H.E. NO. 2007-2

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

In the Matter of

STATE OF NEW JERSEY,
OFFICE OF THE PUBLIC DEFENDER,

Respondent,

-and- Docket No. CO-2004-252

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1037,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the State of New Jersey (Office of the Public Defender) terminated attorney assistant and professional unit employee Rachel Towle in retaliation for issuing an e-mail to management protesting a "health and safety issue." The Hearing Examiner assumed that the e-mail was protected activity under the Act and found that the Charging Party failed to prove that the OPD was hostile to that activity, pursuant to the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Stuart Rabner, Attorney General (Gerri Benedetto, Deputy Attorney General, on the brief)

For the Charging Party, Weissman & Mintz, attorneys (William G. Schimmel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 19, 2004, the Communications Workers of America, Local 1037 (CWA), filed an unfair practice charge against the State of New Jersey, Office of the Public Defender (OPD). The charge alleges that the Public Defender violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3),[1/] when it terminated Attorney Assistant

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1/ This provision prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees (continued...)

Rachel Towle, effective October 13, 2003, in retaliation for her engaging in protected activity - raising a health and safety issue - in an October 1, 2003 e-mail to management. On August 9, 2004 a Complaint and Notice of Hearing issued.

On August 20 and October 18, 2004, the Public Defender filed an Answer and Amended Answer. The Amended Answer admits that Towle was terminated effective October 13, 2003 and that on October 1, she sent an e-mail to Deborah Collins and Linda Biancardi that "listed lots of workplace issues" that Towle felt needed attention. The Public Defender denies that the termination violated the Act or that it retaliated against Towle for engaging in protected activity. It asserts that it exercised a legitimate managerial prerogative when it terminated Towle, an unclassified at-will employee who served at the pleasure of the Public Defender.

On April 14, 2005, the Public Defender moved for summary judgment, primarily contending that Towle's October 1, 2003 e-mail was sent solely on her own behalf and did not constitute protected concerted activity under the Act. It submitted a supporting certification. On June 1, 2005, CWA opposed the Public Defender's motion and cross-moved for summary judgment in its favor. It submitted supporting certifications and raised

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1/ (...continued)
in the exercise of the rights guaranteed to them by this act.

procedural objections to the Public Defender's certification. On July 18, 2005, the Public Defender filed a reply, urging denial of the cross-motion and maintaining that it had the right to discharge Towle.

On September 29, 2005, the Commission issued a decision, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005), denying both the Public Defender's motion for summary judgment and CWA's cross-motion for summary judgment and ordering that the matter be scheduled for hearing. (It also disposed of two procedural issues raised in the parties' filings). The Commission found that "the CWA had presented sufficient evidence from which a reasonable fact finder could determine that Towle's e-mail constituted protected activity concerning a matter of common to attorney assistants rather than simply a personal gripe." Id. at 31 NJPER 280. It also found sufficient evidence warranting a hearing on whether Towle was terminated in retaliation for protected activity. The Commission also determined that summary judgment in CWA's favor was not appropriate, given that its discrimination claim requires an assessment of the employer's state of mind and motivation in terminating Towle.

On January 9 and 10, 2006, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post hearing briefs were filed by March 31, 2006. Replies were filed on April 25, 2006.

Upon the record, I make the following:

FINDINGS OF FACT

1. The State Office of Public Defender employs about 1200 people and implements the Constitutional right to representation by counsel in certain criminal cases (1T243; 2T134). In addition to a clientele of indigent criminal defendants, the Office of Public Defender represents parents whose parental rights have been terminated by the Division of Youth and Family Services (2T64).

The Appellate Division of the Office of Public Defender represents convicted felons, including all inmates on death row (2T136). Typical clients are repeat offenders who often are desperate, mentally ill and/or drug or alcohol-addicted - "the worst of the worst," according to Deborah Collins, Administrative Managing Attorney in the Division (2T64; 2T136).

The Appellate Division of the Office of Public Defender employs about 40 attorneys and 40 support personnel, including secretaries and about 7 attorney assistants (2T150; CP-4). Attorney assistants and all attorneys except "managing attorneys" are included in the State-wide "professional unit" represented by CWA (1T244; 2T150; R-8). Three CWA shop stewards work at the Appellate Division (1T247).

2. The State and CWA negotiated a collective agreement for a "professional unit" extending from July 1, 2003 - June 30, 2007

(R-8). Article 5J, "Discipline Procedures for Provisional Employees and Unclassified Employees with Less Than Four Years of Service," provides in a pertinent part:

> 1. The following is the disciplinary appeal procedure for unclassified employees not covered by a statutory discipline procedure who have more than six (6) months but less than four (4) years of consecutive State service . . .
>
> C. Nothing in this Article shall be construed as limiting the State from exercising its inherent discretion to dismiss employees covered by this section who serve at the pleasure of the department or agency head, without stating the reasons for the dismissal. [R-8]

Article 32C, "Health and Safety," provides:

> Employee complaints of unsafe or unhealthful conditions shall be reported to the immediate supervisor and shall be promptly investigated. Corrective action shall be initiated as soon as practicable to remedy the condition within safety guidelines. [R-8]

Article 32G, "Health and Safety," provides in a pertinent part:

> 1. References to safety are intended to include a concept of reasonable personal security and protections, which shall be maintained to assure employees against physical harm.
>
> 2. It is understood that references to safety and health hazards and conditions of work referred to in this Article are not intended to include those hazards and risks which are an ordinary characteristic of the work or are reasonably associated with the performance of an employee's responsibilities and duties. However, this is not intended to eliminate the State's general obligations for

> the safety and health of such employees as set forth in other provisions of this Article. [R-8]

3. The Appellate Division of the Office of Public Defender is principally located in leased office space on floors 8, 9, and 10 of the building at 31 Clinton Street in Newark. Some lower floors are occupied by the Essex County Adult Trial Division of the agency (1T27; 1T28).

The Office of Public Defender in Newark provides two guards in the building lobby and a metal detector through which all visitors must pass (T246; 2T138-2T140). They must also sign a ledger and state their business to a guard, who telephones an Appellate Division receptionist stationed on the ninth floor to confirm each visitor's appointment with a secretary, an attorney assistant or an attorney. Visitors are then permitted to take an elevator to the ninth floor waiting area, where they may be observed and directed by the receptionist (2T138-2T140).

Visitors to the Appellate Section are typically convicted felons or their family members (if the former are incarcerated) (2T136; 2T138). If visitors arrive at the building without an appointment, they will be directed to the receptionist on the ninth floor, who will elicit the name of the secretary, attorney assistant, or attorney they came to see, usually pursuant to correspondence received from the OPD (2T141). An assigned attorney has the option of accepting or rejecting (i.e.,

scheduling) the unscheduled visitor(s) (1T32). Attorney assistants do not have the same option; they are instructed to meet with unscheduled visiting clients or their family members (1T72). Visitors mistakenly believing their destination is the Essex County Adult Trial Division will be redirected upstairs if a computerized review of the case(s) at the Division show(s) that the trial matter is "closed" (2T141).

