

P.E.R.C. NO. 89-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY BOARD
OF SOCIAL SERVICES,

Respondent,

-and-

Docket No. CO-87-115-81

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Union County Board of Social Services violated the New Jersey Employer-Employee Relations Act when it denied Joan Hartsfield a promotion to Training Technician and Welfare Fraud Investigator because of her union activity. The Complaint was based on an unfair practice charge filed by the Communication Workers of America, AFL-CIO.

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COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, DeMaria, Ellis & Hunt
(Brian N. Flynn, of counsel)

For the Charging Party, Gabrielle Semel, Esq.

DECISION AND ORDER

On October 31, 1986, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Union County Board of Social Services ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(2),(3) and (7),^{1/} when it discriminatorily denied Joan

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

Hartsfield a promotion to training technician because she would not relinquish her position as president of CWA Local 1080.

On December 11, 1986, CWA amended its charge. It added an allegation that the Board discriminatorily denied Hartsfield a promotion to welfare fraud investigator.

On January 9, 1987, a Complaint and Notice of Hearing issued. The Board filed an Answer asserting that Hartsfield was denied the two promotions, not because of her union position, but because other employees were more qualified.

On April 29 and September 17, 1987, Hearing Examiner David F. Corrigan conducted a hearing. At the outset, CWA amended a factual allegation. The parties then examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs and replies by January 25, 1988.

On May 16, 1988, the Hearing Examiner issued his report. H.E. No. 88-56, 14 NJPER ____ (¶ ____ 1988). He concluded that both promotion denials were improperly motivated by Hartsfield's union position.

On June 24, 1988, after receiving an extension of time, the Board filed exceptions. It asserts that the Hearing Examiner erred in finding that hostility towards protected activity motivated either promotion denial. It contends that it legitimately considered whether Hartsfield could simultaneously fulfill the duties of a training technician and the union presidency and that it was not responsible for senior investigator Ruth Brown's anti-union statements.

On September 19, 1988, after receiving an extension of time, CWA filed a response urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-10) are generally accurate. We adopt and incorporate them, with the following modifications.

We correct finding no. 5 to state that Hartsfield began work as an income maintenance technician and was promoted to income maintenance worker, not vice-versa. We modify finding no. 7 to state that Hartsfield did not receive the highest score on the exam for training technician, although she was first on the list when she applied for the position in September 1986. We add to finding no. 8 that training supervisor Mary Comeau (not Comeru) told Hartsfield that in-service training would be held on a new computer system from November 1986 through January 1987 and asked her whether she would be negotiating during this time. Hartsfield said negotiations would not start until April so there was no problem. Comeau was relieved. She told Hartsfield she would convey "what the personnel committee wanted to know back to them." We add to the next to last paragraph of finding no. 9 that Hartsfield testified that Southers replaced Ryan as head of the personnel committee and that Joanne Malone was the other Board member on that committee.

In re Bridgewater Tp., 95 N.J. 235 (1984) establishes the standards for determining whether these promotion denials were illegal. CWA must first establish that Hartsfield's protected activity was a substantial or motivating factor in the denials. If

it does, the Board may still avoid liability by demonstrating that the promotions would still have been denied absent her protected activity.

The employer asserts that it denied Hartsfield the training technician position because of its concern that Hartsfield would spend too much time acting as union president and too little as training technician. But the employer had a complete remedy if Hartsfield's duties would not permit her release: deny her leave. The position of training technician was outside the negotiations unit and Hartsfield would have had no contractual or inherent right to insist upon taking leave to represent another unit. If Hartsfield could not adequately perform her union duties, the employees could then decide whether or not to keep her as president. But it was not the employer's prerogative to decide that question for them or to take Hartsfield's activity as president into account in denying this promotion.

The employer has not argued and no evidence suggests that it would have denied Hartsfield this promotion absent her union activity. Accordingly, we hold that the Board violated subsection 5.4(a)(1) and (3) when it denied Hartsfield a promotion to training technician.

