

P.E.R.C. NO. 94-59

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT  
OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-92-304

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by Communications Workers of America, AFL-CIO, Local 1040 against the State of New Jersey (Department of Corrections). The Chairman adopts the Hearing Examiner's conclusion of law that the employer did not terminate Armand Albano in retaliation for his participation in protected activity.

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Charging Party.

Appearances:

For the Respondent, Fred De Vesa, Attorney General  
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys (Lisa  
Morowitz, of counsel)

DECISION AND ORDER

On March 18 and May 8, 1992, Communications Workers of America, AFL-CIO, Local 1040 filed an unfair practice charge and amended charge against the State of New Jersey (Department of Corrections). The charge, as amended, alleges that the employer 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), (4) and (7),<sup>1/</sup> by terminating Armand Albano, a Teacher II employed at

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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 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

Jamesburg Training School for Boys, in retaliation for his initiating a group grievance.

On June 4, 1992, a Complaint and Notice of Hearing issued. On July 10, the employer filed its Answer denying that its decisions to reprimand and terminate Albano was in retaliation for his protected activity.

On April 29 and May 13, 1993, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On September 28, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 94-4, 19 NJPER \_\_\_\_ (¶\_\_\_\_ 1993). He found that the employer did not know that Albano was participating in protected conduct at the time it made the decision to terminate him and therefore the charging party had not proved an unfair practice under the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

The Hearing Examiner served his decision on the parties and notified them that exceptions were due October 12, 1993. Neither party filed exceptions or requested an extension of time.

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1/ Footnote Continued From Previous Page

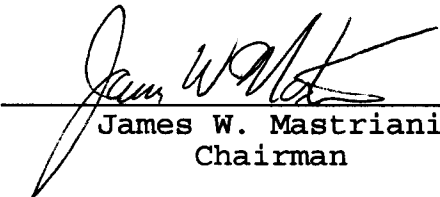
or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

Pursuant to authority granted to me by the full Commission in the absence of exceptions, I am issuing this decision. I have reviewed the record. I incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-19). I also adopt his conclusion of law that the employer did not terminate Albano in retaliation for his participation in protected activity. Accordingly, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

DATED: November 17, 1993  
Trenton, New Jersey

H.E. NO. 94-4

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

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT  
OF CORRECTIONS),

Respondent,

-and-

Docket No. CO-H-92-304

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the State of New Jersey, Department of Corrections, did not terminate Armand Albano, a teacher at the New Jersey Training School for Boys, Jamesburg, in retaliation for his filing a grievance against his immediate supervisor, an action protected by the New Jersey Employer-Employee Relations Act. The Hearing Examiner finds that the employer did not know that Albano was participating in protected conduct at the time it made the decision to terminate him.

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. 94-4

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

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT  
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AFL-CIO, LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Fred DeVesa, Attorney General  
(Stephen M. Schwartz, Deputy Attorney General)

For the Charging Party,  
Weissman & Mintz, attorneys, (Lisa Morowitz, of counsel)

**HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION**

On March 18, 1992, the Communications Workers of America, Local 1040 ("CWA") filed an unfair practice charge (C-3A)<sup>1/</sup> with the Public Employment Relations Commission ("Commission") against the State of New Jersey, Department of Corrections ("State" or "DOC"). On May 8, 1992, the CWA filed an amended unfair practice charge (C-3B). The CWA alleges that the DOC violated the New Jersey

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<sup>1/</sup> Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "J" refer to joint exhibits, and those marked "CP" refer to the charging party's exhibits. The transcript citation "1T1" refers to the transcript developed on April 29, 1993, at page 1, and the citation "2T1" refers to the transcript developed on May 13, 1993, at page 1.

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1), (2), (3), (4) and (7)<sup>2/</sup> By terminating Armand Albano, a Teacher II employed at Jamesburg Training School for Boys in retaliation for his initiating a group grievance.