4. Sometime in early 2003, Rachel Towle submitted her resume to the Office of Public Defender as part of her application for the position of attorney assistant. She learned about the position from then-First Assistant Deputy Public Defender John McKenna (1T154; R-1). On the Appellate Division organizational chart, McKenna was second in charge to Linda Biancardi, Assistant Public Defender and Deputy for the division (R-4; 2T131). McKenna and Biancardi had been trial attorneys together for the Office of Public Defender in Bergen County (2T143). He willingly came to Newark with Biancardi in 2001, when she was promoted (2T131; 2T143). They were close personal friends (2T169).

McKenna told Biancardi that Towle had worked as a paralegal in a New York City law firm and was interested in an attorney assistant position (2T144). Towle's resume' corroborates that work experience (R-1). Biancardi told McKenna to conduct the interview (2T144). McKenna phoned Biancardi after the interview

and enthusiastically recommended Towle for hire. Biancardi immediately agreed (2T145). At the time of McKenna's meeting, interviewing, and recommending Towle and afterwards, he underwent medical treatment for cancer, requiring periodic absences from the Newark office (2T144).

5. The title, "attorney assistant" is unclassified in the State system and replaced "paralegal technician" about six years ago (1T244). Attorney assistants are responsible for compiling complete files on appeals from convictions and/or sentences of criminal defendants at the trial phase. They perform similar duties in juvenile criminal cases and in instances of termination of parental rights (1T24; 1T64; 1T90; 1T100; 2T13). Documents regarding crimes, indictments, rulings, judgments, hearing dates, indigency investigations, etc., together with any (trial) transcripts must be assembled together to "complete" a file. The process takes months; when completed, a file is assigned to an Appellate Division Office of Public Defender attorney (1T24; 1T26; 2T13; 2T19).

The Appellate Division of the OPD processes about 1000 to 1200 sentencing appeals annually and an unspecified number of conviction appeals, which tend to be complex and voluminous (2T8-2T9). Each attorney assistant is responsible for completing the files falling under variously assigned letters of the alphabet, as determined by the first letter of the last name of all

appellants (defendants). Administrative Managing Attorney Deborah Collins assigns and sometimes reassigns alphabet letters to each attorney assistant, depending upon his or her relative experience and workload (2T96). For purposes of this decision, Collins appears fourth on the organizational chart, further along the same line as William Smith, "Deputy Public Defender 2 and Managing Attorney" (R-4). Collins oversees the "intake unit" which includes two assistant deputy public defenders, the attorney assistants, and other support personnel (R-4).

6. On April 4, 2003, the State Public Defender, Yvonne Smith Segars, issued a letter to Towle ". . .confirm[ing] [an] offer of an unclassified appointment as an attorney assistant, effective Monday, April 21, 2003, in our Appellate Regional Office . . .[in] Newark, NJ" (R-2; IT159). The letter advised that all unclassified employees "serve at the pleasure of the Public Defender"; that Towle would be paid a specified annual salary; and that she must contact Manager of Human Resources, Patrick DiMattia, in writing, not later than April 11 (R-2).

Towle wrote "I accept" on the letter, signed and returned it to the OPD (1T161; R-2).

7. On April 21, Towle arrived at the Newark Appellate Division OPD (1T161). Neither Biancardi nor Collins had been apprised of her start date or arrival (2T72; 2T147). Towle waited in the reception area until Collins arrived (2T277).

Collins testified that Towle was "very upset and very frustrated" and said: "Well, I hope I'm supposed to be here. I hope I'm going to get paid" (2T72). Collins discussed attorney assistant duties with Towle for about one hour (2T70). She explains to newly-hired attorney assistants that the Appellate Division of the OPD must take appeals and asks them, "What do you think about criminals? Murderers? Sexual offenders? Crazy people and their families?" (2T67; 2T68). She also explains that attorney assistants have an obligation to keep "contact and communication" with clients, who are often "distressed" (2T68-2T69). Collins introduced Towle to Assistant Public Defender Biancardi, who testified:

> [Towle] said 'hello' but then she said: 'Well, I hear that you didn't know I was coming. Am I supposed to be working? Am I even on the payroll? Do I have to go to orientation if I'm not on the payroll'?
>
> [That's] not normally how you greet your boss, but I thought, 'Okay, well, she's nervous.' I said: 'Don't worry about it. You know I'm sure I just didn't get the letter [i.e., notice of Towle's start date]. If they told you to be here, then you're supposed to be here. [Towle] seemed extremely agitated and concerned and kept repeating, 'Am I on the payroll? Does this mean I have to go to orientation'? [2T148]

Biancardi promptly called OPD "headquarters" in Trenton, confirmed Towle's start date and advised her that she was "on the payroll" and should report to OPD headquarters in Trenton for a one-day orientation (2T149).

Towle testified in rebuttal that she did not "shout" or "bellow" on her first day at the OPD. She admitted being "apprehensive" and found it "disconcerting" that no one in the Newark office expected her arrival (2T275; 2T276; 2T277). She also testified that she "asked if [she was] supposed to go to orientation tomorrow in Trenton" (2T278). She conceded that she may have asked: "Am I going to be on the payroll if I have to go to orientation"? (1T162).

Towle's testimony essentially corroborates Collins' and Biancardi's except for the matter of her tone of voice. I credit Collins' and Biancardi's versions of their conversations with Towle on April 21, but do not find that Towle "shouted" or "bellowed" her concerns.

8. On April 22, Towle attended a required orientation at OPD headquarters in Trenton (1T162; 1T249; 1T251). Patrick DiMattia is Manager of Human Resources at the OPD and oversees matters of hiring, payroll, benefits and employee relations, including grievances and disciplines (1T240). In the orientation, DiMattia's designee spoke about "statewide policies," including "policies against discrimination and workplace violence" (1T249; 1T268). Regarding the latter, DiMattia testified:

> . . . [W]e reference the fact that it is a zero tolerance policy, but that in light of what we do and who we represent . . . that when it comes to tolerance for hostility that

> you may experience or hostility that you may tolerate, that we would expect you to have a higher tolerance level for your client as opposed to a co-worker. . . . A co-worker might get in your face and scream at you. We'd expect you to complain about that. We may not necessarily expect you to complain about the client doing the same thing. [1T249-250]

DiMattia testified that the OPD's clients "are not the most rational. . .[and] have many reasons to be unhappy and frustrated. . .[W]e expect that [our] employees are going to tolerate a little bit more 'guff'. . .from the client that's behind the eight ball" (1T250; 1T251). DiMattia conceded on cross-examination that he did not conduct Towle's orientation (1T268). I infer that he did not attend it.

Towle denied that she was instructed about dealing with clients during the orientation (2T279). I credit Towle's denial over DiMattia's hearsay testimony.

9. On April 23, Towle returned to the Newark office and discovered that a plastic cup of great sentimental value to her was missing from the desk at her cubicle (2T279). Collins testified that she heard a "commotion" from Towle and asked her what happened. She testified that "Towle was furious that [the cup] was stolen" (2T75). Towle testified:

> . . . [I]t was a little disconcerting to be on the second day of a job and to have something stolen from you, whether it's stolen - excuse me,- disappeared. I did not know if it had been stolen. Generally, that's the first assumption when something

> belong[ing] to you disappears. I didn't immediately jump to that conclusion. [2T279-280]

Towle's initial testimony and admission about her "first assumption" undercuts her immediately subsequent testimony denying that she had "jumped to that conclusion." I find that Towle assumed that the cup had been stolen and reacted upon that assumption. She told other attorney assistants about the "stolen cup" and they "tried to help her find it" (2T280). Towle testified that Collins did not overhear her remarks from her office; rather, an attorney assistant told Collins about it, prompting the manager's inquiry (2T280).

