOMFIELD
(Public Employer)

Dated _____

By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-7

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

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

Docket No. CI-86-75-5

MICHAEL J. FRIEL, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated §5.4(a)(3) of the New Jersey Employer-Employee Relations Act when the Chief of its Fire Department failed to appoint the Charging Party as a Deputy Chief in and around April 1, 1986, when a vacancy had occurred as a result of a retirement. The Charging Party was at that time No. 1 on the Civil Service list and the Hearing Examiner found that the reason for his non-appointment by the Chief was the Chief's longstanding animosity toward the Charging Party for protected activities dating back to 1982 when the Chief opposed a move by the Captains in the Fire Department to form a separate negotiations unit. In April 1984, the Chief in the presence of other Captains referred to the Charging Party as a "cancer" that had to be "cut out." The Hearing Examiner found that this vitriolic evidence of animus carried over into the decision of the Chief in 1986 not to appoint Friel to Deputy Chief.

By way of remedy, the Hearing Examiner ordered the promotion of the Charging Party to Deputy Chief with retroactive pay and interest from April 1, 1986, citing as authority Op. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186, 188 (¶11089 1980), aff'd App Div. Dkt. No. A-3230-79 (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.

H.E. NO. 88-7

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

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

Docket No. CI-86-75-5

MICHAEL J. FRIEL, JR.,

Charging Party.

Appearances:

For the Respondent
John A. Bukowski, Jr., Esq.

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 18, 1986 by the Michael J. Friel, Jr. (hereinafter the "Charging Party" or "Friel") alleging that the Township of Bloomfield (hereinafter the "Respondent" or the "Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that in Docket No. RO-82-135 the Fire Captains employed by the Township were severed from the bargaining unit represented by FMBA, Local 19 as being supervisory

employees; and that on April 6, 1983, those Fire Captains who filed the above petition were notified by FMBA, Local 19 that they were being expelled therefrom; that the current Fire Chief, Robert G. Melillo,^{1/} who was a Deputy Chief at the time of the above petition, testified and has since stated that those Fire Captains who filed the above petition were wrong and that those people who filed against Local 19 "were like a cancer"; that since that time those Fire Captains who filed the above petition with the Commission have been discriminated against in their terms and conditions of employment, i.e. Norman Wilcox has been transferred from the position of Acting Deputy Chief despite 24 years on the job and Captain Kiley was transferred from Acting Deputy Chief despite 15 years in that position and, further, Wilcox has been declared eligible pursuant to a Civil Service examination for the position of Deputy Chief while those now functioning have not passed the examination; that Friel has been declared eligible for Deputy Chief by the Civil Service Commission but the Township has not allowed Friel to act in that position despite his greater seniority and Civil Service status; that when a vacancy occurred on April 1, 1986, for the position of Training Officer, a position to be filled by a Deputy Chief, Friel was denied this opportunity; that thereafter the Township downgraded the position of Training Officer on April 10, 1986, making it a Captain's position, such that there is no longer a

^{1/} Melillo became Fire Chief in April 1984.

promotion for Friel; and that Melillo has assigned a Captain, who was not one of the individuals who challenged Local 19 in the above petition, to take courses leading to his assignment as Training Officer; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(3) of the Act. of the Act.^{2/}

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 July 10, 1986. Following a prehearing on October 9, 1986, hearings were held on November 5, 1986, December 15, 1986, and February 6, 1987, in Newark, 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 June 13, 1987.^{3/}

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.

^{2/} This subsection prohibits public employers, their representatives or agents from: "(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."

^{3/} The delay in the filing of post-hearing briefs was due to vacation schedules of counsel for the parties and late transcript.

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

FINDINGS OF FACT

1. The Township of Bloomfield is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Michael J. Friel, Jr., is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Robert G. Melillo, who had been a Deputy Chief in the Township's Fire Department since April 1, 1979, was appointed Fire Chief in April 1984.

4. By an ordinance adopted on April 2, 1984, the Table of Organization of the Township's Fire Department was as follows: (1) One Fire Chief; (2) Five Deputy Chiefs; (3) Twenty-six Fire Captains; (4) and as many Firemen as required (CP-5).

5. Between the adoption of the April 2, 1984 ordinance, supra, and May 5, 1986, infra, there was a Fire Department assignment known as "Training Officer," which was made by Melillo and was usually filled by a Deputy Chief, the reason being that there were four line fire fighting groups, each headed by a Deputy Chief, which allowed for the assignment of the fifth Deputy Chief as "Training Officer."^{4/}

^{4/} However, two witnesses for the Charging Party, Albert Katinsky, a Deputy Chief for nine years, and Arthur Drone, a retired Deputy Chief, who assumed that position in 1984, testified that in their experience Captains as well as Deputy Chiefs have been assigned as "Training Officers" (1 Tr 94, 106, 107).

