

P.E.R.C. NO. 88-81

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Respondent,

-and-

Docket Nos. CO-87-54-48 and  
CO-87-124-66

CARTERET PBA, LOCAL 47,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Borough of Carteret violated the New Jersey Employer-Employee Relations Act when its chief demanded an increase in his PBA convention allotment and then transferred and reassigned employees in retaliation for the PBA's refusal to grant the chief additional monies. A Commission Hearing Examiner recommended this conclusion and the Commission adopts it.

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Docket Nos. CO-87-54-48 and  
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CARTERET PBA, LOCAL NO. 47,

Charging Party.

Appearances:

For the Respondent, John W. Spoganetz, Esq.

For the Charging Party, Dr. Simon Bosco

DECISION AND ORDER

On August 19 and November 14, 1986, Carteret PBA Local No. 47 ("PBA") filed unfair practice charges against the Borough of Carteret ("Borough"). The charges allege the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (3),<sup>1/</sup> when its police chief, Joseph Sica, transferred detective Michael Materazzo to patrol duty and transferred lieutenant Michael Hack and patrol officers John Rivers and Gary Guiliano to a new patrol with a new

<sup>1/</sup> 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."

work schedule. The charges allege that Materazzo was transferred because he opposed the chief's request for an increase in his PBA convention allotment and that the other officers were transferred because they also opposed the Chief's request and advised the prosecutor about it. On December 23, the PBA amended the charge to allege that sergeant Robert Terebetski was discharged because he also opposed the chief's request.

On October 17 and December 8, 1986, Complaints, a Notice of Hearing and an order consolidating the cases issued.

On December 1 and 19, 1986, the Borough filed its Answer. It denies that the personnel actions were taken because the officers opposed an increased allotment or made statements to the prosecutor.

On November 14, December 3 and 4, 1986, January 28, February 18 and 20 and March 5, 1987, Hearing Examiner Edmund G. Gerber conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

On January 6, 1988, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-31, 14 NJPER \_\_\_\_ (¶ \_\_\_\_ 1988). He concluded that the Borough violated subsection 5.4(a)(2) by interfering with the PBA's administration when the chief demanded an increase in his convention allotment. He found that this demand "created an impermissible tension between his PBA membership and his status as an agent of the Borough." He further found that the Borough violated subsection 5.4(a)(3) when the chief transferred Materazzo to patrol duty and reassigned Hack, Rivers and Guiliano.

The Hearing Examiner, based in part on his credibility determinations, concluded these actions were taken in retaliation for the PBA's refusal to grant the chief additional monies. As a remedy, he recommended that the employees be restored to their positions with salaries that they would have been entitled to had they not been transferred, plus interest. He also recommended a cease and desist order and posting. He further concluded that the Borough violated the Act when it unilaterally instituted the new shift schedule for the affected patrol officers. However, he found that the Borough did not violate the Act when it terminated Terebetski. He found that Terebetski was disabled and that the Borough had no suitable employment for him.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before January 20, 1988. Neither party filed exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-13) are accurate. We adopt and incorporate them here.

Under all the circumstances of this case, we agree that the chief's actions violated the Act. He interfered with the PBA's administration when he used his position to attempt to influence the PBA to increase his convention allotment. He then violated the Act when he retaliated against those who opposed his request. Although it appears that Detective Materazzo's work performance had been less than adequate, the record establishes that he was transferred because he refused the chief's request. Finally, we agree that the

Borough would have terminated Terebetski because of his disability even absent his protected activity. We also agree that unilaterally instituting the new work schedule violated the Act.

ORDER

The Borough of Carteret, through its police chief, is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by transferring Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano in retaliation for opposing the chief's request for an increase in his PBA convention allotment and by assigning police officers to a new work schedule without first negotiating with the PBA.

2. Dominating or interfering with Carteret PBA Local #47 by requesting a convention allotment increase from the PBA for having secured outside employment for PBA members.

3. Discriminating in regards to a term and condition of employment to discourage employees in the exercise of their rights guaranteed to them by the Act by transferring Michael Materazzo to patrol duties and assigning Michael Hack, John Rivers and Gary Guiliano to a new work schedule in retaliation for opposing the chief's request for a convention allotment increase.