We also hold that the refusal to promote Hartsfield to welfare fraud investigator was improperly motivated. We base that holding on our review of all the evidence.

The personnel committee established a group of administrators to interview Hartsfield and the other candidates.

Included in that group were Ralph Sullivan, a head of the welfare fraud unit, and Ruth Brown, a senior investigator from that unit. Sullivan and Brown were there as "resource people," that is people who can explain to Board members the concerns and needs of the department with the vacancy. Brown asked Hartsfield if she would give up her unfair practice charge, but the Deputy Director advised her that this question was unfair. Sullivan, however, pressed that line of inquiry, talking about the need for Hartsfield to be on the job and to commit herself as an investigator. He questioned her interest in the investigator position if she was going to pursue the charge. Pursuant to the normal practice, Sullivan and Brown presumably participated in the closed post-interview discussions among the interviewers.

When the Board met to consider whom to promote, Hartsfield complained about the questioning in respect to her unfair practice charge. She asked the Board to review her complaint and to postpone the appointment. The Board neither disowned Sullivan's statements nor granted Hartsfield's request. Instead it appointed two other employees below Hartsfield on the Civil Service list.

Having heard rumors that Brown was talking about why the promotion was denied, Hartsfield called Brown. Brown told her she already had a union vice-president, shop steward, treasurer and negotiator in the welfare fraud unit and she didn't want another union official.

The Board asserts that it had denied Hartsfield an earlier promotion because it believed her union position disqualified her.

That was the same concern expressed by the head of the welfare fraud unit and not disowned. He was worried that Hartsfield would not be "on the job."

The record does not contain any evidence about why the Board promoted two employees below Hartsfield on the Civil Service list instead of her.

Under all these circumstances, we hold that CWA established its prima facie case of illegal motivation and the Board did not prove that it would have denied the promotion anyway. We thus hold the Board violated subsection 5.4(a)(1) and (3) when it denied Hartsfield a promotion to welfare fraud investigator.

In the absence of exceptions, we adopt the Hearing Examiner's remedy.

ORDER

The Union County Board of Social Services is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Act by not promoting Joan Hartsfield to training technician and welfare fraud investigator because she engaged in union activity.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not promoting Joan Hartsfield to training technician and welfare fraud investigator because she engaged in union activity.

B. Take this action:

1. Offer Joan Hartsfield promotions to the positions of training technician and welfare fraud investigator.

2. Make Joan Hartsfield whole for lost wages and other benefits she would have received had she been promoted to training technician and investigator plus interest pursuant to R.

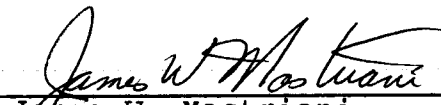
4:42-11(a)(ii).

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.

The Complaint's remaining allegations are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
September 29, 1988
ISSUED: September 30, 1988

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Act by not promoting Joan Hartsfield to training technician and welfare fraud investigator because she engaged in union activity.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not promoting Joan Hartsfield to training technician and welfare fraud investigator because she engaged in union activity.

WE WILL offer Joan Hartsfield promotions to the positions of training technician and welfare fraud investigator.

WE WILL make Joan Hartsfield whole for lost wages and other benefits she would have received had she been promoted to training technician and investigator; plus interest pursuant to R. 4:42-11(a)(ii).

Docket No. CO-87-115-81

UNION COUNTY BOARD OF SOCIAL SERVICES
(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. 88-56

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

In the Matter of

UNION COUNTY BOARD
OF SOCIAL SERVICES,

Respondent,

-and-

Docket No. CO-87-115-81

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that Union County Board of Social Services violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it did not promote Joan Hartsfield to "Training Technician" and "Investigator." The Hearing Examiner determines Hartsfield was not promoted because of her union 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.