Towle could not know what Collins heard. Having found that Towle assumed that the cup was stolen, I infer that her remarks to her peers were animated, highlighted by an angry incredulity, and probably "loud." I find that Towle's discovery resulted in a "commotion." I credit Collins' testimony.

Assistant Public Defender Linda Biancardi was told about Towle's missing cup and asked Towle if she had mislaid it in the lunchroom (2T156). Biancardi testified that Towle was "really angry, serious and adamant" over the matter (2T157-158). Biancardi soon afterwards asked McKenna if he heard about "the cup" and said to him: "What's up with that?" (2T159). Biancardi testified:

> [H]ere she is in her third or fourth day on the job and I already had that kind of

> strange initial meeting with her. And then it was sort of like this cup was a big deal. And I don't mean to demean it - that's how she felt. But it wasn't in the normal course of business the way you would expect a new employee to act. [2T159]

Biancardi did not testify that McKenna responded to her (rhetorical) question.

10. Stephen Martinez has been an attorney assistant (formerly, "paralegal technician") for about 19 years in the Newark Appellate Section of the OPD (1T63). Administrative Managing Attorney Collins assigns an experienced attorney assistant to mentor newly-hired attorney assistants at least until they receive a full caseload (2T65; 2T66). In late April, 2003, Collins assigned Martinez to mentor Towle (1T73; 2T70).

Martinez credibly testified that during the months in which an appeal file is completed, the client has "contact" with the assigned attorney assistant (1T64; 1T65). Contact is initiated by a form "introductory letter" to the client identifying the attorney assistant (by name), who is "familiar with the appellate file and can answer specific questions concerning the status of [the] case" (1T65; CP-3). The letter is issued by an assistant Deputy Public Defender assigned to the "intake unit." For example, attorney Claire Drugach's March 2003 letter to client "K.B." confirms the requested appeal; references an (enclosed) booklet on procedures; provides a telephone number that can be

called from 9 a.m.-4 p.m., Monday through Friday; and specifies that Stephen Martinez is the assigned attorney assistant (CP-3).

Martinez also credibly testified that in 2003, client phone calls to attorney assistants "[were] put right through by the receptionist" (1T70). Specifically, the receptionist did not announce the caller and attorney assistants "were expected to receive and accept all client calls" (1T70). His testimony was corroborated by Suzanne Martinez, another attorney assistant. (1T91-1T92; 1T102). Generally, attorney assistants answer client questions pertaining to the "administration" of an appeal--"they may have to field questions from clients wondering why their case(s) is taking so long [to be processed]" (2T14). Attorneys in the Appellate Section generally refrain from giving legal advice to a client until his or her file is completed (2T13).

11. On or about April 28, 2003, the vendor of a new telephone system recently installed at the Newark office of the Appellate Section of the OPD conducted a training session attended by the staff (1T168; 2T159). Assistant Public Defender Biancardi testified that OPD attorney Mike Jones asked her after the session: "Who's that new paralegal?" After Biancardi identified Towle, Jones assertedly said: "'Well, she just kind of like flipped out on the trainer in there'; that Towle was 'very hostile and angry and asked a series of questions that bordered in impolite'; and that [Towle] was 'bent out of shape

that this [trainer] did not have the right chart'" (2T160). Collins testified that an OPD attorney told her that Towle had a "major argument with the vendor representative" (2T76).

Towle did not specifically deny Biancardi's and Collins' hearsay testimonies. She testified that the training on the new telephone system was "poor" (1T168). I credit Biancardi's testimony and find that she had no reason to doubt the accuracy of Jones' remarks.

Biancardi also testified that Towle "reprimanded" - without supervisory authority - a support staff employee for failing to produce a new telephone extension (directory) list promptly (2T161-2T162). Towle denied admonishing the employee (1T170; 2T282). Biancardi's testimony is hearsay; I do no credit it over Towle's denial.

12. Biancardi testified that sometime in early May, 2003, Abby Schwartz, an OPD attorney in the Appellate Section for many years, told her that she overheard Towle "making negative comparisons between the OPD and private practice" (2T163; 2T240). Schwartz assertedly told Biancardi that she promptly questioned Towle: "Well, what are you doing here if you thought that private practice in New York was so good"? Towle assertedly replied: "I wasn't happy there; I had to stay too late at that job. And John [McKenna] is [a] friend of my mother and he said,

'why don't you come to work for us while you figure out what else you want to do'"? (2T164).

Biancardi testified that her impression of Schwartz's anecdote was that Towle viewed her OPD employment as a "way station, until she found something better" (2T164-2T165). She testified that in her four years as a manager, she never before had "an experience like this with any other employee, where, you know, she was called to my attention so frequently" (2T165-2T166). In her title, Biancardi became directly involved in any disciplinary action or grievance concerning Newark Appellate Section OPD employees (2T167).

Towle did not rebut Biancardi's testimony about her purported conversation with Schwartz and her remarks. I credit Biancardi's testimony.

13. On May 13, 2003, Biancardi attended a quarterly meeting of regional OPD managers in Trenton (1T261; 2T168). Anticipating Human Resource Manager DiMattia's attendance, Biancardi wished to discuss Towle's employment with him because she ". . .was starting to get the feeling that Rachel was not a good fit at all. And, I just didn't think that it was going to work out" (2T168).

Biancardi testified that she told DiMattia that a new attorney assistant was not "working out" and asked him what she "needed to do if I decide to terminate her" (2T168). She

testified that he asked "what was going on" and that she "related the incidents [set forth in findings of fact nos. 7, 9, 11 and 12]" (2T168). Biancardi testified: "And I said, 'her attitude is not indicative of someone who understands the mission of this agency'" (2T168).

DiMattia testified that he told Biancardi that "we should make sure we know whether or not this was the proper appointment before the probationary period is over and avail ourselves of that mechanism" (1T264). Biancardi testimonially corroborated DiMattia's recollection (2T168-2T169). I credit their testimonies.

Biancardi and DiMattia were not specifically asked about their attested May 13 meeting and discussion during their respective cross-examinations (1T268-1T295; 2T240-2T271). DiMattia's April 14, 2005 certification accompanying Respondent's motion for summary judgment sets forth no fact(s) regarding his May 13 discussion with Biancardi. I do not draw a negative inference from that omission. I credit DiMattia's and Biancardi's testimonies.

14. Biancardi chose not to act immediately on DiMattia's advice. She phoned McKenna at home, instead (2T169). She testified:

> I said: 'John, I just don't think Rachel's working out.' He asked me what was going on. And I told him. And you know, it's complicated because Mr. McKenna was a dear

> friend. He wasn't just my First Assistant. And, you know, here he was home on donated leave. And he, himself was dying. And Rachel's mother was not well. And I knew that she was a great support for him, for Mr. McKenna.
>
> So, I--he asked me not to terminate her. . . He said: 'You know, I'm such good friends with her mother. And I go to these support group meetings and how, you know, it would just make me feel terrible, you know. Give her another chance.'
>
> And so I did. [2T169]

Biancardi told Collins about her phone conversation with McKenna. Collins understood and sympathized. Biancardi told Collins: "Just watch [Towle]. Just make sure she's understanding what's going on and how our office really works" (2T170). Biancardi's testimony was unrebutted; I credit it.