4. 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, particularly by unilaterally adopting a new work schedule with different work days and hours.

B. Take the following affirmative action:

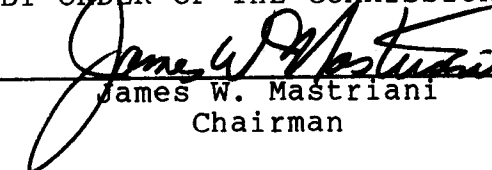
1. Restore Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano to the positions held before their transfers. Pay to Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano all salaries and benefits that they would have been entitled to had they not been transferred plus interest at the rate authorized by R. 4:42-11(a).

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

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

C. The remaining allegations in the Complaint 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  
March 18, 1988  
ISSUED: March 21, 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 rights guaranteed to them by the Act, particularly by transferring Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano in retaliation for opposing the chief's request for an increase in his PBA convention allotment and by assigning police officers to a new work schedule without first negotiating with the PBA.

WE WILL cease and desist from dominating or interfering with Carteret PBA Local #47 by requesting a convention allotment increase from the PBA for having secured outside employment for PBA members.

WE WILL cease and desist from discriminating in regards to a term and condition of employment to discourage employees in the exercise of their rights guaranteed to them by the Act by transferring Michael Materazzo to patrol duties and assigning Michael Hack, John Rivers and Gary Guiliano to a new work schedule in retaliation for opposing the chief's request for a convention allotment increase.

WE WILL cease and desist from 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, particularly by unilaterally adopting a new work schedule with different work days and hours.

WE WILL restore Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano to the positions held before their transfers. Pay to Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano all salaries and benefits that they would have been entitled to had they not been transferred plus interest at the rate authorized by R. 4:42-11(a).

CO-87-54-48  
Docket No. CO-87-124-66

BOROUGH OF CARTERET  
(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. 88-31

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

In the Matter of

BOROUGH OF CARTERET

Respondent,

-and-

Docket Nos. CO-87-54-48 and  
CO-87-124-66

CARTERET PBA, LOCAL 47

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Borough of Carteret committed unfair practices when the Chief of Police of Carteret transferred employees in retaliation for the Carteret Police Benevolent Association, Local #47's refusal to increase the Chief's convention allotment and for giving statements to the Middlesex County Prosecutor with regard to the Chief's conduct in this matter.

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. 88-31

STATE OF NEW JERSEY  
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CARTERET PBA, LOCAL 47

Charging Party.

Appearances:

For the Respondent,  
John W. Spoganetz, Esq.

For the Charging Party,  
Dr. Simon Bosco

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On August 19, 1986, Carteret PBA Local #47 ("Local #47") filed an unfair practice charge alleging that the Borough of Carteret ("Borough") violated subsections 5.4(a)(1), (2) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")<sup>1/</sup> when Police Chief Joseph Sica transferred Detective Michael

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<sup>1/</sup> 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

Footnote Continued on Next Page

Materazzo to patrol duty. Local #47 alleges that Sica transferred Materazzo, a PBA delegate, in retaliation for its refusal to consider Sica's request for a PBA convention allotment increase. Local #47 alleges that Sica sought the allotment increase after he had obtained off-duty employment for Local #47 members.

A Complaint and Notice of Hearing issued on October 17, 1986.

On November 14, 1986, the Borough moved to dismiss the Complaint. The motion was denied.

On November 14, 1986, Local #47 filed a second unfair practice charge (CO-87-124-66) alleging that the Borough violated subsections 5.4(a)(1), (2) and (3) of the Act when Sica transferred Lt. Michael Hack and Patrolmen John Rivers and Gary Guiliano to a newly created patrol beat with a non-negotiated work schedule. Local #47 alleges that Sica transferred the officers because they opposed his request for an allotment increase and because they gave testimony to the Prosecutor's Office about the Chief's conduct.

On December 1, 1986, the Borough filed an Answer to the original complaint (CO-87-54-48), stating that it transferred Materazzo based on his poor performance.