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COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Miller & Menaker, Esqs.
(Laurence M. Miller, of counsel)

For the Charging Party, Gabrielle Semel, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 31 and December 11, 1986, Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Union County Board of Social Services ("Board"). The charge, as amended, alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3) and (7),^{1/} when it:

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

(1) asked Joan Hartsfield, the President of CWA Local 1080, whether she would resign her union position in the event she received a job promotion to "Training Technician" she had applied for; (2) told her she would be promoted to "Training Technician" if she resigned her union position;^{2/} (3) denied her promotion when she did not resign and after she filed an unfair practice contesting the promotion denial; (4) asked her during a promotional interview for the "Investigator" position, if she would pursue the charge if she received the promotion, and (5) denied her a promotion to the "Investigator" position and was told "that department (welfare fraud) did not want any more Union activists."

1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

2/ The original charge alleged that she was asked this question four times. The charging party requested to amend this at hearing to delete that and replace it with "while being interviewed by the Personnel Committee, which consists of four people, for a job promotion, the president of CWA Local 1080, was asked if she would give up her union activities if she got the job." I permitted the amendment over the Board's objection because it appeared to simply correct a typographical error, did not add a new substantive allegation and did not prejudice the Board's defense.

On January 9, 1987, a Complaint and Notice of Hearing issued. On February 2, 1987, the Board filed its Answer. It admits that Hartsfield is CWA's president and that she was denied two promotions that she applied for. It denies, however, that it was because of her union activity; denies that she was asked to resign her union position to receive a promotion and denies that the Board told her that she was denied the "investigator" promotion because it did not want "any more union activists." It admits that she was asked during the interview for the investigator position whether she would pursue her unfair practice charge if she were promoted, but states that this question was asked by a Board employee who had no authority to make the promotion decision, that his question was objected to before an answer was given and it had no bearing on the promotional decision. As an affirmative defense, the Board contends that it promoted more qualified employees and that anti-union animus was not a substantial or motivating factor in the Board's decision not to promote Hartsfield.

On April 29 and September 17, 1987,^{3/} I conducted a hearing in Newark. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs and replies by January 25, 1988.

^{3/} The delay between the two dates was caused by both parties requesting postponements of scheduled dates and an unsuccessful attempt to settle it.

Findings of Fact

1. The Union County Board of Social Services is a public employer within the meaning of the Act. The Board is under the jurisdiction of the Merit System Personnel Act.

2. CWA is an employee representative within the meaning of the Act. It is the majority representative of the following Board employees:

Income Maintenance Specialist, Income Maintenance Worker, Income Maintenance Technician, Investigator/CWA, Social Worker, Social Worker Specialist, Clerk, Clerk Typist, Receptionist, Telephone Operator, Clerk Transcriber, Clerk Stenographer, Messenger, Senior Account Clerk/Senior Clerk Bookkeeper, Senior Clerk Stenographer, Senior Telephone Operator, Account Clerk/Clerk Bookkeeper, Senior Receptionist, Senior Clerk Transcriber, Senior Clerk Typist, Data Control Clerk. Data Entry Machine Operator, and Senior Data Entry Machine Operator and supervisor of Data Entry Machine Operations.

3. Joan Hartsfield has been employed by the Board since June 25, 1979. On January 1, 1985, she became vice-president of CWA, Local 1080. On July 1, 1986, she became president. As president, she is responsible for negotiating and administering the collective negotiations agreement. She spends an average of two hours of work time per week administering the contract, but this varies considerably from week to week (T13). She also spends much time when a successor contract is to be negotiated, but this occurs only every two years.

4. The parties' agreement provides for the following union leave time: 25 days with pay and 20 days without pay for union conferences and conventions and time off to attend daytime Board meetings.

5. She began working at the entry position of "income maintenance worker" and on January 1, 1983 she received an automatic promotion, based on her seniority, to "income maintenance technician" ("IMT") (T14). On May 19, 1984, she was provisionally promoted to "income maintenance specialist." In March, 1986, she was removed from this position, pursuant to Civil Service regulations, because she did not score high enough in the competitive examination (T17). She then returned to her prior IMT position.