15. On June 3, 2003, Biancardi convened a meeting with all seven attorney assistants, including Towle (1T123). Biancardi wanted to delineate certain responsibilities among Collins and a recently-hired "intake unit" assistant deputy public defender, a Ms. Kyles. Specifically, Biancardi believed:

> . . .[there was] a little bit of an obstacle course between them as to who was supposed to oversee what and whether the attorney assistants should go directly to [Collins] or to [Kyles] about certain matters. [2T171]

Biancardi wished to meet with the attorney assistants separately so that they might freely express their concerns and suggestions (2T171-2T172).

In advance of the meeting, Biancardi requested a written agenda or list of attorney assistant concerns, which she received from an "experienced" (but unspecified) attorney assistant on the morning of June 3 (1T125; 2T173; 2T172; CP-6). The one-page list sets forth seven matters, including:

> Overwhelming workload; unrealistic expectations from supervisors; lack of cooperation within the PD creates more responsibility for us, wastes time, and slows down the process (i.e., attorneys not picking up their own ESOA files, receptionists not screening calls, difficulty obtaining doc[uments], secretaries not proofreading documents, slow computer system); accountability; lack of office supplies. . . etc. [CP-6; 2T173].

Biancardi promptly reviewed the list, noting ". . . there were things on [it] that didn't make sense to me." Specifically, most of the attorney assistants had been employed at the Appellate Division for many years and "none of this stuff had ever come up" (2T173; 2T174). She testified that ". . . receptionist not screening calls" seemed strange,

> . . .[because] the first contact the client has with our office is usually through the attorney assistant because when the file is opened, it is the job of the attorney assistant in the intake unit to complete the file and prepare it entirely for the appeal . . .[A]nd because we have so many cases all at one time coming to the intake unit, the receptionist would be paralyzed if she would have to screen every single call . . . The calls regularly go through from clients to attorney assistants. [2T175-2T176]

Towle testified that in the meeting, Biancardi said that "she believed that [the calls] were screened" (1T126). Attorney assistant Suzanne Martinez testified that Biancardi said that she was unaware that their calls were not screened (1T93). Assuming that Towle's testimony is accurate and that Biancardi only later appreciated or recalled that attorney assistant names are set forth in the introductory letter to clients (see finding no. 10) and that screening such calls would be administratively "paralyzing", I do not credit Biancardi's testimony as a precise description of her thinking during the June 3 meeting with the attorney assistants. Phone calls to attorneys at the Newark office of the Appellate Division of the OPD are screened (1T30; 2T109; 2T186). Considering Towle's specific testimony, and the infrequency of Biancardi's direct dealings with attorney assistants and their concerns, I infer that Biancardi was thinking of phone calls to attorneys and assumed that calls to attorney assistants were also screened, if she answered as Towle attested.

Biancardi testified that in the meeting, Towle remarked that the circumstance that phone calls to attorneys were screened and those to attorney assistants were not was unfair and time consuming, i.e., ". . . it took away time from her other job duties" (2T190). Towle testified that her "main concern initially" with unscreened client phone calls was that ". . . it

wasted valuable time . . . and it wasn't until later after my experience with [client K.B.] that I felt a safety issue" (1T122). Biancardi testified that no one discussed security or "abusive" clients at the June 3 meeting (2T190). I credit their testimonies.

Biancardi thought that "difficulty in obtaining documents" was a common and legitimate attorney assistant concern (2T176). She thought that "accountability" and "lack of office supplies" were "strange" concerns (2T176; 2T177).

During the meeting on June 3, Biancardi wrote "Rachel" five times on the list of attorney assistant concerns she was given (R-12; 2T178). "Rachel" appears alongside four items and twice alongside phrases of the one item accompanied by a parenthetical list (R-12). Biancardi wrote her name because Towle was "the predominant person speaking on those issues" and her concerns were "off-base and indicative of her inability to adjust to the climate of our office and being out of sync with the tenor of the rest of the attorney assistants" (2T178; 2T179; 2T180). Biancardi testified that "from time to time, all the attorney assistants spoke" at the meeting (2T180). Towle admitted in her testimony that she talked a lot at the June 3 meeting but was not the only attorney assistant who spoke (1T177).

Biancardi testified that Towle was the only attorney assistant who complained about "unrealistic expectations of

supervisors," which revealed to her a "[lack of] understanding of the normal course of business in our office" (2T178). Biancardi attributed Towle's remarks to the fact that she was a "new person"(2T179). Towle testified that other attorney assistants with longer tenure than her spoke about the issue and that she openly agreed with them (1T178; 1T179). I find that attorney assistants, including Towle, spoke about "unrealistic expectations of supervisors."

Towle's concern about "attorneys not picking up their ESOA [Excessive Sentence Oral Argument] files" was that she did not know where the attorney offices were (i.e., no name plates on office doors) and that attorney assistants wasted time by having to leave their cubicles to deliver files (2T180-2T181). Biancardi believed that Towle misunderstood that she was supposed to "assist" attorneys - a concept inherent to her title (2T181). Biancardi told Towle: "If you don't know where somebody's office is, ask somebody else" (2T182).

Towle also talked about "accountability." She objected to the seemingly disparate facts that attorneys reported to no one and attorney assistants ". . . had to report to everyone and were always getting in trouble" (2T183). Biancardi asked the group if anyone had gotten in trouble about which she was unaware and no one claimed to have ". . . gotten in trouble" (2T184). Biancardi

testified that attorneys have "completely different job responsibilities and concerns" and accordingly, the complaint ". . . made no sense" (2T184). I credit her testimony.

Other attorney assistants complained about workloads. A backlog of cases had developed because two attorney assistant vacancies had been unfilled until the then-recent past. Biancardi said to the attorney assistants: "You can do only what you can do. And nobody's going to get in trouble" (2T189).

Finally, Biancardi testified that Towle's demeanor in the meeting was "very loud, bordering on hostile, red-in-the-face, [and] agitated." She testified:

> [Towle] was angry. She was like - - the one sentence that I'll never forget, which I think really kind of summed up her attitude for me, was at the very end of the meeting. She stood up in a very haughty manner and said: 'Well, when should I expect to hear back from you on these issues'? [2T185]

Biancardi replied that some actions ". . . are going to take a little while." She also said that she "will talk to [the receptionist] about whether there's any way that we can figure out with the new phone system [a way] to relieve some of the influx of calls for you guys" (2T186). Biancardi testified that she questioned the receptionist, who answered that screening attorney assistant calls would consume all her work time (2T186; 2T188). I credit her testimony.

Biancardi told Collins after the meeting: "Rachel didn't seem to understand what the job was and demanded changes that were integral to the job of attorney assistant" (2T87). Collins recalled that Biancardi mentioned that Towle didn't think that attorney assistants should deliver files to attorneys and that "she didn't like getting phone calls" (2T87). I infer from the latter remark that Collins exaggerated Towle's complaint about unscreened client calls to attorney assistants.