A Complaint and Notice of Hearing and an Order Consolidating the second charge with CO-87-54-48 issued on December 8, 1986.

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1/ Footnote Continued From Previous Page

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."

On December 19, 1986, the Borough filed an Answer to CO-87-124-66, stating that it exercised a managerial prerogative to create a neighborhood patrol and that the transfers of Hack, Rivers and Guiliano were not unlawfully motivated.

On December 23, 1986, Local #47 amended the consolidated Complaint and alleged that Sgt. Robert Terebetski was discharged because he opposed Sica's proposal for an increased allotment. The Borough denies these allegations and maintains that Terebetski was discharged because he was disabled.

Hearings on these matters were held on November 14, December 3 and 4, 1986; January 28, February 18 and 20, and March 5, 1987. The parties filed briefs by May 18, 1987.

Based on the entire record, I make the following:

FINDINGS OF FACT

The Borough is a public employer with the meaning of the Act and is subject to its provisions.

Local #47 is an employee organization within the meaning of the Act and is subject to its provisions. It represents a collective negotiations unit consisting of captains, lieutenants, sergeants and police officers employed by the Borough's Police Department.

Joseph Sica is the Borough's Chief of Police. Though not included in Local #47's collective negotiations unit, Sica is a fraternal PBA member. His membership entitles him to a yearly stipend for PBA convention expenses.

Sometime in Spring 1986, a representative of Herman's World of Sporting Goods (Herman's) contacted Sica and requested that the Borough provide a police officer for traffic control at its warehouse in the Borough. The Chief indicated that the Borough could not provide an on-duty patrolman to direct traffic but that Herman's could hire off-duty officers subject to the Chief's approval. The Chief agreed to allow off-duty officers to work the assignment and he negotiated an hourly rate of \$25 with Herman's agent.

Michael Materazzo was a detective in the department since 1974 and worked in the narcotics squad since 1972. Although the position of detective is not a rank per se, those assigned to the detective bureau receive a yearly stipend of \$800 and are not required to wear uniforms. Materazzo is also a PBA delegate.

Shortly after the Chief obtained the new off-duty job, he called Materazzo into his office. Sica told Materazzo about the Herman's job. The Chief had calculated that Local #47 members would earn approximately \$6500 annually from the job. Sica requested that Local #47 increase his convention allotment by \$650 (10% of the \$6500) each year. Materazzo told Sica that he disliked the proposal because the \$650 increase would bring the Chief's total convention allotment to more than \$1000. Materazzo's testimony about this discussion differs from Sica's. Sica did compare the \$650 for convention expenses to the \$6,500 that the Herman's job would bring in. Materazzo's testimony was the more candid, forthright and believable and I credit it.

Materazzo also opposed a request by Sica to increase his convention allowance in 1985. The Chief requested his allowance of \$415 be doubled because he had not attended the convention the previous year. The Chief's request was considered at a PBA meeting and rejected. Consequently, the Chief discontinued a practice of permitting Local #47 the use of a secretary for typing. The Chief also told Materazzo that he was going to "straighten things out" and that no union business would be permitted on Borough time. Local #47 subsequently reconsidered the Chief's request and gave him the \$830.

In June 1986, Sica also contacted Daniel Tarrant, President of Local #47, and explained that he had negotiated the new off-duty deal and that he wanted the \$650 or 10% of the amount that Local #47 members would earn in a year. The Chief told Tarrant that the \$650 should come to him in the form of a convention allotment increase from the PBA and he had already discussed this with Materazzo.

Patrolman Gary Guiliano was Local #47's president in 1984-85. On the same day that Sica talked with Materazzo, Lt. Nagy told Guiliano's crew that the Chief had obtained a new off-duty assignment. On June 24, 1986 Sgt. Platt, on Nagy's orders, called a meeting of the 7 a.m. shift. Platt informed this crew of the new off-duty job and requested that they attend a union meeting that evening to vote the Chief the right to obtain 10% of the deal. Guiliano replied that he didn't think it was Platt's place to tell officers how to vote at a union meeting. Platt was angered at Guiliano's reply and the two nearly came to blows. Guiliano walked out of the meeting.