On June 4, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On July 10, 1992, the State filed its Answer (C-2) generally denying that it violated the Act and that its decision to reprimand and terminate Mr. Albano was in retaliation for his exercise of protected activity. Hearings were conducted on April 29, and May 13, 1993, at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the charging party's case, the State made a Motion to Dismiss (1T113). I denied the Motion (1T122). At the conclusion of the State's case, the State renewed its Motion to Dismiss (2T162). I reserved my ruling on the State's

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<sup>2/</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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

Motion (2T169). My ruling on the State's Motion to Dismiss is subsumed within this recommended report and decision. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by July 27, 1993.

Upon the entire record, I make the following:

#### FINDINGS OF FACT

1. The parties stipulated that the State, DOC, is the public employer and the CWA is the public employee representative within the meaning of the Act (1T9). The parties also stipulated that at all times relevant to the charge, Albano was a public employee within the meaning of the Act (1T9-1T10).

2. In September, 1991, Albano was hired as a Teacher II at the New Jersey Training School for Boys, Jamesburg ("Jamesburg") (1T20). Jamesburg is a minimum security facility for males between the ages of 12 and approximately 20, maintained by the DOC (1T21; 1T125). Albano was assigned to teach a basic skills program to approximately 12 inmates assigned to Cottage 4. Cottage 4 contained inmates classified as substance abusers (1T126). Albano's morning and afternoon classes each consisted of approximately 6 students (1T21).

3. Albano's Teacher II classification is contained in the professional unit. The Teacher II title is included in the unclassified service of State government. Article V, J., of the



collective agreement (J-1) sets forth the disciplinary procedure applicable to unclassified employees. Article V, J., details the disciplinary appeal procedure for unclassified employees who have been employed for a minimum of six months. The contract contains no appeal rights for unclassified employees who have served less than six months.

4. Angelo Cetrulo, Supervisor, Juvenile Unit, Cottage 4, is responsible for overseeing Cottage 4 residents' behavior (2T41-2T42). One morning in October, 1991, Albano telephoned Cetrulo's office to advise him that Albano was having problems with three inmates (2T58). In response to the phone call, Cetrulo decided to have a meeting with Albano, Gene Dolnick, who was then serving as either the Assistant Supervisor of Education or the Director of Professional Services,<sup>3/</sup> Cheryl Palermo,<sup>4/</sup> who at that time was serving in the title Assistant Supervisor of Education and was Albano's immediate supervisor, and the three inmates to discuss the problem (2T58-2T59). Previously, Cetrulo and Dolnick had convened similar meetings under similar circumstances in an effort to resolve student problems although Dolnick's meetings were with the social services staff, rather than the teaching staff (2T38; 2T45). Cetrulo wanted Dolnick to attend the meeting because Dolnick sat on the classification committee and wanted him to

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<sup>3/</sup> Dolnick was unsure of exactly which title he served in during the October, 1991 through February, 1992 period.

<sup>4/</sup> Palermo arrived at the meeting late (1T24).

witness the students' behavior (2T44). Cetrulo believed that the problems raised by the students were of a disciplinary nature and, therefore, should be brought before the classification committee for corrective action (2T30-2T31; 2T60). Dolnick understood that the purpose of the meeting was to allow the inmates to show their improper behavior in front of Albano, thus, providing support for Albano to show that he was not at fault for the problems the inmates were having in the classroom (2T6). Cetrulo did not believe the students and thought the meeting would be a source of embarrassment for the students (1T106; 1T110). No one explained to Albano the nature of the meeting or what he might expect to occur. The meeting lasted between 30 and 90 minutes (1T25; 2T32; 2T47).

5. The three inmates did most of the talking during the meeting (1T59). The inmates used vulgarities, made gestures and aimed epithets at Albano during the meeting (1T25). At one point, Albano called an inmate a liar and the student responded by calling Albano a liar (2T46). The students' discourse was loud, hostile and agitated. (2T35; 2T57). During the meeting, Dolnick, Palermo and/or Cetrulo took steps to attempt to control the inmate's behavior (1T60; 2T35). One of the inmates became "verbal", raised his voice, used hostile words and appeared agitated (1T60-1T61; 2T47; 2T57). The inmate stood for less than a minute (1T61). Cetrulo stood and told the inmate to settle down (2T47).