16. On June 10, 2003, Biancardi and Collins conducted Performance Assessment Reviews (PARs) of all attorney assistants, individually (2T89-90; 2T193). Attorney assistant PARs were normally conducted by Collins at an unspecified date later in the year (2T192). Biancardi thought:

> . . . [R]ather than single [Towle] out and in light of my conversation with John [McKenna] in May, I didn't want to make her feel bad. I really was trying to make every attempt to have her adjust. So, I decided with Deborah Collins . . . [that] I was going to do all the attorney assistant PARs in [early] June . . . [2T192]

Biancardi wanted to "satisfy [her]self that [she] sat down with every single attorney assistant, reviewed their job responsibilities, that there was no confusion, that everyone understood exactly what was expected of them" (2T193).

Biancardi and Collins conducted the PAR meeting with Towle (her first one) for the purpose of reviewing "job expectations" (2T193-2T194; CP-5). Biancardi told Towle to read the "job

expectations" section of the PAR form, offering to photocopy it and allow her to read the copy by herself in another room. Towle declined, but read the document. Biancardi then drew her attention to two printed items (2T195; 2T197). They were:

> **Job Responsibility:** Serves as primary profession[al] liaison between office and clients during period of compiling appellate record. Evaluates telephone and written inquiries about case status and legal problems from inmates, family members, and others. Responds to routine inquiries independently, in writing or by telephone. Refers non-routine and urgent matters to supervisory attorney.
>
> **Essential Criteria:** Gives information of a routine nature to clients and takes messages from clients as to legal problems requiring the attention of an attorney. Messages must be complete and accurate. Judgment must be exercised correctly as to which calls are of an emergent nature, which calls require only routine information and which calls can only be handled by an attorney. Written correspondence must be accurate and courteous and must reflect good judgment [CP-5; 2T196-2T197]

Biancardi referred the items to Towle because her questions at the June 3 meeting revealed that she "did not understand the way [the] office worked or what her job was" (2T262). Biancardi mentioned the agenda discussed at the June 3 meeting and said that no changes could be made regarding the items listed (1T188). Towle said that she understood the "job expectations," had no questions and she signed the form (1T184; 2T92, 2T197). On cross-examination, Towle conceded that it was "her job" to answer

client K.B.'s questions about her case, pursuant to her PAR (2T205).

Biancardi briefly left the room to photocopy the PAR document Towle had read and signed (2T93; 2T198). Collins testified that in the interim, Towle asked her: "She doesn't think I'm a troublemaker, does she"? Collins answered: "Just listen to Linda [Biancardi]." Towle rejoined: "I'm not a troublemaker" (2T93).

Towle testified that she recalled the June 10 PAR meeting but did not remember that Biancardi left the room to photocopy the signed PAR form (1T212). She did not testify that she remembered that Biancardi left the room. She testified that she asked Collins: "Is [Biancardi] pissed off at my suggestions"? (1T213). Towle denied saying the word, "troublemaker" (1T213).

I cannot reconcile Towle's inability to recollect that Biancardi left the room with her remembrance of her question to Collins, which in context and form assumes Biancardi's absence. I am inclined to credit Collins' testimony. In either case, I infer from Towle's question to Collins that she surmised a dissonance between the substance of her complaints at the June 3 meeting and Biancardi's expectations of attorney assistants.

17. On June 12, Collins met with all the attorney assistants as a group to advise them of a "new procedure to open files" (2T94). She asked if anyone had concerns in the aftermath

of their meeting(s) with Biancardi. No one voiced a concern (2T95).

18. On or about August 11, 2003, William Smith, a then-upper level manager in the Appellate Division of the OPD returned from lunch to the ninth floor at 31 Clinton Street and observed four people - a man, a woman and two children - seated on a couch near the receptionist (1T244; R-6). The office manager told Smith that they were relatives of a client. The adult visitors asked about the client's legal status. Smith cordially invited them to accompany him to his eighth floor office, where he telephoned the "intake" section to speak with any attorney assistant (1T226; 1T227). No one answered his call. Smith escorted all four visitors to the tenth floor. Attorney assistant Suzanne Martinez spoke with Smith, reviewed the client's file and confirmed that the client had requested an appeal (1T228).

Martinez testified that the woman visitor was "a little hostile" in her questioning about the status of the case (1T94; 1T95). Smith testified that the adult female visitor was not disrespectful to Martinez (1T230). I credit their testimonies. Martinez testified that the visitors' unannounced arrival was "unnerv[ing]" because she was "put on the spot" and "was not ready to see strangers" (1T96). She testified that Smith told her the circumstances of the family's presence in the building

and conceded that he remained with them for the duration of their visit to the tenth floor (1T105). I infer from Martinez's testimony that her concerns about the unexpected visitors were professional and not personal; that is, she wanted to be prepared to answer questions about a file and was not physically afraid of the visitors.

Towle also observed Smith and the visitors arrive at the "intake" section. She testified that she felt "very uncomfortable," thinking that ". . . it was inappropriate that clients and their families know where attorney assistants sat . . ." (1T127). After the visitors left, Martinez and Towle complained to Collins (1T128).

Towle said to Collins that Smith had allowed family members "to [come] to our desks." She said: "I looked [the client] up. He's a murderer" (2T98). Collins was angered by Towle's remark and said to her: "Excuse me. As a mother, I really resent [your] remark about a family member being imputed with the crimes of the child" (2T98). She told Towle that she would speak with Smith ". . . about sending people up" (2T99).

Smith told Collins that he had not "sent them up; he took them up." Collins believed that Towle "really did not know what had happened; that she had [gotten] the story wrong." Collins considered the entire matter a "non-issue" (2T100). She testimonially opined that unscheduled visitors are "supposed to

be announced from the lobby" but clients infrequently "come to the office to find out the status of the case" (2T103).

On an unspecified date between April and October, 2003, Stephen Martinez told Collins about his safety concerns whenever "unannounced" clients or family members inquired in person about the status of an appeal (1T72; 1T73). Martinez did not testify about Collins' reaction or reply to his concerns. Nor did he specify an instance of an unscheduled client's visit causing him concern.

19. On an unspecified date, probably between May and June, 2003, Collins reassigned all (client-last-name-beginning-with-letter) "B" appeal files from Stephen Martinez to Rachel Towle (see finding no. 5; 1T129). The client file of "K.B." was initially assigned to Martinez in March, 2003. In phone calls to Martinez, K.B. was often "upset and angry" about delays in scheduling the appeal of her sentence on two indictments in which she plead guilty to the fourth degree criminal offenses of harassment and resisting arrest (2T24; 2T25). K.B. also suffered a mental illness, resulting in delusions or paranoia. She believed that (innocent) others stalked her and noting their automobile license plate numbers, filed complaints against them. She was judicially enjoined from that conduct (2T26). The distressing condition of her probation was the suspension of her driving privilege, which hampered her commute to work (2T26;

2T27). Martinez told his immediate supervisor, assistant public defender in charge of sentence appeals, Claire Drugach, about K.B.'s frequent and angry phone calls (1T76).

K.B. continued her calls about the status of her appeal to the Appellate Section after her file was reassigned to Towle. Towle testified:

> . . . [O]nce I had a few conversations with her [K.B.] and I realized that she - no matter what I said to her, she was relentless in calling, sometimes two, three times per day, which is highly unusual for most cases. And as I said before, it frustrated me that I didn't know how to help her and that she was abusive. And I was concerned that she would show up, unannounced. Perhaps even at one point I was concerned that she would actually wait for me in front of the building. [1T129-1T130]

Towle did not more specifically define "abusive," nor provide examples of K.B.'s "abusive" remarks. I generally credit her testimony, notwithstanding the imprecise characterization. Towle also wrote a memorandum in which she reported that K.B. "often calls two and three times per week . . ." (CP-2). I credit the document and not her testimony regarding the overall frequency of K.B.'s phone calls to the OPD. Towle spoke with Drugach about K.B. because she did not understand why K.B.'s case ". . . had not moved forward" (1T130; 1T131).

