P.E.R.C. NO. 95-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF SUSSEX,

Respondent,

-and- Docket No. CO-H-93-447

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL NO. 1032,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the County of Sussex violated the New Jersey Employer-Employee Relations Act by reprimanding a nurse for discussing her suspension with co-employees since the employer did not demonstrate that this reprimand was justified by its legitimate operational need to care for patients without upsetting them. The Commission rejects certain recommendations of the Hearing Examiner that exceeded the allegations contained in the unfair practice charge.

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COMMUNICATIONS WORKERS OF AMERICA,
LOCAL NO. 1032,

Charging Party.

Appearances:

For the Respondent, Giblin & Giblin, attorneys
(Robert A. Silber, of counsel)

For the Charging Party, James Marketti, staff representative

DECISION AND ORDER

On June 21, 1993, the Communications Workers of America, Local No. 1032, filed an unfair practice charge against the County of Sussex. The charge alleges that the employer violated subsections 5.4(a)(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, on June 8, 1993, the Administrator of the Sussex County Homestead, a nursing home, disciplined a graduate nurse, Alice Retz, for

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act and (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."

discussing her employment conditions with other employees. On July 13, 1993, CWA amended its charge to specify that Retz discussed a two-day suspension given her on May 24, 1993.

On August 26, 1993, a Complaint and Notice of Hearing issued. The employer filed an Answer incorporating an earlier statement of position. The employer admits that Retz received a written warning because she had discussed her suspension with other workers in the nursing unit, but asserts that this warning was a proper response to her having violated an order not to discuss the suspension on a nursing floor where patients lived.

On November 1, 1993, Hearing Examiner Alan R. Howe conducted a hearing. At the outset, the employer asked to have the unfair practice proceeding deferred to arbitration on the theory that Retz could have filed a grievance asserting that the June 8 warning was unjust. The Hearing Examiner postponed ruling on this motion until after the hearing. The parties then examined witnesses, introduced exhibits, argued orally, and filed post-hearing briefs.

On May 12, 1994, the Hearing Examiner issued his report. H.E. No. 94-24, 20 NJPER 246 (¶25123 1994). He denied the employer's deferral motion and concluded that the employer had violated subsections 5.4(a)(1) and (3) by the Homestead Administrator's actions against Retz on or after April 23, 1993. He recommended an order requiring the employer to stop violating the Act, withdraw the June 8 warning, make Retz whole for any pay lost

as a result of the May 24 suspension, and post a notice of its violations and remedial actions.

On June 14, the employer filed exceptions. It asserts that the unfair practice charge does not contest the May 24 suspension so the Hearing Examiner erred in recommending that Retz be made whole for any lost pay and that the Hearing Examiner's conclusions of law depend upon erroneous findings of fact. CWA has not responded.

The employer no longer asserts that this matter should have been deferred to arbitration. Our longstanding policy is not to defer unfair practice cases involving alleged violations of subsections 5.4(a)(1) and (3) as opposed to cases involving alleged violations of subsection 5.4(a)(5). Cases in the former category normally focus on issues of business necessity, motivation and alleged discrimination independent of contractual interpretation while cases in the latter category often center on or interrelate with issues of contractual analysis. Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983).

The employer asserts that the Hearing Examiner exceeded the allegations contained in the unfair practice charge by invalidating the May 24 suspension. We agree. The charge contests the June 8 warning only. We may consider other incidents as background in deciding whether that warning constituted an unfair practice, but we cannot find that any other incidents constituted unfair practices in themselves or warranted relief. In particular, the May 24 suspension was neither contested in the charge nor so fully and

fairly litigated that the employer must have known that unfair practice liability or relief could be based on that incident. Contrast Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83) (respondent itself framed and litigated issue not pleaded in charge). The Hearing Examiner also exceeded the boundaries of the pleadings when he concluded that the Homestead Administrator violated subsections 5.4(a)(1) and (3) at an April 28, 1993 meeting with Retz and when he ordered the County to cease and desist from failing to stop the Homestead Administrator from interfering with Retz's right to communicate with the freeholders.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are generally accurate. We adopt and incorporate them, with these modifications and additions.