6. Although Dolnick thought that Albano was inciting the inmates, he also believed that the meeting got out of control

(1T131-1T132). Dolnick told Albano that he was sorry that Albano was subjected to the students' outbursts during the meeting (1T25; 1T61-1T62; 2T35; 2T48). Cetrulo did not apologize to Albano for what occurred in the meeting (1T25; 2T49).

7. The day after the meeting, Albano told Dolnick that he felt the meeting had undermined his authority as a teacher (2T36). Albano went to Cetrulo's supervisor, Major Smith, and told him what occurred during the meeting with the inmates. Smith told Albano that he knew nothing about the incident and arranged a meeting between himself, Albano and Cetrulo. At the conclusion of the meeting, Smith admonished Cetrulo for allowing the inmates to get out of control (1T27-1T28).

8. Albano never filed a grievance concerning the meeting. Albano spoke to shop steward Ben McNally regarding the incident. McNally told Albano that he would talk to Cetrulo, however, Albano heard nothing further from McNally (1T25-1T27).

9. From the outset of his employment, Albano found it necessary to write disciplinary charges against inmates assigned to his class (1T98). Albano also found it necessary to remove inmates from the classroom. Initially, the policy pertaining to classroom removal allowed for teachers to return inmates directly to the cottage. As this policy was determined to be a security risk, prior to December, 1991, the policy was changed to require teachers to direct inmates to the school office to see Supervisor of Educational Programs Donnell-Nixon or one of her assistants such as Palermo

(1T97-1T98; 1T146-1T147; 2T81-2T82). The new policy did not provide for inmates to be returned to the cottages. In emergency situations, teachers were instructed to use the intercom system to call security personnel or push a "panic button" (2T83). Under the revised policy, an inmate removed from the classroom would be sent to a custody officer only if he were very disruptive or fighting (2T52).

10. Prior to January 8, 1992, Albano was removing inmates from his classroom once or twice each week. Subsequent to the implementation of the new policy, Albano continued to send inmates back to the cottage rather than directly to the school office (1T71; 2T84; 2T134). Palermo spoke to Albano each time an inmate was removed from his classroom (2T84; 2T134). Since Albano was a new teacher and new to a corrections environment, Palermo thought that Albano could benefit from working with Lukenda, a psychologist, who could assist Albano with new techniques to handle disciplinary problems (1T49). While Albano agreed to work with Lukenda, he did not avail himself of her expertise and did not implement any of her suggestions (1T164; 2T85-2T86, 2T145).

11. On January 8, 1992, Palermo conducted her first informal observation on Albano (1T93; 2T75; CP-1). Palermo put the informal observation in writing (CP-1). Prior to the actual informal observation, Palermo had direct and indirect contact with Albano in order to monitor his progress (2T76). Since Albano was a new teacher, Palermo would attend his classroom once or twice each

week. Occasionally, Palermo would observe Albano from Ms. Ciocian's class. Albano and Ciocian shared the same classroom and separated their classes by 3 1/2 to 4 foot tall bookcases (2T76; 2T112-2T113; 2T115). Palermo also obtained reports on Albano from Ciocian and Child Study Team Chairperson Lukenda (2T114; 2T116-2T117).

12. As was the practice with other new teachers, Palermo asked Teryl Lebkuecher to train Albano concerning computer lab procedures, available academic programs and other computer related matters (2T147; CP-11). Lebkuecher advised Donnell-Nixon and Palermo that Albano was uninterested in learning about the use of the computer (2T17; 2T78).

13. In the January 8, 1992 informal observation, Palermo found that Albano prepared in advance for his students' arrival. This showed good organization and planning. Palermo also found that while Albano allowed students to quietly talk among themselves, he never lost control of the class. Although Palermo observed Albano moving around the classroom to view students' work and help them, she was critical of his mainly staying seated at his desk. Palermo comments that "...more frequent rounds would have possibly revealed one student reading a National Geographic inside his English workbook located in his lap" and "[a]nother turned to the back of his...math book recording all the answers on his assigned paper" (CP1). Palermo also noted that Albano had problems with recordkeeping, in that he didn't maintain all of the information he needed to properly prepare the students' institutional guides

(2T88). Albano did not follow-up on the resident transfer sheets which shows the academic status of a student who has transferred from one class to another (2T92-2T93).