Guiliano and Platt met later that day and Guiliano apologized. They shook hands and Platt said that it was better to have the Chief on their side and the crew should give him a vote of confidence.

Sica returned from a Police Chiefs' convention in Great Gorge on the afternoon of June 24, 1986. He stopped at a service station owned by Sgt. Terebetski. Lt. Hack, who was working for Terebetski at the station, told Sica about the argument between Platt and Guiliano. He also told Sica that Platt advised his crew to vote for the allotment increase at the union meeting that evening. Hack told Sica that he understood that patrolmen working the new assignment would kick-back \$2.50 from each shift to the Chief. The Chief became angered and drove to the police station.

Later that day, the Chief ordered the day shift to his office. Materazzo and patrolmen McFadden, DeFelice, Platt and Guiliano responded. The Chief, very agitated, told the officers that he was aware of the union meeting scheduled for that evening. He also told them to shove the money up their a--, and then pointed at each officer and profanely ordered them out of his office.

That night, the issue of paying the Chief was not considered at the union meeting. After the meeting, Nagy told Materazzo that he should have raised the matter and that the Chief would now be a raving maniac and that heads would roll. Approximately one hour after the meeting, another officer told Materazzo that he was going to be transferred.

After the union meeting, Lt. Nagy called together the members of his crew and asked each one if they had threatened to sign a complaint against one of his officers. Guiliano admitted that he made such a threat in his argument with Platt. Nagy responded that if Guiliano did not like the way the crew was run he would transfer him. Nagy added that when Platt asked the crew to vote for the Chief's money, the request had come from Nagy.

Shortly after the union meeting on June 24, 1986, Sica called the Mayor (who is Chief Sica's brother) and asked to speak with the City Council, which was also meeting that night. The Mayor agreed and Chief Sica arrived at the Council meeting at approximately 10 p.m. Sica advised the Council that he couldn't take Terebetski anymore, that he was like a knife in his back, and that Materazzo had not been doing his job and should be reassigned into a patrol bureau. Councilman Szczesny asked Sica if the transfer was related to the proposed arrangement with the Herman's and the Chief replied that it was. I make this finding despite the fact that two Councilmen and the Mayor could not recall Szczesny asking the question. Chief Sica testified that he replied "No" to the question. Sica admitted the question was asked. These inconsistencies among the Borough's witnesses leads me to discount their testimony and credit that of Szczesny's.

On the following day, June 25, 1986, Materazzo was transferred into a patrol squad. Shortly after he was advised of his transfer, Materazzo and Officers Tarrant, Terebetski, DeFelice, Rivers and Guiliano gave statements to the County Prosecutor's Office about the



circumstances of the previous few days. Later that day Sica told Terebetski that he was recommending Terebetski's discharge to the Mayor and Council.

Sica maintains that Materazzo was transferred because of his poor performance as a narcotics detective. Sica asserts that although Materazzo was an outstanding detective at one time, his performance began to deteriorate in 1983 when he was promoted to sergeant. Civil Service found the promotion improper and the promotion was rescinded. In May 1985, following a narcotics overdose death in a local trailer park, Sica assigned Materazzo to investigate drug dealing in the area. Sica testified that Materazzo did not conduct an investigation. He based his opinion on Materazzo's failure to file any reports. Materazzo denied that he failed to conduct an investigation and explained that he never filed a report because he made no arrests. In January 1986, following a second drug overdose death at the same trailer park, Sica again assigned Materazzo to investigate. No arrests were made and no reports filed. Between January and June 1986, Materazzo made a total of four arrests, two of which were drug-related. In May 1986, Sica gave Materazzo the names of three people suspected of drug dealing in a section of Carteret known as the "Chrome area." Materazzo conducted an investigation but no arrests were made. Materazzo explained that he was known in the area and that this hampered his effectiveness in the investigation.