Drugach explained the problem to Towle, but the attorney assistant conceded that she ". . . never fully understood it" (1T131). On an unspecified date, Drugach spoke to K.B. on the

phone at Towle's request. Towle listened to Drugach's remarks from directly outside the attorney's office door (1T132; 2T30). On another occasion, when K.B. phoned and Towle requested Drugach's assistance, Drugach told Towle to tell K.B. that she would telephone her (private practice) attorney to obtain his cooperation (2T30). Drugach testified that in her one or two conversations with K.B., the client was "never hostile", conceding that she ". . . was angry, but not angry with me" (2T35; 2T36). Specifically, K.B. told Drugach: "I need my job; I can't get to work unless [I get my driver's license back]" (2T54). I credit Drugach's testimony.

20. Sometime in September, 2003, Towle asked Collins if she needed to obtain a particular document before passing on client "M.B."'s file as "completed." After a brief discussion, Collins replied: "No, I don't think you do" (2T78; 2T79).

The file without the document was passed to Assistant Deputy Public Defender Abby Schwartz. An unspecified short time later, Towle, appearing "miffed" to Collins, said: "Abby wants that document. You said that I didn't need it. And now she wants me to get it." Collins said: "Well, we have to get it" (2T80).

Schwartz later said privately to Collins about Towle: "What is her problem? Rachel gave me an argument about [the need to obtain the missing document]" (2T81). Towle located the document.

Collins testified that Towle's conduct was inappropriate because attorney assistants should not show a "[bad] attitude" to attorneys (2T81).

21. On September 30, 2003, Collins issued a memorandum to all attorney assistants, "reminding" them to "never give out an attorney's direct telephone number to a client." The memorandum referenced a "troublesome client" released on probation who called the office and a named OPD attorney who wanted "to protect himself" (CP-4). The client had phoned from Florida and attorney assistant Suzanne Martinez "could not get off the phone with her." She so advised Collins, who spoke with the client on the occasion of her next phone call to the OPD (CP-4; 1T97; 1T98). Collins testified that the attorney who was the subject of her memorandum had received the file but had not reviewed it. The attorney wanted to review the file before speaking to the particular "time-intensive" client (2T125). I credit her testimony. Considering the client's location, and that Martinez did not testify that the client was intimidating or hostile to her, I am not inclined to find that "troublesome" means physically threatening and that "protecting himself" means warding off physical danger. Nothing in the record suggests that Collins would or did speak (or write) euphemistically. I infer that "troublesome" means difficult and "protecting himself" means being prepared to answer legal questions.

22. In the late afternoon on September 30, attorney Drugach was informed by the receptionist that client K.B. was "on the line." Drugach replied that she could not take the call (because she was preparing cases) and requested that it be transferred to the attorney assistant (2T37-2T39). Drugach admittedly ". . . dreaded speaking to [K.B.] because it was so time-consuming, not because she was abusive or threatening" (2T41). She testified that although attorneys will take client calls when attorney assistants become "frustrated," the "primary responsibility" for talking to the client is the attorney assistant's (2T41). I credit Drugach's testimony and infer that the "primary responsibility" is relinquished to OPD Appellate Division attorneys when files are completed and passed to them.

Attorney assistant Stephen Martinez promptly walked into Drugach's office and told her that K.B. was "on the phone . . . [and] that Rachel [Towle] was [present], but I [he] was taking the call" (2T50). Martinez asked Drugach for instruction on what K.B. should be told (2T38). Drugach directed Martinez to advise K.B. that ". . . nothing has changed since our last conversation and we will [contact] her when the situation changes" (2T38).

At or around 5:20 p.m. that afternoon, Towle received a telephone call from K.B. Towle informed the client that her case would not be listed on the October ESOA calendar (1T197; CP-2;

finding no. 15, p. 22). (The problem was apparently outside the control of the OPD; see finding no. 25).

On October 1, at noon, Towle typed an e-mail memorandum addressed to Collins and Biancardi, with a copy to Drugach (CP-2; 1T140). Towle wrote that K.B. ". . . refuses to listen to any explanations. . . .she raises her voice, talks over me, gets hysterical, and won't get off the phone. My average client calls lasts about 5 minutes. Hers are 15-20 and consist of her ranting and me repeating myself." (CP-2). She typed what happened on the previous day after she told K.B. that her case would not be listed:

> [S]he started shrieking at me. This time (previously I had been very patient with her) I too raised my voice and let my frustration come through. I won't give you a complete rundown of the conversation in this e-mail, but would be happy to give you more details in person, if necessary. [CP-2]

Towle continued her correspondence:

> I am not comfortable taking any more calls from this woman. First of all, I do not know what to say to her and second, she is abusive. [K.B.] was convicted of harassment, stalking and physical assault. According to her PSI, she has some form of mental illness and does not take her medication. She is also paranoid and has a persecution complex. Additionally, she is not incarcerated and her [method of operation] indicates that she might very well show up here.
>
> As a paralegal, I am apparently not afforded the same luxury as an attorney of having my calls screened. Therefore, I respectfully ask that reception be instructed not to put

> K.B.'s calls through to me, nor send her to my desk should she come to the office.
>
> I look forward to hearing your response to this matter.
>
> Thanks,
> Rachel
> [CP-2]

On cross-examination, Towle was asked about the meaning of her e-mail to Collins and Biancardi. Her answer follows:

> Q. Your e-mail basically said, 'I don't want to have to take K.B.'s calls and don't send her to my desk if she comes inquiring about her case,' didn't it?
>
> A. Until I was able to help her, I no longer wished to talk to her because I had no way of helping her. And she was abusive to me. And I was very frustrated and at my wits' end, yes. [1T208]

Attorney assistants Suzanne Martinez and Stephen Martinez implored Towle not to send the e-mail (1T108; 2T10; 2T212). They wanted Towle to speak with Collins "face-to-face" (1T108). Towle sent the e-mail (1T140).

23. Towle testified that Collins told her sometime in May, 2003, that if a client or family member became "abusive" to her, she was not required to "stay on the phone" (1T138). Collins testified that if an attorney assistant could not answer client questions and the client or family was getting angry, he or she could "find a lawyer," including Drugach or herself, to "take the call." If no attorney could be located, the attorney assistant

could tell the client (or family member(s)) that someone will return the call (2T104).

Towle's and Collins' testimonies were unrebutted. I infer their mutual consistency and credit them, notwithstanding the absence of a precise definition of "abusive."