14. Between January 8 and January 31, 1992, deficiencies in Albano's performance continued. Cetrulo brought to Donnell-Nixon's and Palermo's attention problems which Albano was having with student control and the removal of students from the classroom (2T65). Palermo was contacted by other staff concerning the way in which Albano related to the students and other staff members. Palermo was receiving calls that inmates were being sent out of class (2T96; 2T135). Prior to January 31, 1992, Palermo discussed the problems involving Albano with him orally, nothing was placed in writing other than Palermo's own informal notes which she made as various incidences occurred (2T130; 2T151-2T152).

15. On January 31, 1992, Albano arranged to have school social worker Meckler make a presentation to the inmates concerning the transition from a correctional institution to the outside world (1T30). The class met in the conference room, not the regular classroom (1T66-1T67). Meckler chastised one of the inmates who was misbehaving during his presentation. The inmate and Meckler argued (1T30-1T31). Albano intervened and the inmate began making threatening gestures, e.g., punching the palm of his hand with the fist of his other hand (1T31). Concerned that the inmate might get out of control, Albano told him to leave the room and report to a security officer at "center", approximately 50 feet away (1T32;

1T67). The inmate stood abruptly, slammed his chair and bolted out of the door. Albano caught up to the inmate in the hallway and escorted him to the security officer (1T106; 1T112-1T113). Albano did not bring the inmate directly to the school office out of concern that the inmate might get out of control and become violent (1T32). Albano returned to the conference room to check on his class (1T32-1T33; 1T68-1T69). Although Albano testified that he asked the security officer to hold the inmate so that he could find Palermo, in fact, he returned to the conference room and sat down (1T68-1T69).

16. The security officer at "center" called Cetrulo to advise him that the inmate was being sent back to the cottage (2T62). Cetrulo's office is about 40 yards from "center" (2T63). Cetrulo walked to "center", picked up the inmate and took him to Palermo's office. After delivering the inmate to Palermo, Cetrulo returned to Cottage 4 (2T50-2T51).

17. The security officer at "center" also called Palermo to advise her that the inmate was sent out of class and requested direction (2T97-2T98). Palermo called the conference room and requested that Albano report to her office (1T32-1T33; 1T69; 2T98). As Albano arrived at Palermo's office, he saw Cetrulo and the inmate arriving from one direction and Palermo coming from another (1T33; 1T70). Palermo asked Albano why the inmate was sent back to the cottage. Albano responded that he did not send the inmate to the cottage (1T33). Palermo then met with the inmate and Albano returned to the conference room.

18. Approximately ten minutes after Albano had returned to the conference room, Palermo called him to her office (1T34). Palermo asked Albano to explain what happened with the inmate. Albano explained the incident, however, Palermo did not accept Albano's explanation and continued to question him concerning his decision to return the inmate to the cottage, contrary to established policy (1T34; 1T74). Albano thought that the discussion might result in his being disciplined and also believed that Palermo was acting unreasonably. Albano told Palermo that she was abusing him (1T34; 1T75-1T76). Palermo continued to question Albano regarding whether he could have handled the incident differently. Albano stood and left the meeting (1T34; 1T75-1T76; 2T99). During the meeting, Palermo remained seated behind her desk and did not threaten Albano (1T76-1T77). At no time prior to this meeting had Palermo ever raised her voice, threatened or intimidated Albano in any way (1T93-1T94).

19. From Palermo's office, Albano went directly to Donnell-Nixon (1T35; 1T78). Donnell-Nixon told Albano that if Palermo had not dismissed him from the meeting, he should return and try to resolve their dispute (1T35; 1T78; 1T134). She told Albano that he would be considered insubordinate if he left his meeting with Palermo before she dismissed him (1T134). Donnell-Nixon told Albano that if he were dissatisfied with the outcome of the meeting he should file a grievance (1T134). Albano went back to Palermo's office to continue the meeting (1T35; 1T78; 1T134).