We modify the last sentence of finding no. 5 to state that Retz had not been suspended or given a formal warning notice before May 24, 1993 (T44). She had, however, been removed from her position as a medication nurse for alleged errors or irregularities in administering medicines (T63).

We modify footnote no. 2 in finding no. 6 to state that Mayer's version and Retz's version of what Mayer said to Retz at the May 24 meeting differ significantly. According to Retz, Mayer gave her permission not to tell anyone else about the suspension because it was a private matter (T44; T102). According to Mayer, she ordered Retz not to discuss the suspension "upstairs" -- that is, on

the nursing floors. The administration prohibited conversations about personal problems in or near areas frequented by patients (T153) and required that conversations of an emotional or heated nature be held in non-patient areas on the first floor during meal or break times (T152; T158). For purposes of this decision, we will assume that Mayer gave Retz such an order. We add that Retz and Miller corroborated Mayer's testimony that there had been incidents where patients, some with Alzheimer's disease, had been upset or confused by hallway conversations (T103; T135; T152-T153) and that Retz conceded that suspensions should not be discussed with other employees in front of patients (T100) and that it would have been reasonable for Mayer to tell her not to have such conversations where patients' rooms are (T103).

We add to finding no. 8 that when Retz reported to the nurses' station on the second floor, nurse Kathleen Smith asked her if she was sick and Retz responded she was not. When Retz added she had been suspended, Smith gave her a little hug (T44-T55). We add also that Retz's conversation with nurse Kathleen Dippold occurred at 9:00 or 9:30 p.m., as they were doing paperwork at the table in the nurses' station. In discussing the next day's staffing, Dippold asked Retz what floor she would be on and Retz responded that she would not be at work because she had been suspended (T56-T57). Retz testified that the nurses' station is designed to permit nurses to have conversations outside the hearing of patients (T62) and that on-duty nurses often have personal conversations there (T58). These points were not contradicted by other witnesses.

We add to finding no. 12 that the Patient Bill of Rights states, in part, that patients have the right "[t]o be treated with consideration, respect, and full recognition of your dignity and individuality, including privacy in treatment and in care for your personal needs."

With respect to finding no. 14, we find that the Hearing Examiner was not required to infer that Retz told a group of nurses' aides about her suspension while the group was standing before the utility room near the second floor elevator. Miller did not overhear anything Retz said to this group of employees (T141) and Retz had left the group before Miller overheard the aides talking about Retz's suspension (T142). Retz was permitted to discuss her suspension on the first floor and she told at least one of these aides, Arminda Burdi, about the suspension there (T46); it is possible that Burdi or another employee besides Retz communicated this information to the other aides. It does not appear that the employer investigated Miller's allegations and the employer did not call Burdi or any other witnesses to establish that Retz discussed her suspension with them in the hallway on the second floor. Thus, no independent evidence shows that Retz had the hallway conversation Miller assumed she had.

We add to finding no. 14 that after taking the patient to her room, Miller went to the nurses' station on the second floor. On her way, she overheard an aide, Louise Crocco, ask the shop steward, Tracey Vela, why Retz had been suspended; Vela responded

that she could not talk about it and Retz had been told not to talk about it too (T136). When Miller arrived at the nurses' station, she saw Retz being hugged and consoled by Smith and she heard Smith saying: "[D]on't be upset, they seem to be trying to find every little thing wrong about everyone here." (T137; T144). At supper time that day, Miller went to the patients' dining room on the second floor where she heard three aides (Dzupinka, Trautz, and someone else) talking about the suspension. Miller called the head nurse and reported that the second floor aides were talking about the suspension (T137-T140; T145); this report apparently triggered the disciplinary action against Retz, but the record does not disclose how the report was turned into the warning. It does not appear that any other employees were reprimanded for speaking about the suspension in patient areas.