6. On May 5, 1986, the Township by ordinance amended its Table of Organization in the Fire Department by reducing the number of Deputy Chiefs from five to four (CP-6).

7. Katinsky testified without contradiction that the "Training Officer" is assigned to the day shift and that his duties are to coordinate all training and maintain training records. He also testified that there is only one "Training Officer" in the Fire Department at any one time. Drone testified that the "Training Officer" assignment does not carry any additional stipend. As is evident from the two Table of Organization ordinances, supra, "Training Officer" does not appear as a position.

8. Friel was hired as a Fireman in the Fire Department on June 1, 1970. He has been a Captain since 1979. Friel took a test for Deputy Chief in December 1982 and when a list was promulgated his name was not on it. Six months later he took a "re-test" and his name appeared on the Deputy Chief list in September 1983. This list expired on April 27, 1986.

9. Friel was instrumental in a movement among the Captains in the Fire Department to petition the Commission for a separate collective negotiations unit. This movement originated with the displeasure of the Captains over the loss of parity with the Lieutenants in the Police Department.

10. A representation petition was filed with the Commission by the "Bloomfield Fire Captains Association" on January 26, 1982 (Docket No. RO-82-135). At two hearings before the

Commission in January and February 1983, the then Fire Chief, John Flaherty, the then Deputy Chief Melillo and Captains William Gehringer and John Corona, testified against the severance of the Fire Captains from the larger unit represented by FMBA Local 19, which included Captains. Among the five Captains, who testified at the Commission hearings in support of the petition for severance were Friel and Robert Bashall (1 Tr 34).^{5/}

11. Although the relevance is somewhat tangential, on March 18, 1983, FMBA Local 19 filed charges of a violation of its by-laws against some 12 or more Captains, who were active in the petition for severance, supra (see, e.g., CP-1 & CP-2). Among those against whom charges were filed were Friel, Bashall, Drone and Edward McGowan. All of those against whom charges were filed were adjudged "guilty as charged," notwithstanding that no hearing had been held (see, e.g., CP-2). The Hearing Examiner finds as a fact that subsequent to the severance petition proceedings before the Commission, supra, and the action of the FMBA internally, Bashall, McGowan and Drone were promoted to the position of Deputy Chief.^{6/}

^{5/} Notwithstanding that Flaherty, Melillo, Gehringer and Corona testified in opposition to the petition for severance, it was stipulated that the Township was neutral in the Commission proceeding in RO-82-135, supra, (2 Tr 64, 65).

^{6/} However, Chief Melillo never referred to any of these three individuals as a "cancer," etc. As to Friel, see Finding of Fact No. 13, infra.

12. Kenneth P. Kiley, a Captain in the Fire Department, testified without contradiction that in 1982 he had spoken with Melillo and that Melillo had stated that he did not want a separate unit for Captains. Further, when Melillo became Chief in April 1984, he convened a meeting at the home of Paul Reynolds, a Captain in the Fire Department, and, according to Kiley, the tenor of the meeting was that Chief Melillo asked the Captains to be "one happy family."^{7/}

13. Katinsky testified that at a retirement party, just after Melillo became Chief in April 1984, Melillo said to Friel, "You're a cancer and I'm going to cut you out" (1 Tr 91, 96, 97). Friel testified to the same effect as to what Melillo stated on that occasion (2 Tr 61, 62).

14. Having previously found that Bashall, McGowan and Drone were promoted to the position of Deputy Chief after having been active in the petition for severance, supra, the Hearing Examiner further finds that Gehringer, who opposed the severance petition, was designated by Chief Melillo as an Acting Deputy Chief at the end of 1985 and was then made a provisional Deputy Chief in May 1986. In or around that time two things happened: (1) Deputy

^{7/} This meeting occurred shortly after the Commission election on the Captains' severance petition, the election having been held March 9, 1984. Although Kiley testified that the Reynolds meeting occurred before the election (1 Tr 70-73), it was obviously after the election since Melillo did not become Chief until April 1984.

Chief Drone retired in February 1986, effective April 1, 1986; and (2) Corona, who had also opposed the severance petition, and who had become a Deputy Chief thereafter, retired as of June 1, 1986. Deputy Chief Katinsky had been injured on June 13, 1985, and returned to active duty as a Deputy Chief in April 1986. At the time that Gehringer was designated as a provisional Deputy Chief in May 1986, Friel was No. 1 on the list for promotion to Deputy Chief.^{8/}

15. At the end of January 1986, Friel went to see Melillo and requested that since he was No. 1 on the Civil Service list he should be appointed Deputy Chief. Melillo said that he was not appointing Friel as an Acting Deputy Chief and "Seniority doesn't mean anything and...how I came out on the list doesn't mean anything...File a grievance" (2 Tr 54, 55).