20. The meeting between Albano and Palermo resumed, but lasted only two minutes or less (1T81). Palermo continued to question Albano regarding the incident with the inmate (1T35). Albano has no specific recollection of what Palermo asked or said during the meeting, however, he does recall Palermo rolling her chair from behind her desk into close proximity of his chair so as to be face to face with him (1T35; 1T79-1T82). Albano felt scared and threatened, but was evasive and non-responsive regarding Palermo's continued questioning about the incident (1T81-1T82; 2T99). Palermo raised her voice and said "Frank, don't give me that crap" (2T100). Albano told Palermo that if she wanted to continue the meeting, he wanted a union representative. Palermo did not respond. Albano stood and again left the office (1T35-1T36; 1T82; 2T100). Palermo followed Albano into the hall and continued to question him although others were present (1T83). Albano told Palermo that she was abusing him and continued to walk away from her (1T83). Shop steward McNally called Albano to his office and Albano told him what had just transpired (1T84). McNally suggested to Albano that he file a grievance against Palermo's actions. Albano told McNally that he would think about filing a grievance over the weekend and get back to him on Monday (1T36; 1T84)<sup>5/</sup>

21. After Albano left Palermo, she proceeded to Donnell-Nixon's office and told her that Albano had again left the

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<sup>5/</sup> January 31, 1992, was a Friday.

meeting without permission before its conclusion (1T134; 2T8).

Donnell-Nixon told Palermo to write up the incident for disciplinary action (1T134; 2T100). Donnell-Nixon wanted assistance with the disciplinary action from the personnel office, however, since Personnel Officer Pew had already left for the day, the disciplinary action was put on hold until the following Monday (1T135).

22. On Monday, February 3, 1992, Donnell-Nixon called Pew to obtain assistance in taking minor disciplinary action against Albano for insubordination (2T9). During their discussion concerning the disciplinary action, Pew advised Donnell-Nixon that Albano was approaching the end of his six month probationary period and, if there were problems with his performance, she should consider whether he should be terminated (1T136).

23. After Donnell-Nixon's conversation with Pew, she called a meeting with Palermo and Cetrulo for later that same day to discuss Albano. During that meeting, Palermo and Cetrulo told Donnell-Nixon about problems they were having with Albano. Palermo told about Albano's reluctance to take instruction from Lebkuecher on the computer and his resistance to accept help from Lukenda. Cetrulo told Donnell-Nixon that Albano was having trouble handling the inmates assigned to his class and that security officers in the custody section had stopped handling his complaints (1T136-1T138). Palermo also showed Donnell-Nixon notes in her personal file concerning difficulties Albano was encountering and expressed concern about Albano's ineffective teaching style (1T137-1T138;

2T101-2T102). At the conclusion of the meeting, Cetrulo and Palermo recommended that Albano be terminated (2T54; 2T101-2T102). By the end of the day, February 3, 1992, Pew had prepared the notification of minor disciplinary action (CP-3) for Palermo's signature (1T139-1T140). Since Donnell-Nixon knew that all disciplinary actions required the superintendent's approval, late Monday afternoon or Tuesday morning, she called Superintendent Helm's office and obtained an appointment for Wednesday, February 5, 1992, in the late morning (1T140).

24. First thing Monday morning, February 3, 1992, before class had begun, Albano sought out McNally and told him that he would file a grievance against Palermo (1T30; 1T37; 1T85-1T86; J2). Albano then signed a blank grievance form. He did not date the form (1T87). Later, McNally filled out the grievance form and took it around to other teachers so that they could also sign it and, thereby, become a party to the grievance. Filling out the grievance form and obtaining the other teachers' signatures was completed on February 5, 1992. On that day, McNally and Albano met and Albano dated the grievance form (1T89-1T90). Albano does not recall the time of day that he dated the grievance form (1T103). The grievance form was filed with the Jamesburg Personnel Office some time on February 5, 1992 (2T159). At no time prior to the filing of the grievance, did Albano discuss the grievance with Palermo (1T39).