6. She then became interested in applying for a vacant "training technician" position. This is the entry level position in the training department and the primary duty of this position is to train new employees, hired as income maintenance technicians, in a six-week training course. She neither evaluates or supervises employees in this position (CP-1). At the time Hartsfield applied, there were three positions in the training department: "training technician," "assistant training supervisor" and "training supervisor." These positions are not represented by any collective negotiations unit (T21).

7. Hartsfield took the exam for training technician. She received the highest score and applied for the position.^{4/} (1T23)

^{4/} This was the third time she applied for this position. In October 1985, she decided to accept the provisional income maintenance specialist position; in February, 1986 the second highest score accepted the position (the highest score had declined to apply).

Candidates for promotion are interviewed by the Board's personnel committee. The personnel committee, itself, is composed of either one or two Board members. (2T49) In addition, several staff members, while not actually on the committee, attend interviews, ask questions and function generally as resource aids for the Board members (2T49). The Board committee members, after the interview and review of personnel file, make recommendations to the full Board to determine who is to be promoted (2T50).

8. On September 23, 1986, the personnel committee interviewed Hartsfield. Present for this interview were Mary Ryan, the Board Personnel Committee Chairwoman; the Board's Deputy Director, Peter Kerner; Al Liotta, Personnel Officer and Mary Comeru, the training supervisor. Hartsfield explained her qualifications and her reasons for applying for the job to the committee (T24). Ryan then asked Hartsfield whether she could fairly evaluate a technician since she was active in the union (2T56). Hartsfield responded that she could, but did not understand the question's relevance since she would not be evaluating the new trainees; rather, the Department Head would. Mary Comeru then asked her whether she would resign as union president in the event she were offered the position (1T32). Hartsfield responded that she planned to continue as president. Liotta then said that he believed there was a conflict between the union president and the training technician's position. Hartsfield again responded that there would be no conflict because her duties would be to teach the rules and

regulations of the program's administration and not establish Board policy (1T34). Comeru then asked whether her time off for union activities would interfere with her new position. Hartsfield responded that it would not. Liotta then said he believed there was a conflict in two positions (T35).

Hartsfield then contacted CWA national headquarters: they advised that it was up to the membership whether she could continue as president (T37). She so informed Comeru. Comeru responded that she believed her union activities and specifically, negotiations would interfere with the Training Technician position (1T38-39).

9. Hartsfield was concerned that she would not be considered for the promotion. She spoke with Giluppo, the Board's director. He was aware of the discussion and believed that Hartsfield should step down as president in order to receive the promotion (1T41). Hartsfield said she could perform both duties (1T41). Giluppo reiterated his opinion in a phone conversation the next day -- the day of the Board meeting. Hartsfield became upset; the conversation terminated (1T42). That night, the Board voted to promote Joan Wainer (1T43). She was third on the promotion list.

The next day, Hartsfield asked Liotta why she was not promoted. He responded that he deferred to Director Giluppo's preference (1T45). Giluppo then responded in a written memo. It stated, in pertinent part:

The Board has the difficult task of choosing among several qualified candidates. The fact that someone else was appointed does not mean that you were considered unqualified. I hope you

will not be deterred from applying for advancement in the future.

Comeru, during discussions with the committee, had expressed reservations whether Hartsfield could handle both the training position and her union duties (2T57-58). Her concern was that it would be disruptive for the training classes to be disrupted because the technician left to perform union duties (2T58). The personnel committee, which was composed solely of Mary Ryan, recommended Joan Wainer for the training technician position (2T51; 2T55) and the full Board followed this recommendation. According to Liotta, the Board selected Wainer because she was more qualified. He did not know, however, why the Board believed Wainer was more qualified than Hartsfield (2T53).

Joan Hartsfield has received 16 evaluations since 1980. Employees receive one of five ratings: unsatisfactory; below average; average; excellent and exceptional. Hartsfield has been rated excellent five times; she has been rated exceptional eleven times. She was also commended in June 1985. Her supervisor, in part, said "Ms. Hartsfield's strong personality, intelligence, dedication and sense of fairness exemplify the traits of an excellent supervisor and I strongly recommend she be highly considered for this title should an opportunity arise." She has no negative evaluations or reprimands in her file.