We agree with the County that reasonable time and place restrictions may be imposed the freedom of employees to discuss their employment conditions when an employer can demonstrate legitimate business needs justifying such restrictions. In the private sector, the United States Supreme Court has upheld hospital bans against union solicitations in patient care areas such as operating and therapy rooms, patients' rooms, and nearby hallways and lobbies. NLRB v. Baptist Hosp., 442 U.S. 773, 101 LRRM 2556 (1979); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 98 LRRM 2217 (1978). The Court has distinguished areas not frequented by patients such as gift shops and public cafeterias. Cases applying

these distinctions have required hospitals to show that a particular solicitation was improper because it occurred both at a place and a time jeopardizing patient care. NLRB v. Southern Md. Hosp. Center, 916 F.2d 932, 135 LRRM 2693 (4th Cir. 1990); Manchester Health Center v. NLRB, 861 F.2d 50, 129 LRRM 2849 (2d Cir. 1988). See generally Hardin, The Developing Labor Law at 91-92 (4th ed. 1992); The Developing Labor Law, Third Edition, First Supplement 1990-1992 at 14. The National Labor Relations Board has invalidated a rule prohibiting all union-related solicitations in nursing stations. Rocky Mt. Hosp., 289 NLRB No. 138, 130 LRRM 1487 (1988).

We recognize the employer's legitimate interest in proscribing emotional or heated conversations in patient areas. Nevertheless, under all the circumstances of this case, we adopt the Hearing Examiner's determination that the employer violated subsection 5.4(a)(1) when it disciplined Retz. Given this record and Retz's uncontradicted testimony about the nurses' station, the employer has not demonstrated that it needed to prohibit Retz from mentioning her suspension at the nurses' station in response to questions about her health and the next day's staffing -- it does not appear to us that these brief interchanges in an area designed to permit nurses to have private conversations threatened patient care. Nor has the employer proved that Retz violated Mayer's order by discussing her suspension with nurses' aides in the second floor hallway. Miller did not overhear Retz discussing her suspension; the employer did not investigate Miller's report to test Miller's

assumption that Retz had discussed the suspension in the hallway; at least one of these employees had already learned about the suspension from Retz downstairs and could have initiated the upstairs conversation after Retz left; and the employer did not call any witnesses to testify that Retz had told them about her suspension in the second floor hallway. We therefore find that the employer has not met its burden of demonstrating that its legitimate operational needs justified its disciplinary action and we order the removal of the Employee Warning Record from Retz's personnel file. Cf. St. Luke's Hosp., 327 NLRB No. 73, 146 LRRM 1291 (1974).2/

ORDER

The County of Sussex is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Alice Retz for discussing her suspension with her co-employees since the employer did not demonstrate that this reprimand was justified by its legitimate operational need to care for patients without upsetting them.

2/ Given this result, we need not consider whether the employer violated subsection 5.4(a)(3) as well as subsection 5.4(a)(1). We note, however, that there is no evidence that any other employer representative besides Marchionda harbored any hostility towards Retz because of her protected activity.

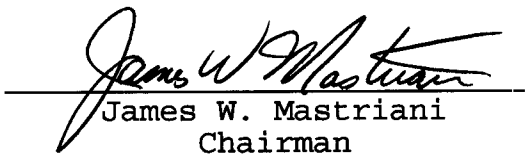
B. Take this action:

1. Withdraw the Employee Warning Record (CP-2) from Retz's personnel file;

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

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: October 25, 1994
Trenton, New Jersey
ISSUED: October 26, 1994

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Alice Retz for discussing her suspension with her co-employees since it was not demonstrated that this reprimand was justified by our legitimate operational need to care for patients without upsetting them.

WE WILL withdraw the Employee Warning Record (CP-2) from Retz's personnel file.