25. In either the late morning or afternoon of February 5, 1992, Donnell-Nixon, Palermo and Cetrulo met with Superintendent

Helm, Assistant Superintendents Sheila Thomas and Joe Tumilo, and Pew for the sole purpose of discussing Albano (1T140; 2T55; 2T102). Donnell-Nixon opened the meeting by advising that Albano was approaching the end of his six month probation period (1T141). Also discussed during the meeting was whether Albano should be disciplined for walking out of the meeting with Palermo on January 31, 1992 (2T105). Donnell-Nixon was particularly concerned with resolving Albano's status prior to the conclusion of his six month probationary period because she had experience with other employees who had been identified as having problems and who were ultimately terminated after their probationary period had elapsed. In those circumstances, Helm had told her not to continue employing such employees beyond the probationary period, because it was more difficult to terminate post-probationary employees. At the time of those earlier incidents, Helm had told Donnell-Nixon that in the future he wanted to be informed should similar circumstances arise (1T141). Donnell-Nixon, Palermo and Cetrulo recommended that Albano be terminated (2T55; 2T66; 1T145). Superintendent Helm, who held the ultimate authority concerning Albano's status, agreed that Albano should be terminated before the end of his probationary period (1T142; 2T55-2T56; 2T106).

26. After it was decided to terminate Albano, Donnell-Nixon urged that he be allowed to work until the end of his probationary period and, thereby, receive an additional month's pay (1T142-1T143). The meeting concluded and Pew and Donnell-Nixon

reviewed the contract and calculated the requisite notice period so that the termination would become effective at the end of the probationary period (1T143). Pew prepared the letter of termination. At the time that the attendees left the February 5 meeting, the decision to terminate Albano was finalized, approved by Helm and all of the details concerning timing were set in place (1T144-1T145; 2T55-2T56; 2T106; 2T149).

27. Donnell-Nixon, Cetrulo and Palermo testified that neither they nor anyone else who attended the February 5, 1992 meeting with Superintendent Helm knew during the meeting that Albano filed a grievance against Palermo. There was no discussion concerning any grievance filed by Albano nor any other protected activity on his part (1T141-1T142; 1T152; 2T55-2T56; 2T105). Donnell-Nixon did not receive a copy of Albano's grievance until mid-March and Palermo did not receive a copy of the grievance until it was given to her by Donnell-Nixon (2T20; 2T152; 2T158).<sup>6/</sup> Albano testified that Palermo was aware of the grievance prior to

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<sup>6/</sup> While Palermo may not have actually seen a copy of Albano's grievance until March, 1992, this does not mean that she was unaware of its existence until that time. Several of the teachers who had signed the grievance wanted their names removed from it. At different times, the teachers approached Palermo to discuss the grievance and tell her that they no longer wished to be a party to it. Teacher McDonald was the first to approach Palermo to discuss the grievance and advise her that he was removing his name (2T155). Effectuating his request, the personnel office sent a transmittal letter dated February 19, 1992, to the CWA removing McDonald's name from the grievance (J-3). McDonald spoke to Palermo prior to February 19, 1992. Accordingly, I find that Palermo learned of the grievance not later than February 18, 1992.

the meeting with Helm. Albano stated that McNally told him that Palermo had visited McNally's office before 10:00 a.m. on February 5, 1992 and McNally advised her of the grievance (1T41). Palermo testified that while she had a meeting with McNally prior to the Helm meeting, McNally did not indicate that a grievance had been filed against her or that one was being prepared. Rather, McNally expressed dissatisfaction with the manner in which she handled the January 31 meeting with Albano and stated that if she used strong arm or intimidation tactics with other teachers he would support the filing of a group grievance against her (2T104). The meeting between McNally and Palermo was very brief (2T105). Applying the residuum rule,<sup>7/</sup> I credit Palermo's testimony. Albano's testimony is based solely on hearsay and is otherwise unsupported by any legally competent evidence.