Daniel Vacula has received 14 evaluations. He has never received an exceptional evaluation. He has been rated excellent five times; average eight times and below average once. He was also

reprimanded once and suspended without pay for a day because of chronic lateness.

Joan Wainer has been evaluated 17 times. She has been rated excellent 14 times; average three times. She has never received an exceptional rating. She has been disciplined eight times for lateness -- the last time was January 29, 1986.

Hartsfield next applied to be investigator (1T49). She was no. 2 on the Civil Service list and advised of her interest in November, 1986 (1T50). (The no. 1 person was promoted to another position (1T51)). She was interviewed by members of the personnel committee and investigators in the Welfare Fraud Unit (1T51-52). The personnel committee was composed of Board members Ryan and Southers. In addition, the personnel officer, deputy director and members of the fraud unit, consisting of Joseph Williams, Ralph Sullivan and Ruth Brown, were present (2T63). Ruth Brown asked Hartsfield if she would withdraw her unfair practice charge in the event she were promoted. The Deputy Director immediately responded that was an unfair question (1T53-54). Sullivan asked whether, in the event she were successful with the charge, she would still be interested in the investigator position (1T54). Hartsfield said that was an unfair question.

On November 17, the Board met to consider who to promote (1T55). Hartsfield spoke at the public portion: she said the questioning concerning the unfair practice charge was unfair and asked the Board to investigate why the issue was raised and delay

making an appointment until the review had been completed. The Board refused the request. Jeff Robinson and Lauren Marty, who had ranked third and fourth, were appointed instead (1T56). She called Ruth Brown to complain. Brown said "she didn't want another union person in the unit" (1T57; 1T59). Brown then told another investigator "she had nothing personal against [Hartsfield], nothing against her work product or her employment background, she just didn't want another union person in the welfare fraud unit" (2T29; 2T38). There were other union officials in the unit (2T45).

Positions of the Parties

CWA contends that it proved the Board discriminated against Hartsfield because of her union activity when it did not promote her to Training Technician and Investigator. It asserts that it is undisputed that she engaged in protected activity and that the Board knew it. It further asserts that the Board was hostile to that activity, citing the following evidence: Hartsfield was best qualified for both positions; the Board's representatives expressed reservations about her union activity, made statements that her union activity would interfere with the positions, and that there were enough union officials in the positions. CWA further asserts that the Board did not establish an independent business justification that it would have taken the same action absent her union activity.

CWA contends that the statements made by the Board's representatives independently violated the Act. Finally, it asserts

that the Board violated subsection 5.4(a)(4) of the Act by implying that she would be promoted if she withdrew her unfair practice charge.

The Board contends that CWA failed to establish that Hartsfield's union activity was a substantial factor in the Board's decision not to promote her. It asserts that the Board decided to appoint other, more qualified applicants. It asserts that Hartsfield did not have a college degree and little teaching experience and that those promoted had both.

On January 25, CWA responded. It objects to the Board's proffered reasons for not appointing Hartsfield because these reasons are not in the record.

The central issue is whether the Board illegally discriminated against Hartsfield when it denied her two applications for promotion.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), 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 employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as

pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the Commission to resolve.

I first consider the training technician position. There are relatively few facts in dispute. Hartsfield engaged in union activity and the Board knew it. I also find that the Board was hostile to this activity. I conclude that the Board did not promote Hartsfield because of her union activity. The evidence virtually compels this conclusion. The promotional interview was dominated by questions and comments concerning whether Hartsfield would be able to perform her duties as a training technician given her position as union president. Hartsfield responded that she could. Nevertheless Giluppo twice advised Hartsfield that she should step down as union president if she wanted the promotion. Hartsfield refused. She was not promoted. All of this establishes that her union activity was a "substantial or motivating" factor in the Board's decision not to promote her.