Docket No. CO-H-93-447 COUNTY OF SUSSEX
(Public Employer)

Date: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 94-24

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

In the Matter of

COUNTY OF SUSSEX,

Respondent,

-and-

Docket No. CO-H-93-447

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL NO. 1032,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County independently violated §5.4(a)(1) of the New Jersey Employer-Employee Relations Act when its Administrator interfered, in a myriad of ways, with the protected activities of a registered nurse, Alice Retz, at its "Homestead" facility because of her filing a grievance and seeking to speak to co-employees during working time about a two-day suspension she received on May 24, 1993, none of which interfered with patients or disrupted the County's facility. There was also a restraint by the Administrator of Retz's recognized right to communicate to Freeholders regarding terms and conditions of employment. The same conduct of the County's Administrator violated §5.4(a)(3) of the Act under Bridgewater because the Administrator was hostile to Retz's exercise of her Section 5.4(a)(1) rights.

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. 94-24

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

In the Matter of

COUNTY OF SUSSEX,

Respondent,

-and- Docket No. CO-H-93-447

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL NO. 1032,

Charging Party.

Appearances:

For the Respondent, Giblin & Giblin, Attorneys
(Robert A. Silber, of counsel)

For the Charging Party, James Marketti, Staff Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 21, 1993, and amended on July 13, 1993, by the Communications Workers of America, Local No. 1032 ("Charging Party" or "CWA") alleging that the County of Sussex ("Respondent" or "County") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act), in that on or about June 8, 1993, the County by its agent, Carmine Marchionda, retaliated against Alice Retz, a nurse and a member of CWA's unit, for engaging in free speech with fellow employees regarding her terms and conditions of employment, and as a result of which Retz was threatened with further discipline, in

addition to a prior suspension, imposed on May 24, 1993; all of which is alleged to be a violation of Sections 5.4(a)(1) and (3) of the Act.[1/]

A Complaint and Notice of Hearing was issued on August 26, 1993. Pursuant thereto, a hearing was held on November 1, 1993, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses and present relevant evidence. Both parties argued orally (Tr160-168) and post-hearing briefs were filed by December 23, 1993.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The County of Sussex is a public employer within the meaning of the Act, as amended, and is subject to its provisions. The Communications Workers of America, Local No. 1032, is a public employee representative within the meaning of the same Act.

2. The current collective negotiations agreement between the parties was effective through the term ending December 31, 1992, the agreement having been executed on June 20, 1991 (CP-12).

3. Alice Retz, has been employed as a graduate registered nurse (RN) at the County's "Homestead" facility since December 19,

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

1990 (Tr32-34). Retz had previously been employed by the County in its library, beginning on July 20, 1988 (Tr34).

4. Retz has been a member of CWA for about two years but, apparently, was never an officer or official of the Charging Party (Tr35).

5. On May 24, 1993, Retz was summoned to a meeting at the beginning of the second shift where the following persons were present: Doris Mayer, the Supervisor of Nurses, Candice Leduc, the Business Office Manager, and Tracy Vela, the day-shift CWA Shop Steward (Tr42-44, 150, 152; CP-1). At this meeting, Retz was given a Notice of Minor Disciplinary Action, stating that she was suspended for two days (Tr42, 151; CP-3). [The County's basis for this suspension appears under "Specifics" in CP-3, infra]. This was the first disciplinary action that Retz had ever received (Tr44).

6. Mayer had stated to Retz, during the May 24th meeting, that she should not discuss the disciplinary action with anyone (Tr44).[2/] Mayer's stated reason for this restriction was that nursing units were not an appropriate place "...to bring one's personal matters...in a nursing home..." One, situated as Retz, could speak away from the nursing unit on the first floor at supper time, at break time or in a non-patient area (Tr152). However, the

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2/ Specifically, Mayer was quoted by Retz as saying, "You don't have to tell anyone about this" (Tr44). Mayer testified that she "...told her (Retz) this was not to be discussed upstairs...on the nursing units..." (Tr152). No significant differences appear between these two versions.

discussion of personal matters would depend on "...the stress level that they (discussions) can cause..." (Tr156). Mayer insisted that there had been prior instances where conversations in the hallway had adversely affected patients (Tr152, 153). Mayer had no records or notes, which indicated that as of May 24th any of the patients had overheard any of the conversations concerning Retz's discipline (Tr157).