28. On February 5, 1992, Albano was given a Notification of Minor Disciplinary Action form by Assistant Supervisor of Education Robert Snyder (1T105; CP-3). The form advised Albano that he would receive an official written reprimand for leaving Palermo's office without permission on January 31, 1992. Albano received CP-3

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<sup>7/</sup> While hearsay evidence is admissible in administrative proceedings, the residuum rule requires that some legally competent evidence exist to support each ultimate finding of fact. Weston v. State of New Jersey, 60 N.J. 36, 51 (1972); N.J.A.C. 1:1-15.5(b).

after he filed the grievance (1T39).<sup>8/</sup> Albano did not appeal the minor disciplinary action (1T104).

29. On February 18, 1992, Donnell-Nixon called Albano into her office and handed him a letter from Superintendent Helm advising him of his termination effective the end of business on Friday, March 6, 1992. (1T46-1T47; J-5). In interrogatories completed by Donnell-Nixon and Palermo, the date shown as to when the decision was made to terminate Albano was February 16, 1992. This date conflicts with Donnell-Nixon's and Palermo's testimony indicating that the decision to terminate Albano was finalized on February 5, 1992, during the meeting with Helm. I note that the interrogatory is dated September 23, 1992, some seven months after the operative events. Mr. Sarlo assisted in the preparation of the interrogatories and Donnell-Nixon does not recall providing February 16, 1992 as the date in answer to that question (2T25). Donnell-Nixon did not completely read the answers to the interrogatories before signing them (2T26). I found Donnell-Nixon's and Palermo's testimony to be direct and forthcoming. Although the witnesses were sequestered, Donnell-Nixon and Palermo testified that the decision to terminate Albano was finalized during the meeting with Superintendent Helm on February 5, 1992. Further,

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<sup>8/</sup> I understand Albano's testimony to mean that he received CP-3 after he dated the grievance which was his last involvement with the document. Albano does not know nor does the record indicate at exactly what time of day the personnel office received the grievance (J-2).

Donnell-Nixon works Monday through Friday and Saturday mornings (2T29). I take administrative notice of the fact that February 16, 1992 is a Sunday. I find it unlikely that the decision to terminate Albano was made on February 16, 1992. Accordingly, I credit Donnell-Nixon's and Palermo's testimony.

30. Although Palermo had her own personal file which contained notes regarding the difficulties which Albano was encountering, she neither asked nor received written statements from others until after the decision to terminate Albano had been reached (2T129). Donnell-Nixon never requested written documentation concerning Albano's teaching difficulties prior to the decision for termination because she believed none was necessary to terminate an employee serving during the probation period (2T20).

#### ANALYSIS

The CWA alleged violations of Sections 5.4(a)(1), (2), (3), (4) and (7) of the Act. The CWA did not present any evidence that this case involves issues arising under Subsections (a)(2), (4) and (7). Accordingly, those elements of the unfair practice charge are dismissed. This case is limited to allegations arising under subsections (a)(3) and, derivitatively, (1), wherein the CWA charges that Albano was terminated from his Teacher II position at Jamesburg in retaliation for his exercising activities protected by the Act.



In Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the Supreme Court established the test used in determining whether an employer's actions violate subsection (a)(3) of the Act; motive is a necessary element. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence, that conduct protected by the Act 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 a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242.

It is long established Commission law that filing grievances constitutes protected activity. See, Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); State of New Jersey (Department of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987). Albano's involvement in the filing of his grievance against Palermo is protected activity.

The Commission has also held that timing is an important factor in assessing motivation. See, City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Essex County Sheriff's Department, P.E.R.C.

No. 88-75, 14 NJPER 185 (¶19071 1988); Down Township Board of Education, P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In the instant matter, timing is critical.