Sica insists that he had decided to transfer Materazzo before the dispute arose about the new off-duty job. He stated that on June 23, 1986, he told Lt. Nigro that he was considering transferring

Materazzo. Nigro's testimony, however, contradicts Sica's. According to Nigro, he and the Chief had several discussions about increasing personnel in the narcotics bureau in June 1986. Nigro agrees that he met with the Chief on June 23 but, testified, in contradiction to the Chief, that the Chief told him that the Borough would provide narcotics with anything it needed. He also asserted that they drafted a proposal for a narcotics squad under which Materazzo would head the squad and the Department would place two additional detectives in the narcotics bureau. According to Nigro, the Chief's only concern was to get Materazzo motivated. Nigro admitted that there was a general feeling that Materazzo was not getting work done and that he (Nigro) had once recommended that Materazzo be transferred to a different division of the detective bureau. However, Nigro was surprised when, on June 25, the Chief advised him that Materazzo had been transferred to patrol duty. Nigro testified that the Chief had made no mention of such a transfer on June 23.

I credit Nigro's testimony about the events of late June. His testimony was straight-forward and had the ring of truth. Further, he had nothing at stake in the dispute over the off-duty arrangement. Sica, in contrast, appeared to be reaching for a justification of Materazzo's sudden transfer. I do not believe that Sica had planned to transfer Materazzo prior to Materazzo's involvement in the off-duty job dispute. Sica never warned Materazzo that he would be transferred unless his performance improved. It is significant that no allowance for a proper inventory of narcotics evidence was made at the time of

the transfer. Materazzo was responsible for the storage of this evidence (which is necessary to establish the chain of possession). Materazzo had to spend several days after the transfer conducting an inventory. There is no question that Materazzo's transfer was made in haste.

On September 5, 1986, Sica assigned Lt. Hack and Patrolmen Guiliano (a former Local #47 president) and Rivers to a new patrol division. Hack was to oversee Guiliano and Rivers, who were to work a beat in the Chrome district on a four-day on, four-day off, ten-hour day rotation. Everyone else worked a five-day on, two-day off, eight-hour rotation. Sica created the new section and implemented the new schedule without negotiating with Local #47. Hack, Guiliano and Rivers all gave statements to the County Prosecutor about Sica's request for an increase in his convention allotment and the Herman's job.

Sica said he created the new patrol as a community relations program in response to requests from local merchants. The program is apparently similar to one tried in Flint, Michigan. Sica asserts that he picked Guiliano because he knew the neighborhood and had made several arrests there. He asserts that he chose Rivers because he had a degree in criminology and was bi-lingual. Sica testified that he was not aware of the identity of the officers who testified to the County Prosecutor.

I have found that Sica willfully testified falsely as to his reasons for transferring Materazzo. He was attempting to deceive the

trier of the facts about the motivation for Materazzo's transfer. Absent compelling, independent corroborating evidence concerning the motivation for the transfers of Rivers, Guiliano and Hack, I cannot credit Sica's testimony as to the motivations for their transfers. See Model Jury Charges: Criminal, New Jersey State Bar Association New Jersey Institute for Continuing Legal Education:

4.150 False in One - False in All

If you believe that any witness or party willfully or knowingly testified falsely to any material facts in the case, with intent to deceive you, you may give such weight to his or her testimony as you may deem it is entitled. You may believe some of it or you may, in your discretion, disregard all of it. State v. Ernst, 32 N.J. 567, 583 (1960); State v. D'Illoposito, 22 N.J. 318, 324 (1956). (other citations omitted)

The same charge applies to the civil side. Lawnton v. Virginia Stevedoring Co., 50 N.J. Super. 564, 581 (App. Div. 1958); Hargrave v. Stockloss, 127 N.J.L. 262, 266 (E. & A. 1941).

The Borough insists that Robert Terebetski was dismissed because he was disabled and that it had no other suitable employment for him. In 1984, Terebetski injured his knee which required two corrective surgeries. In December 1985 he applied for a service-connected disability pension which was granted in May 1986. A service-connected disability would have entitled him to a benefit of 60% of his salary. It was determined, however, that his injury was not service-connected. He received a pension totalling 40% of his salary.