7. Upon leaving the May 24th meeting, Retz proceeded down the first floor hallway with Vela to Retz's locker. This was a floor on which there were no patients. Retz spoke first to a maintenance man, John Schwartz, and then to three nursing assistants, Armanda Burdi, Florence Nespor and Glenda Nystrand, about her suspension (Tr45-47). Retz testified clearly and credibly that she was nowhere near patient areas at the time that she spoke to these employees about her suspension (Tr 45, 48, 49 & CP-4A: Tr51, 52, 61, 62).

8. Also, on May 24th, after leaving the locker area, Retz reported to the nurses station on the third floor (Tr52), later corrected (and not contested) to the second floor (Tr107, 108). When Retz arrived at the nurses station she met a co-employee, Kathleen Smith, as Smith was leaving her shift. When Smith noticed Retz's apparent upset, Retz related the fact of her suspension earlier in the day (Tr54-56). Shortly thereafter, Retz met another co-employee, Kathleen Dippold, at the same nurses station, and Retz related to her what had happened earlier, regarding her two-day

suspension (Tr56, 57). These conversations with Smith and Dippold, plus those with the other four employees in the locker area, supra, consumed no more than five minutes during that day (Tr57, 58).[3/]

9. On May 26, 1993, Retz filed a grievance regarding her two-day suspension under Article VI, §§2, 3 of the collective agreement (CP-1). On June 8, 1993, there was a meeting with supervision on this grievance, where the Administrator, Carmine Marchionda, was present along with Mayer and a CWA representative (Tr36, 37, 39-42; CP-1). At this meeting, Retz was given a document entitled "Employee Warning Record," which stated that she had been "informed" by her supervisor not to discuss her disciplinary action of May 24th. The "Warning" further stated that Retz thereafter discussed her suspension with another nurse at the nurses station, and, also, with three assistants in the hallway, all of which was "...not only disruptive to nursing operations, but was in proximity to resident rooms...Further infractions will result in additional disciplinary action." [CP-2; Tr41, 42]. The position of CWA was that the terms of the progressive discipline had not been followed as to Retz. Marchionda responded: "You want progressive discipline, I'll give you progressive discipline" (Tr40, 110). James Marketti, the CWA Staff Representative, added that Marchionda shoved a disciplinary notice toward him (Tr110; CP-2).

3/ Retz testified without contradiction that employees discuss a variety of non-work related subjects during their working day and this has never been the subject of reproval by the Respondent (Tr58, 59, 61).

10. On November 24, 1992, Retz had filed a grievance when Marchionda removed her from her position as a medication nurse in October 1992 (CP-5). Her informal protest to him was sent on October 31, 1992 (CP-6).[4/]

11. The May 24th meeting, supra, had been preceded by a non-disciplinary meeting on April 23, 1993, which was attended by Retz, Marchionda, Mayer and a CWA Shop Steward, Lynn Killner (Tr74, 75). Marchionda expressed to Retz his dissatisfaction with her behavior and that she was challenging him by filing grievances (Tr76). More specifically, Retz testified, without contradiction, that Marchionda told her that he wanted her to stop talking to public officials about her treatment and he stated to her that he could "fire" her (Tr76, 77). Finally, he stated to Retz that she was to have no further conversations with her fellow employees "whatsoever" (Tr77). Retz acknowledged that she had spoken to certain of the Freeholders about Marchionda (Tr76-78). Retz also testified without contradiction that her relationship with Marchionda had become "very hostile" over the past year (Tr78). [5/] Mayer recalled that Marchionda told Retz that she was not to discuss "...these issues up on the nursing units... and it could cause stress (to) the patients in that environment..." (Tr149).