Under Bridgewater, the burden now shifts to demonstrate that the same action would have taken place even in the absence of the protected activity. Id. at 242. In its' brief, the Board has asserted that Hartsfield was not promoted because she did not have a college degree and Wainer did. I cannot consider this purported justification because there is nothing in the record to support it. No one at the hearing testified concerning the Board's reasons for not promoting Hartsfield. Nor does her union activity conflict with the position. First, the training technician is not a supervisory position. There is nothing to show that there is a conflict of interest between her union activities and her position as training technician. She neither evaluates or supervises such employees. Compare W. Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971). To the contrary, based on her past record, Hartsfield was the most qualified based on the objective criteria: she was ranked first on the Civil service list, had the best evaluations of those considered and had no past disciplinary record. Nor, under this case's circumstances, does her responsibilities as union leader justify denying her a promotion. The Board retained the right under Article III, D of the contract to limit her leave to the Director's approval. They could have attempted to work out a reasonable accommodation. Instead, they flatly refused to appoint her after she refused to step down from her union duties. This, I believe, violates subsection 5.4(a)(3) of the Act: Hartsfield was discriminated against because of her union activity.

I also find that the Board unlawfully discriminated against Hartsfield when she was not promoted to "investigator." Again, she was most qualified: she ranked first. But she engaged in union activity and the Board knew it. The Board, through Ruth Brown, expressed hostility to that activity: Brown said she didn't want another union person in the unit and Brown explained that was why Hartsfield was not selected. The Board's defense that Brown did not play a role in the ultimate decision is not persuasive under these circumstances. The Board did not call any witnesses that would explain why Hartsfield was not selected. Specifically, no Board member testified. The Board, rather, is asking me to speculate as to why she was not promoted. Given Brown's unrebutted statements, I cannot so speculate. I cannot give the Board a favorable inference given its failure to call such witnesses. See State v. Clawans, 38 N.J. 162,171 (1962); Wild v. Roman, 91 N.J. Super 410 (App. Div. 1966). CWA established a prima facie case. The Board did not rebut it: it never established a legitimate business justification.

Hartsfield has since been promoted to "social worker." This, contrary to the Board's argument, does not rebut a discrimination finding. The fact that she was not discriminated on one occasion does not mean that she never was. Nor does this affect the remedy. Hartsfield is entitled to be made whole. She should be offered both positions and receive back pay and interest from the time she was first discriminated against.

The remaining issue is whether Brown's statements implying that Hartsfield would be promoted if she withdrew her pending unfair practice charge violated the Act. This statement, however, was immediately disavowed by other Board representatives. The Board cannot be responsible for statements it did not authorize and immediately disassociated itself from. I recommend that this aspect of the charge be dismissed.

Conclusions of Law

The Union County Board of Social Services violated subsections 5.4(a)(1) and (3) of the Act when it did not promote Joan Hartsfield to "training technician" and "investigator."

Recommended Order

I recommend the Commission order the Union County Board of Social Services to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by not promoting Joan Hartsfield to "training technician" and "investigator" because she engaged in union activity.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act by not promoting Joan Hartsfield to "training technician" and "investigator" because she engaged in union activity.

B. Take the Following affirmative action:

1. Offer Joan Hartsfield promotions to the "training technician" and "investigator" positions.


2. Make Joan Hartsfield whole for lost wages and other benefits she would have received had she been promoted to training technician and investigator; plus interest pursuant to R. 4:42-11(a)(ii).

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.

I recommend that the Complaint's remaining allegations be dismissed.



David F. Corrigan
Hearing Examiner

DATED: May 16, 1988
 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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by denying Joan Hartsfield promotions to "Training Technician" and "Investigator" because she engaged in union activity.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by denying Joan Hartsfield promotions to "Training technician" and "Investigator" because she engaged in union activity.

Docket No. CO-87-115-81

UNION COUNTY BOARD OF SOCIAL SERVICES

(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.