16. On February 1, 1986, Friel filed a written grievance with Melillo, requesting that he should be appointed an Acting Deputy Chief in place of Drone, who was retiring on this date, February 1st (CP-3).

17. There was further testimony by Friel regarding his seeking to become assigned "Training Officer," to which the Hearing Examiner attaches no significance since it was not a "position" in the Table of Organization of the Fire Department nor did it carry a

^{8/} The undisputed testimony of the Charging Party's witnesses was that the longstanding practice of the Township was to promote by numerical order on the Civil Service list.

stipend or any other indicia of a significant term or condition of employment in the Fire Department.^{9/}

18. The Respondent called no witnesses nor offered any documentary evidence in support of its position. The Hearing Examiner draws a negative inference from the failure of the Respondent to call Chief Melillo as a witness, given the Charging Party's proofs as to what Melillo had said to Friel in April 1984, supra. It was stipulated that as of the February 6, 1987 hearing Melillo, following a recent illness, has reported to duty several hours per day (3 Tr 10).^{10/}

DISCUSSION AND ANALYSIS

The Respondent Township Violated §5.4(a)(3) Of The Act When Chief Melillo First Made William Gehringer An Acting Deputy Chief And Then A Provisional Deputy Chief In The Time Period Between The End Of 1985 And May 1986 When The Charging Party Was No. 1 On The List For Deputy Chief.

The Hearing Examiner first notes that, notwithstanding the initial contention of the Charging Party, this case is not about

^{9/} The issue in this case appears to the Hearing Examiner to be the alleged discriminatory failure of Chief Melillo to appoint or designate Friel as a Deputy Chief or as an Acting Deputy Chief. This position is buttressed by the fact that whereas Friel filed a grievance regarding the failure of Chief Melillo to appoint him as an Acting Deputy Chief (CP-3, supra) he never filed a grievance regarding the "Training Officer" assignment.

^{10/} See Regan v. Lenkowsky, 137 F.Supp. 133, 143 (D.N.J. 1956) & Parentini v. S. Klein Dept. Stores, Inc., 94 N.J.Super. 452 (App. Div. 1967).

Friel's efforts to be designated or assigned to the position of "Training Officer." In so concluding, the Hearing Examiner is convinced that there is no "position" in the Table of Organization of the Township's Fire Department known as "Training Officer." However, there has been been for some period of time a "Training Officer" assignment. The Charging Party's evidence has established that the Chief of the Fire Department has assigned both Deputy Chiefs and Captains to "Training Officer." The Hearing Examiner is unable to perceive any discrimination by the Township as to Friel in having failed to assign him to "Training Officer" since this assignment has been given to Captains and/or Deputy Chiefs at different points in time. It appears that since the Chief of the Fire Department has the authority to make such an assignment, the fact that Friel was not assigned is not evidence of discriminatory motive on the part of the Township in violation of §5.4(a)(3) of the Act, without more. Cf. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. Ed., 78 N.J. 144 (1978).

The Hearing Examiner, in analyzing the evidence adduced by the Charging Party in this case (the Respondent having adduced no evidence), concludes that whatever discriminatory motive the Township manifested toward Friel by the conduct of Fire Chief Robert G. Melillo pertains to Friel's having been passed over for appointment as Acting Deputy Chief and then provisional Deputy Chief from which would follow promotion to the permanent position of Deputy Chief. Thus, the subject matter of Friel's assignment to

"Training Officer" seems extraneous to the issue before the Hearing Examiner.

Since the issue in this case is whether or not the Township violated §5.4(a)(3) of the Act,^{11/} the Hearing Examiner must turn to the analysis of the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the Supreme Court adopted the analysis of the National Labor Relations Board in dual motive cases,^{12/} which in turn was adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983). The "Bridgewater" analysis in a "dual motive" case involves the following requisites in assessing employer motivation: (1) The Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discriminate (here the failure to promote); and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected (95 N.J. at 242).

The Court in Bridgewater further refined the test in a dual motive case by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile toward the exercise of the protected

^{11/} The only subsection of the Act alleged to have been violated.

^{12/} Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).

activity (95 N.J. at 246). Also, the Hearing Examiner notes that the Charging Party must establish a nexus or causal connection between the exercise of protected activity and the employer's conduct in response thereto: Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983).