4/ The testimony on the matter of the November 24, 1992 grievance, and the surrounding circumstances, appear to have no relevance, but it is found at Tr62-71.

5/ Five job performance evaluations, spanning the period December 14, 1990 through December 1, 1992 were marked for identification only since their relevance was not apparent (CP-8A-D, CP-9; Tr81, 82).

12. During the cross-examination of Retz, the Respondent produced a copy of its "Patient Bill of Rights" (R-1B) and an acknowledgment sheet by Retz that she had received and reviewed a copy of the "Bill of Rights" on three separate dates in 1991 through 1993 (R-1A) [Tr90, 93-97, 99-101]. The relevance of the foregoing to this case is doubtful at best.

* * * *

13. Marketti testified in his own right, regarding the June 8, 1993 first-step meeting on Retz's May 26, 1993 grievance (CP-1, supra; Tr109-117; CP-10, CP-11). The testimony adduced established only that at the June 8th grievance meeting there was a dispute between Marketti and Marchionda regarding the parameters of free speech in such meetings (Tr110, 111, 116, 117 & CP-10, CP-11, supra).

14. Mary Ellen Miller, an LPN on the 3:00 p.m. shift, testified without contradiction that on May 24, 1993 she encountered four employees by the elevator, one of whom was Retz (Tr125-127, 133). After Retz left the group, Miller overheard the remaining three individuals talking about Retz having been suspended (Tr133, 134). According to Miller, it was inappropriate for such a conversation to have taken place since patients rooms were nearby and it could be "disturbing" to them (Tr134). The elevator area was at the second floor and Miller testified that patients were coming back and forth into the day room in wheel chairs and walking (Tr133, 134). Miller also observed Retz and Smith speaking to one another

regarding the suspension of Retz (Tr136, 137). However, on cross-examination, Miller acknowledged that she never actually heard anything that Retz said on the second floor unit on May 24th and that Retz was not a participant in the additional conversations which Miller testified to (Tr141-145).

15. Doris Mayer, referred to previously, is the Supervisor of Nurses at the "Homestead" and is responsible for the management of the Nursing Department and for patient care (Tr146, 147). She supervises twenty-five nurses, including Retz, and has been the supervisor for five years (Tr147).

ANALYSIS

The Positions of the Parties

1. CWA sees this case as one involving "...free speech about...terms and conditions of employment..," which is itself a protected activity and was exercised in this instance by Retz when she spoke with co-employees about her two-day suspension on May 24th. The citation of Salem City Board of Education, P.E.R.C. No. 84-153, 10 NJPER 439 (¶15196 1984) is apposite since that case, as in most Commission decisions on the subject, involved a finding of protected activity where an employee addressed the public employer directly, thereby departing from the "chain of command."[6/] Here, Retz was charged by Marchionda with having spoken to certain

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6/ See Commercial Tp. Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd. App. Div. Dkt. No. A-1642-82T2 (1983) and Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228, 229 (1977).

Freeholders. CWA correctly cites City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), aff'd. App. Div. Dkt. No. A-3562-77 (1979), which involved the President of a Union sending a letter to the Mayor during negotiations for a successor agreement, i.e., a public employee communicating directly with the public employer in departure from the "chain of command." The City's position was that this communication violated a regulation that barred any communication with a public official other than the Fire Chief. The Commission found the letter to be the presentation of a position concerning terms and conditions of employment to an elected official. Thus, it was "...indisputably a protected activity..." (4 NJPER at 191). CWA relies heavily upon Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), infra.