At the time of his injury, Terebetski was in the patrol division. He had worked four or five months when a second operation was needed. His knee continued to bother him. In February 1985, Sica

assigned Terebetski to the record bureau. In April 1986, the Chief told Terebetski that he would either have to resume patrol or file his pension papers; Terebetski went back on patrol. He received a final determination for his pension benefits sometime in the second week of May. Terebetski then discussed the matter with Sica, stating that he had no problem performing his duties. The Chief replied that he wanted to speak with the Borough's attorney. The Borough Attorney advised Sica not to keep Terebetski on patrol. If his knee gave out while on duty, the Borough might be liable for damages which resulted from Terebetski's inability to respond to an emergency. In the meantime, Terebetski contacted the pension system and was told that it was not uncommon for employees who otherwise qualify for pensions to be allowed to remain on-duty if employment which did not interfere with the disability was available. It was up to the Borough to notify the pension system that they had alternate employment for Terebetski.

Terebetski had been a patrolman for the Borough for approximately fourteen years and a sergeant for six years. On June 22, 1986, at approximately 1 p.m., he overheard the Chief tell Tarrant and Materazzo not to forget about their deal. Terebetski asked what the deal was but no one responded. Later that afternoon, Terebetski again asked the Chief about the deal. The Chief responded that he had obtained the traffic duty at the rate of \$25 an hour and that he was requesting an additional \$650 in his convention allowance.

The following morning, Terebetski spoke with Guiliano who told him about his confrontation with Platt. Terebetski went on patrol and

later met Hack and Nigro and discussed the Chief's proposal with them. Terebetski later discussed the matter with Councilman Szczesny. He also gave a statement to the County Prosecutor.

Here there was an independent finding by the retirement system that Terebetski was disabled and not qualified to perform patrol duty. Terebetski did testify that for several months he was able to perform on patrol. Nevertheless, it was never disputed that Terebetski's knee might cause him problems and render him ineffective on patrol, thereby causing a risk of other harm to himself and/or the public and the determination that there was no other job available for Terebetski besides patrol duty was made prior to the Herman's incident.

#### ANALYSIS

Subsection 5.4(a)(2) prohibits public employers and their agents from "dominating or interfering with the formation, existence or administration of any employee organization." N.J.S.A. 34:13A-5.4(a)(2).

I conclude that Sica did interfere with the administration of Local #47.

After securing an off-duty assignment with a local store, Sica contacted Materazzo, a PBA delegate and "requested" that Local #47 increase his convention allotment by 10% of the projected additional annual earnings of Local #47 members. This occurred approximately one year after Sica's previous request for special consideration about convention allowances, which was granted only after Sica had withdrawn

courtesies previously extended to Local #47 and threatened to "straighten things out."

The circumstances of Sica's request created an impermissible tension between his PBA membership (even as a social member) and his status as an agent of the Borough. I conclude that his conduct unlawfully interfered with the administration of Local #47.

I further conclude that the Borough violated 5.4(a)(3) and derivatively (a)(1), when Sica transferred Materazzo to patrol duty, and reassigned Hack, Rivers and Guiliano to a new patrol with a non-negotiated schedule.

Materazzo's transfer was made in retaliation for the PBA's refusal to grant Sica an additional travel reimbursement. Rivers, Guiliano and Hack went before the County Prosecutor in direct response to Sica's acts to protect their rights as Local #47 members. It was a violation of protected rights for Sica to transfer these employees.

An employee is protected when he or she seeks enforcement of their rights in a forum outside the Commission and/or a forum created by collective negotiations, i.e., arbitration. See Arlene Spear and Burlington County Voc. & Tech. Bd. of Ed., P.E.R.C. No. 88-35, 13 NJPER 810 (¶18310 1987) appeal pending App. Div. Docket No. A-1520-87T8.

Bridgewater Township, 95 N.J. 235 (1984), establishes a two-part test for considering allegations of discriminatory conduct. A charging party must prove by a preponderance of the evidence that the employees' protected conduct was a substantial or motivating factor in the employer's adverse action. In the absence of any direct evidence

of illegal motivation for the employer's action, circumstantial evidence may create a reasonable inference that an adverse action was impermissibly motivated. In such a case, to establish unlawful motivation, the Charging Party must show that the employee engaged in protected activity, that the employer knew of this activity and that the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer presents no evidence to rebut the showing of an illegal motive, or if the reasons an employer proffered to explain the adverse action are rejected as pretextual, there is a sufficient basis for finding a violation without further inquiry.