I find that the CWA failed to establish that the employer knew of the protected activity at the time it took adverse action against Albano. On January 31, 1992, Palermo went to Donnell-Nixon to advise her of the events which transpired in an earlier meeting between Palermo and Albano. Palermo and Donnell-Nixon agreed that Albano should be disciplined for prematurely leaving the meeting without permission. On February 3, 1992, Donnell-Nixon contacted Personnel Officer Pew for assistance in preparing a minor disciplinary action against Albano. It was at this time that Pew raised the issue of whether Albano should be retained in light of the approaching conclusion of his probationary period. There is no evidence of animus towards the CWA, as a whole, or Albano, individually, on Pew's part. While it is reasonable to speculate that Pew may have been aware of the events pertaining to this particular proposed disciplinary action against Albano, there is no evidence that Pew had any knowledge concerning Albano's performance as a teacher or involvement in protected activity. I find that Pew's suggestion that Donnell-Nixon consider whether Albano should be retained beyond his probationary period occurred purely as a ministerial matter and was unrelated to any protected conduct on Albano's part. Thus, the idea concerning Albano's retention arose on February 3, 1992, well before Albano's grievance was filed in the

personnel office and well before any managerial official at Jamesburg was aware of Albano's conduct of protected activity.

On February 5, 1992, Donnell-Nixon, Palermo, Cetrulo and Pew met with Superintendent Helm and others to discuss Albano. No one who attended that meeting knew that Albano was in the process of filing or had filed a grievance against Palermo. The meeting focused solely on the issues of Albano's minor disciplinary action and whether he should be retained beyond his probationary period or terminated prior to its conclusion. The consensus reached at the meeting was to terminate Albano immediately. This decision was arrived at based on Albano's difficulty in controlling inmates, teaching deficiencies, unwillingness to accept assistance from Lebkuecher and Lukenda and other factors. It was only at Donnell-Nixon's urging that Albano was retained until the end of his probationary period. By the end of the meeting, or shortly thereafter, all of the details concerning the timing and notice of Albano's termination were finalized.

The charging party carries the burden of showing that the employer was aware of Albano's protected activity. While the evidence establishes that Albano's grievance was filed on the same day as the Helm meeting, there is no evidence showing that the grievance was filed before the meeting took place or that anyone who attended the meeting was aware that a grievance was about to be filed. Albano could not remember the time of day that he dated the grievance, nor did he personally deliver it to the personnel

office. While Palermo was aware that a grievance had been filed prior to her receipt of a copy, there is no evidence contradicting her testimony that she was not aware of the grievance during the Helm meeting. That McDonald had discussed the removal of his name from the grievance with Palermo only establishes that Palermo was aware of the grievance on or before February 18, 1992, and not that Palermo was aware of the grievance during the Helm meeting.

As stated above, the DOC moved to terminate Albano before he concluded his six month probationary period. The CWA argues that neither the parties' collective negotiations agreement nor civil service nor tenure laws provide for such a probationary period for non-tenured teachers employed by the State. The CWA notes that unlike their career-service counterparts, unclassified employees must serve for six years<sup>9/</sup> before they are permitted to appeal a Department level decision involving major discipline. Thus, the CWA concludes that there is no six month "probationary" period after which time an unclassified teacher becomes permanent. However, I find that the collective agreement does distinguish between unclassified employees with a minimum of six months' service and those with less. Moreover, the evidence shows that the DOC believed that Albano was serving a six month probationary period and was under the impression that it was preferable to terminate an

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<sup>9/</sup> Article V (J) (5) of J-1, the collective agreement, provides that an unclassified employee must have a minimum of eight consecutive years in order to appeal a Department level decision involving major discipline.

unclassified employee with less than six months service than an employee with more than six months service. The DOC acted in accordance with that understanding. I make no finding as to the correctness of the DOC's impression regarding the termination of unclassified employees with less than six months service. That is not the issue in this case. An employer's misapplication of personnel policies or misinterpretation of the collective agreement does not constitute a violation of the Act. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).


Accordingly, based upon the entire record and above analysis, I make the following:

#### CONCLUSIONS OF LAW

The DOC did not terminate Armond Albano in retaliation for his participation in protected activity. Consequently, the DOC did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7).

RECOMMENDATIONS

I recommend that the Commission ORDER that the Complaint be dismissed.

  
Stuart Reichman  
Hearing Examiner

DATED: September 28, 1993  
Trenton, New Jersey