2. The Respondent County takes the position that Retz's claimed violation of our Act is in fact an arbitrable grievance under Article XXXII of the parties' collective agreement (CP-12) since the definition of a grievance there includes, inter alia, any complaint by an employee that he or she has been "...treated unfairly or inequitably by reason of any act or condition which is contrary to established County policy or administrative practice governing or effecting employees..." (CP-12, p. 27). Although Retz did file a grievance on the issue at hand (CP-1), and an earlier grievance on a separate subject in 1992 (CP-5), neither of these would be susceptible to a mandated deferral to arbitration since the instant Unfair Practice Charge does not allege a violation by the

Respondent of Section 5.4(a)(5) of the Act as to which a Human Services[7/] argument might be made. The Respondent then proceeds to argue that CWA did not carry its burden of proof by a preponderance of the evidence. Further, the action of the employer was merely to discipline Retz because of the potential problem that her conduct created when on May 24th she spoke to co-employees on the nursing units within earshot of patients quarters. Thus, the issuance of a warning and the imposition of a two-day suspension was not retaliatory nor did it restrict her exercise of the right of free speech.

The Respondent County Independently Violated Section 5.4(a)(1) Of The Act And, Additionally, Section 5.4(a)(3) Of The Act By Restricting The Right Of Retz To Speak To Co-Employees, Following Her Two-Day Suspension On May 24th And A Warning On June 8th Threatening Additional Discipline

I support CWA's basic contention that when an employee speaks to a co-employee, or to co-employees, and this speech pertains to terms and conditions of employment, and is not disruptive of the employer's operation, the employee is engaged in a protected activity under our Act without question. This proposition

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7/ N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) where the Commission first clearly articulated the rule that a mere breach of contract claim does not state a cause of action under §5.4(a)(5). Therefore, the parties must attempt to resolve the dispute under their negotiated grievance procedures (10 NJPER at 421).

does not require further citation.[8/] The activity of Retz, in speaking on May 24th to her co-employees about her two-day suspension, was clearly a discussion about the imposition of discipline and did, therefore, deal with terms and conditions of employment in the broadest sense.

Salem City Board of Education, supra, is on point because it, plus Hackensack and the several other cases cited above, involved the finding of protected activity where a public employee addressed his or her employer, in writing or verbally, and in doing so departed from the customary "chain of command." The instant case, involving Retz, pertains to her protected activity: (1) in speaking to several co-employees on May 24th about her suspension, either at the elevator or the employee lockers on the first floor, or at the second floor nurses unit; and (2) to certain Freeholders about Marchionda. I reiterate that this speech by Retz involved the exercise of a protected activity without limitation.

We now proceed to the Bridgewater analysis. In assessing employer motivation under Section 5.4(a)(3) of the Act, the Court articulated the following test: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's adverse decision; and (2) once this is established, the employer has

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8/ CWA errs slightly in asserting that "the employee activity must be 'concerted'..." This is a requisite under §7 of the NLRA, but is not required under our Act.

the burden of demonstrating, in the absence of pretext or sham, that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

Thus, the Charging Party must have proven by a preponderance of the evidence, on the record as a whole, that protected activity was a "substantial" or a "motivating" factor in the employer's adverse decision. The Court then stated that this may be done by direct or circumstantial evidence, which demonstrates that:

(1) the employee engaged in protected activity; and

(2) the employer knew of this activity; and

(3) the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].[9/]

If the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have been taken even in the absence of protected conduct [Id. at 242]. This affirmative defense need only be considered if the Charging Party has first proven on the record as a whole that hostility or animus was a "...motivating force or substantial reason for the employer's action..." [Id].

9/ Note, however, that the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or, if its explanation has been rejected as pretextual or a sham, then there is a sufficient basis for finding a violation of the Act without more.[10/]

* * * *

The requisite of protected activity having previously been met, the next question is whether or not the Respondent knew of Retz's exercise of speech in the presence of her co-employees. There can be no doubt whatsoever that both Mayer and Miller had direct knowledge of Retz's speaking with some six co-employees on May 24th. They testified to this effect (F/F Nos. 14 & 15). The first two requisites of the Charging Party's proofs under Bridgewater having been satisfied, there remains the matter of employer hostility or animus toward Retz's exercise of the protected activity of employee speech.