24. On October 1, Biancardi read Towle's e-mail twice because she "couldn't believe it" (2T203). Characterizing Towle's earlier conduct as "over the top," largely the result of her "having great difficulty adjusting and interacting with people in the office . . ." Biancardi regarded the October 1 e-mail differently. She testified:

> . . . [N]ow we were getting into dealing with the client. And this is the whole reason for the existence of our agency -- the representation of clients . . . And I'm reading this and I'm thinking, 'She should be working for the Department of Corrections, not the Public Defender's Office because the way she's talking about this client lacks compassion [and] understanding.' And I couldn't believe that she actually admitted in an e-mail that she lost her patience with the client. So, I'm reading this and I'm thinking, 'Oh my God, where is she going? Now, this is really getting bad!'
>
> And I was really disappointed because at that point I really said, 'She just so doesn't get it. She doesn't get her job.' . . . When I say 'her job', maybe she could do the daily tasks with what she was required to get - the documents, whatever; I wasn't overseeing that part. I'm talking about why she was in our agency. What she was doing . . . she's supposed to be helping these people . . . and preserve some level of dignity that they have. [2T204]

Biancardi testified that she was concerned about the "tenor" of Towle's e-mail. She recalled:

> . . . The only thing I saw when I read this e-mail was that she doesn't understand the nature of her job and she doesn't understand who the client is. And she has total disdain for the client, instead of wanting to help her . . . [2T208]

Biancardi conceded that if the call was placed after hours and Towle was leaving for the day, "she could have let it go to voice mail" (2T211). In Biancardi's view, Towle's admission that she "let her frustration come through" to the client ". . . is just not how you behave in our office. That's not the tenor of the mission of the Public Defender" (2T211-2T212). She elaborated:

> There are situations where we all get upset when we're talking to our clients . . . [They] can be very difficult . . . angry . . . upset . . . [T]hey're going to yell. That's what you get when you choose to work for the Office of the Public Defender. People are not going to speak in a well-educated [and] modulated tone to you, especially if they're mentally ill or drug users . . . [2T212]

Biancardi was not familiar with K.B.'s file or history when she received Towle's e-mail (2T208). Upon her review of the file, Biancardi observed that K.B. was convicted of harassment -- the lowest level felony offense -- and not "stalking." Accordingly, she regarded Towle's deduction that K.B. "might very well show up here" as a "gigantic and unrealistic leap of imagination" (2T216; 2T217). In a similar vein, Biancardi

questioned the meaning of "abusive" in Towle's e-mail; a mentally ill person is likely to "rant and rave" (2T215). Finally, Biancardi testified that the [next to] last paragraph of the e-mail was "just plain sarcasm" and revealed "rudeness" and "insubordination" by the refusal to speak to the client (2T219; 2T220).

I credit Biancardi's testimony about her initial reaction to Towle's e-mail memorandum. I infer that her professional concern for the client is consistent with the perspective of a careerist and manager in the OPD.

25. On October 1, at around 3:30 p.m., Drugach issued a brief e-mail memorandum to Biancardi, Collins and Towle regarding client K.B. Drugach wrote that the case has been a problem because "the defendant had retained a private attorney below on one indictment"; that "[the private attorney] filed a notice of appeal on one of two indictments for which [K.B.] had been sentenced on the same day"; and that a public defender who had represented her on the other indictment "forwarded an appeal on both." Drugach wrote that "the client had a difficult time understanding that she could not have two attorneys represent her on the same appeal." She also wrote that the case would be "listed" on the November ESOA calendar and the client would be assigned an attorney by the week's end (R-9; 2T44).

Biancardi conferred with Drugach about client K.B. sometime before or shortly after she received the attorney's e-mail summary (2T221; 2T225).

26. On October 1, at around 4:50 p.m., Biancardi issued an e-mail memorandum to Collins and a copy to Drugach regarding client "K.B." (R-11; 2T225). Biancardi wrote that she was "extremely displeased with the tone and assertions that Rachel is making in [her] e-mail." She listed in detail six items which Collins and Drugach were directed to explain to Towle:

> 1. No paralegal or staff attorney can simply refuse to talk to a client. The nature of this job is such that our clients may be mentally ill, out on bail, and charged with crimes far worse than harassment and assault . . . We are supposed to learn how to handle the situation and evidence a level of compassion and support for those who are unfortunate . . . She is working for the Public Defender and if she cannot do this she should not be here. She should go to her supervisor if she has a problem with a client . . .
>
> 2. The Public Defender has required all regional offices to have a receptionist present until 5:30, therefore if someone received a call at 5:20 p.m. and they are still at their desk, the call will be put through.
>
> 3. The PAR specifically states that paralegals will provide backup assistance to attorneys, including taking calls (Deborah, we identified that paragraph in response to Rachel's complaint about announcing the caller at the paralegal meeting). She signed the

PAR indicating that she understood her job responsibilities in this regard.

4. The tone of her e-mail indicates a complete disregard for management in that she is basically telling us what she will and will not do, which is totally unacceptable. Further, she evidences a total lack of understanding of the clients in this office, the mission of the office and the nature of the job.

5. She seems to feel that it is appropriate to "raise her voice and let her frustration come through" with a client. I do not find this to be the least bit appropriate; in fact, I cannot believe that she admitted it in writing!

6. She also seems to believe that limiting client calls to 5 minutes is a good idea. While I understand that the job of a paralegal does not include coddling a client, there are times and situations which require care and concern for the people we represent and again, her attitude is entirely inappropriate. [R-11]

Biancardi also wrote that Towle should be advised that she needs to learn how to handle clients, ". . . but that the bigger problem is the attitude." She wrote that "the first level of management should address [this] at this juncture, but I do want to nip this in the bud" (R-11).

Later that day after leaving work, Biancardi reconsidered her memorialized course of action. She became concerned about what Towle might do "if she had to talk to a much heavier client"

[i.e., one having a far more aggressive or violent disposition or a more serious criminal conviction] (2T226).

27. The next morning, October 2, Biancardi decided that the admonition set forth in her e-mail to Collins and Drugach ". . . was not going to do it because I've tried and tried." Biancardi believed that Towle was "not right" for the agency - ". . . [s]he just doesn't get it and she doesn't fit in" (2T228). She also decided against calling John McKenna at home for his opinion. She thought: "This is my decision; I will deal with it." She had not previously recommended any employee's termination (2T222; 2T228).

Biancardi told Collins not to meet with Towle and that she was "going to call headquarters" about terminating Towle's employment (2T228; 2T258). That morning, Biancardi wrote a list of seven "issues considered" regarding Towle's performance (R-13; 2T230). The two-page handwritten document predominantly highlights Towle's October 1 e-mail (finding no. 22) and her specific "complaints" at the June 3, 2003 meeting (finding no. 15). Each noted item references a function attorney assistants performed and which Towle had complained about. Biancardi also noted William Smith's escort of a client's family (finding no. 18), and three minor "problems" with support staff (R-13). Biancardi wrote that Towle's October 1 e-mail was "insubordinate"

and demonstrated "no sense of understanding regarding her duties to the client" (R-13).

28. Also on October 2, Biancardi phoned Public Defender Yvonne Smith Segars and told her the particular facts leading to her recommendation that Towle should be terminated. She also read Towle's October 1 e-mail to Segars. The Public Defender accepted Biancardi's version of events and agreed to abide the recommendation (2T235). A letter dated October 2 terminating Towle's employment on October 13 and signed by Segars was hand-delivered to Towle at the Newark office on October 3 (CP-8; 1T150).

Biancardi also spoke with Manager of Human Resources DiMattia about Towle's e-mail and her refusal "to handle certain clients," thereby abdicating "what an attorney assistant should be doing." They discussed procedures for terminating Towle's employment (1T264-1T265; 2T259; 2T266; 2T267).