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 even absent the protected conduct. Id. at 242. Conflicting proofs concerning the employer's motives are for us to resolve.

There was testimony from Mayor Sica and members of the Borough Council that they ordered and/or approved Materazzo's transfer. However only the Chief has the legal authority to make such transfers. See, 40A:14-118 and City of Jersey City, P.E.R.C. No. 86-12, 11 NJPER 459 (¶16163 1986).

I have previously discredited Sica's testimony about the transfers of Materazzo, Hack, Guiliano and Rivers, I find that the



Borough did not establish a dual motive and that the employees were transferred in order to discourage the exercise of protected rights.

The Borough asserted that it terminated Terebetski because he was disabled and it had no suitable employment for him. Terebetski had applied for and received a disability pension. I find that although Terebetski's actions on June 24 were protected, he would have been terminated in any event because of the determination that he was disabled and because the Chief had made a determination that there was no suitable position for Terebetski prior to the Herman's incident. See Bridgewater.

Accordingly, I find that the Borough did not violate the Act when it terminated Terebetski.

Finally, I conclude that the Borough's failure to negotiate the shift schedule of the new patrol violated subsection 5.4(a)(5) of the Act. The Borough did not demonstrate compelling managerial concerns which would have relieved it of the obligation to negotiate the new schedule.

Accordingly on the entire record in this matter, I make the following:

#### CONCLUSION OF LAW

1. The Respondent, Borough of Carteret, violated N.J.S.A. 34:13A-5.4(a)(1), (2) and (3), when on June 25, 1986, Chief Joseph Sica transferred Detective Michael Materazzo from the Detective Bureau to a

patrol squad because of Materazzo's opposition to increasing Chief Sica's convention stipend.

2. The Respondent, Borough of Carteret, violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) when Chief Sica reassigned Lt. Michael Hack and Patrolmen John Rivers and Gary Guiliano to a new patrol with a new schedule without negotiating for the new schedule in retaliation for the PBA's refusal to grant Chief Sica's request for a PBA convention allotment increase and for Rivers, Guiliano and Hack in giving statements to the Middlesex County Prosecutor in response to Sica's transfer of Michael Materazzo.

3. The Respondent, Borough of Carteret, did not violate N.J.S.A. 34:13A-5.4(a)(3) when it terminated Sgt. Robert Terebetski.

#### RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Borough 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 transferring Michael Materazzo for the PBA's refusal to grant Chief Sica's convention stipend.

2. Dominating or interfering with the administration of Carteret PBA Local #47 by seeking additional increases in his convention allotment by securing outside employment for PBA members.

3. Discriminating in regards to a term and condition of employment to discourage employees in the exercise of their rights

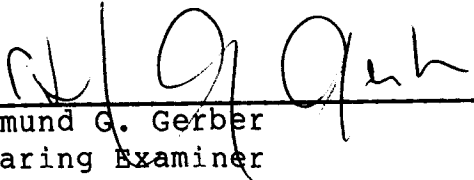
guaranteed to them by the Act by transferring Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano for their opposition to his receiving an additional convention stipend and for Gary Guiliano, Michael Hack and John Rivers giving statements to the Middlesex County Prosecutor.

B. The Respondent Borough take the following affirmative action:

1. Restore Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano to their positions prior to their transfers. Pay to Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano all salaries that they would have been entitled to had they not been transferred plus interest at the rate authorized by R 4:42-11.

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.

  
Edmund G. Gerber  
Hearing Examiner

DATED: January 6, 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 NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed to them by the Act, particularly, by transferring Michael Materazzo in response to the Carteret Police Benevolent Association, Local #47's refusal to provide increased convention stipend to Chief Sica and by transferring John Rivers, Gary Guiliano and Michael Hack giving statements to the County Prosecutor in response to the above action.

WE WILL restore Michael Materazzo, Michael Hack, John Rivers and Gary Guiliano to their positions before the illegal transfers.

CO-87-54-48  
Docket No. CO-87-124-66

Borough of Carteret  
(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.