Applying the Bridgewater analysis to the facts of the instant case as they involve the failure and refusal of Chief Melillo to move Friel up the promotional ladder to the position of Deputy Chief, it appears first that Friel definitely engaged in protected activity throughout the period between 1982 and 1984 when he was active among those seeking to sever the Captains into a separate unit in the Fire Department (see Findings of Fact Nos. 9, 10 & 16, supra). Plainly, the Township had to have had knowledge of Friel's activity on behalf of the "Bloomfield Fire Captains Association" since, as noted previously, Friel and others had been active since the filing of the petition on January 26, 1982, and had seen the matter through the election on March 9, 1984, and the ultimate certification by the Commission on March 16, 1984.

The remaining question is whether or not the Charging Party has demonstrated prima facie that the Township was hostile toward Friel's exercise of the protected activities set forth above. In this regard, the evidence adduced by the Charging Party through Katinsky, established that at a retirement party just after Melillo became Chief in April 1984, Katinsky heard Melillo state to Friel, "You're a cancer and I'm going to cut you out." (1 Tr 91, 96 &

97). The testimony of Friel corroborated that of Katinsky in this respect (2 Tr 61, 62). Since Melillo did not testify and, thus, did not deny that such a statement was made by him, nor did anyone else testify on behalf of the Respondent, the Hearing Examiner necessarily concludes that Melillo made the "cancer" statement as testified to by Katinsky and Friel. Also, recall that at the end of January 1986, Melillo told Friel that, notwithstanding that he was No. 1 on the Deputy Chief list, "Seniority doesn't mean anything" and that Friel should file a grievance, which he did (see Findings of Fact Nos. 15 & 16, supra).

Clearly, the undisputed testimony by Katinsky and Friel, regarding Melillo's "cancer" statement to Friel in April 1984, supra, was so vitriolic that its impact carried over and was evidence of discriminatory motivation on the part of Melillo toward Friel in the early part of 1986. Thus, the Hearing Examiner finds and concludes that the animus and hostility of Melillo toward Friel in April 1984 was causally connected to the fact that Melillo promoted Gehringer, who had opposed the severance petition, over Friel, who had actively sought severance.^{13/}

The Respondent, having elected to proffer no evidence in its defense, cannot avail itself of the second part of the

^{13/} Also, Friel's grievance of February 1, 1986 (CP-3), supra) is evidence of protected activity from which an inference of retaliatory motivation may be drawn: Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984).

Bridgewater test, supra, namely to demonstrate that Friel would not have been promoted to Deputy Chief even in the absence of protected activity. This was a risk that the Respondent undertook in not calling Melillo or anyone else on its own behalf. Thus, the Charging Party has met all of the requisites of Bridgewater by establishing a prima facie case as to protected activity, knowledge, hostility and nexus.

In conclusion, the Hearing Examiner is plainly convinced that when Chief Melillo preferred Gehringer over Friel in the latter part of 1985 and the first part of 1986, notwithstanding that Friel was No. 1 on the promotion list for Deputy Chief, Melillo acted with illegal discriminatory motivation in violation of §5.4(a)(3) of the Act.

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(3) when the Chief of its Fire Department, Robert G. Melillo, failed to appoint Michael J. Friel, Jr. to the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief on or before April 1, 1986, in retaliation for Friel's having engaged in protected activities under the Act.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from:

1. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to promote Michael J. Friel, Jr. to the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief on or before April 1, 1986, Friel then being No. 1 on Civil Service list.

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

1. Forthwith promote Michael J. Friel, Jr. to the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief in the Township's Fire Department, with all of the rights, benefits and privileges attached to said position, retroactive to April 1, 1986,^{14/} and with back pay and interest from this date. Back pay shall be calculated by the difference between Friel's pay as a Captain during this period and the rate of pay he would have received as a Deputy Chief if he had been promoted on April 1, 1986.^{15/} Interest shall be calculated at the rate of 9.5% for 1986 and 7.5% for 1987.

^{14/} Deputy Chief Drone's retirement became effective April 1, 1986, and, thus, this date affords a logical basis for retroactive calculation.

^{15/} See Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186, 188 (¶11089 1980), aff'd App. Div. Dkt. No. A-3230-79 (1981).

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

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



Alan R. Howe
Hearing Examiner

Dated: July 27, 1987
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to promote Michael J. Friel, Jr. to the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief on or before April 1, 1986. 1 on Civil Service list.

WE WILL forthwith promote Michael J. Friel, Jr. to the position of Acting Deputy Chief, provisional Deputy Chief or Deputy Chief in the Township's Fire Department, with all of the rights, benefits and privileges attached to said position, retroactive to April 1, 1986, and with back pay and interest from this date. Back pay shall be calculated by the difference between Friel's pay as a Captain during this period and the rate of pay he would have received as a Deputy Chief if he had been promoted on April 1, 1986. Interest shall be calculated at the rate of 9.5% for 1986 and 7.5% for 1987.

Docket No. CI-86-75-5

TOWNSHIP OF BLOOMFIELD

(Public Employer)

Dated _____

By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.