29. On October 31, 2003, OPD attorneys and CWA shop stewards Dan Gautieri and Marcia Blum wrote a memorandum to Biancardi stating that Towle's October 1 e-mail "highlighted" a "health and safety concern" (CP-1). They wrote: "While attorneys can decline to accept calls from difficult clients and decline to see clients without an appointment, we have recently learned that the same is not true for paralegals" (CP-1). The memorandum cites Article 32 of the collective negotiations

agreement [see finding no. 2] and requests that paralegals be given discretion to decline call(s) from "the occasional difficult client." The shop stewards also requested training of staff ". . . on how to deal with difficult clients" (CP-1).

ANALYSIS

The issue in this matter is whether attorney assistant Rachel Towle was terminated from her job in retaliation for engaging in protected activity, thereby violating 5.4a(3) of the Act. In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements a charging party must prove to establish a violation of 5.4a(3).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the 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 unlawful motive 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, be 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.

Conduct "protected" by our Act is not limited to an individual employee's participation in collective negotiations, grievance processing or contract interpretation. In its earlier decision in this case, the Commission wrote:

> Our Act gives public employees the right, without fear of penalty or reprisal, to form, join or assist any employee organization, N.J.S.A. 34:13A-5.3. The Act also covers concerted activity engaged in for employees' mutual aid and protection. [citation omitted] Drawing on case law interpreting 29 U.S.C. §157 of the National Labor Relations Act (NLRA), we have held that protected activity may include individual conduct - such as complaints, arguments, objections, letters or similar activity - related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n. 16 (¶4205 1978), aff'd NJPER Supp.2d 63 (¶45 1979). [other citations omitted] However, mere 'personal griping' does not constitute protected concerted activity. Compare Capitol Ornaments Concrete Specialties, Inc., 248 NLRB 851, 1518 (1980) (employee's complaint about condition of road leading to

> new parking area not protected activity where there was no evidence that he acted in concert with any other employee and no reason to infer that his Complaint touched a matter of common concern) and Salisbury Hotel, Inc., 283 NLRB 685 (1987) (non-unionized employees were engaged in concerted activity to change employer's lunch hour policy where employees balked at the new policy and complained among themselves and to management; therefore, discharged employee's complaints to other employees and her individual complaints to the employer were part of that concerted effort). [31 NJPER 279]

The Commission cited other cases delineating an employee's "protected" activity from another's "personal griping" (i.e., a part-time employee complaining about receiving her paycheck at 4:00 p.m. was ". . . not acting on behalf of an employee organization; she did not act in concert with anyone, and her complaint was on behalf of herself individually and did not relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself." Essex Cty College P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987)). See also, Atlantic Cty Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994); State of New Jersey (Public Defender), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. 12 NJPER 199 (¶17026 1986), aff'd NJPER Supp. 2d 169 (¶148 App. Div. 1987).

The State contends that Towle's October 1 e-mail is not protected under our Act because it reveals only "personal griping" about having to accept unscreened telephone calls from a

particular OPD client (brief at 37). I assume that Towle's e-mail is protected by the Act.

The CWA argues that employer hostility to Towle's e-mail is demonstrated by direct and circumstantial evidence. It contends that Biancardi's admission of "extreme displeasure" with the e-mail and her reading of it to Public Defender Segars is direct evidence of animus (brief at 31). It asserts that hostility is proved circumstantially by the timing of the OPD's decision to terminate Towle; the absence of any documents written before October 2 showing "displeasure" with Towle's performance; the disparate treatment of Towle, i.e., no other attorney assistant had been terminated; and by the OPD's inconsistent reasons for terminating Towle's employment. (Specifically, CWA contends that Biancardi failed to explain why client contact is "essential to the mission of the OPD." Attorney assistant PARs provide that "routine" client calls must be answered, but client K.B.'s calls were not "routine." Finally, CWA argues that Towle discussed her problems with client K.B. with managing attorney Drugach and issued her e-mail to Collins, her immediate supervisor, as she was required to do).

I recommend that CWA has not proved by a preponderance of evidence that the OPD was hostile to Towle's assumed protected activity. Biancardi wrote that she was "extremely displeased" with the "tone and assertions" in Towle's e-mail (emphasis

added). Nothing in the record suggests that her "extreme displeas[ure]" was anger at receiving a complaint about terms and conditions of employment. I find that the e-mail's text aggravated Biancardi, negatively reinforcing and adding to her concerns that Towle did not adequately recognize or appreciate her job duties and had neither the requisite temperament for, nor commitment to clients. Reasons for Biancardi's "displeasure" were documented in her prompt and unstudied October 1 written response to Towle's e-mail, a six-point manager's rejoinder to supervisor Collins revealing no trace of unlawful animus. Similarly, her October 2 handwritten notes cataloging Towle's misunderstandings about her job; her "insubordinations" set forth in her e-mail; and her "problems" with staff and "unrealistic fear" reveal no animus to protected conduct.

I also disagree that circumstantial evidence proves that the OPD was hostile to Towle's e-mail. Timing is a factor in assessing employer motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In this case, it is merely the relatively strongest factor in CWA's proofs. Biancardi's decision to terminate Towle's probationary employment on the heels of receiving her e-mail was actually preceded by her initial and then-aborted decision to admonish the attorney assistant. Biancardi reconsidered largely because she feared that Towle would not perform her job under the pressures of "a

much heavier client" and had exhausted opportunities to "adjust." Biandardi's rationale is unrelated to the exercise of protected rights.

The CWA contends that before October 2, the OPD did not give Towle any document revealing its dissatisfaction with her job performance. On June 10, 2003, Biancardi personally conducted Towle's PAR meeting to apprise her of attorney assistant duties. She gave Towle a written job description to that effect. The meeting was held months before it would have normally been scheduled because Biancardi became concerned that Towle's remarks at the June 3 attorney assistants' meeting revealed serious misunderstandings of her job. Biancardi positively reinforced attorney assistant duties to Towle, despite her own misgivings in the previous month that she was not a "good fit" at the OPD.

I am satisfied that the OPD has demonstrated that client contact is a primary component of the attorney assistant position and that its dissatisfaction with Towle's performance of it is not pretextual. CWA's argument that Towle responded properly to client K.B.'s CWA's September 30 phone call belies the dominant fact that she admitted yelling at a client. I infer from the Martinezes' directive to Towle (that she should discuss the incident with Collins rather than issue her e-mail) that they believed Biancardi would likely not tolerate her admitted conduct and written intention not to accept a client's phone calls.

From the outset, Towle's temperament was not in sync with a staff that is highly tolerant of its clientele and not distracted by the absence of office amenities. Nor did Towle earn her supervisors' favor by candidly expressing a casual commitment to her employment, notwithstanding her competency to "complete" client files. Her questioning of attorney assistant responsibilities raised the concern that she did not fully understand her job, which in turn prompted a PAR meeting. Towle's October 1 e-mail called into question the efficacy of the PAR meeting and was reasonably perceived as insubordinate.

RECOMMENDATIONS

I recommend that CWA has not proved that the OPD was hostile to the exercise of Towle's assumed protected conduct - her October 1 e-mail to supervisor Collins and Deputy Public Defender Biancardi. Accordingly, I recommend that the Complaint be dismissed.

Jonathan Roth
Hearing Examiner

DATED: November 13, 2006
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 27, 2006.