I find and conclude that this record is replete with evidence of hostility toward Retz on the part of the Respondent's representatives, especially Marchionda.[11/] For example, at the

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10/ Because I am persuaded that this case is one of pretext or sham, I will later expand upon the pretext analysis as articulated by the NLRB in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).

11/ This evidence of hostility, infra, is egregious and satisfies not only the requisites of Bridgewater but it also supports my

Footnote Continued on Next Page

April 23rd meeting where Retz appeared before Administrator Marchionda, Mayer, the Supervisor of Nurses, and a CWA Shop Steward, Marchionda expressed dissatisfaction with Retz's behavior and stated that she was challenging him by filing grievances. This was supposedly a non-disciplinary meeting and yet Marchionda told Retz that he wanted her to stop talking to public officials about her treatment and that he could "fire" her. Finally, he stated that she was to have no further conversations with her fellow employees "whatsoever." [See F/F No. 11]. It strikes me that this was pretty "heavy" conduct on the part of Marchionda in the context of a non-disciplinary meeting. Retz provided no apparent provocation except that she acknowledged having spoken to certain Freeholders about Marchionda, a clear right of hers under our Act: Salem City Board of Education, Hackensack and related cases cited previously. Retz testified without contradiction that her relationship with Marchionda had become "very hostile" over the previous year. [See F/F No. 11].

Moving on to May 24th, Retz was next summoned to a meeting with Mayer, Leduc and Vela, the CWA Shop Steward. At this meeting

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11/ Footnote Continued From Previous Page

conclusion that the County independently violated Section 5.4(a)(1) of the Act: "An employer (independently) violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification": Jackson Tp., H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988), adopted, P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); and UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

Retz was given a Notice of Minor Disciplinary Action stating that she was suspended for two days (Tr42; CP-3). Retz, who had been employed by the Respondent as a graduate nurse since December 1990, had never been the subject of disciplinary action. As the meeting ended, Mayer stated to Retz: "You don't have to tell anyone about this..." [F/F Nos. 5 & 6].[12/]

Although it is undisputed that Retz spoke with six co-employees shortly after her May 24th meeting with Mayer ended, I find the County's proofs wholly lacking in credibility or substance vis-a-vis any perceptible impact that her conversations with employees might have had upon patients. [Compare F/F Nos. 7 & 9 with F/F Nos. 14 & 15].

1. For example, the testimony of LPN Miller demonstrates that she encountered the four co-employees by the elevator after Retz had left the group. Miller's testimony was solely that she overheard the remaining three employees talking about Retz having been suspended. This clearly does not implicate Retz as one who disrupted patients even though Miller stated that such a conversation could be "disturbing" to patients nearby. Note that nothing up to this point has implicated Retz in any disruption involving interference with patients.

12/ Mayer testified that she told Retz that "...this was not to be discussed upstairs..." [meaning the nurses units (Tr152)]. The testimony of Retz did not contradict Mayer on this point.

2. As to Retz's conversation with Smith on the second floor nurses unit, Retz readily acknowledged the event but denied that it could have had any impact on patients, due to lack of proximity. On cross-examination, Miller acknowledged that she never heard anything that Retz might have said on the second floor unit on May 24th, and she admitted that Retz was not a participant in any other conversations.

Mayer contributed little to the question of whether Retz's conversations with co-employees on May 24th disrupted patients since she addressed only prior occasions, which did not involve Retz. Otherwise, Mayer testified generally about patient upset when there are altercations between staff members, again having nothing to do with Retz (Tr152, 153, 156). Significantly, on cross-examination Mayer conceded that she had no notes to support a conclusion that any conversations concerning Retz's discipline on May 24th was overheard by any of the patients (Tr157).

Given the foregoing, we next must examine the June 8th meeting where Marchionda, Mayer, Marketti and Retz were present. Retz was given a document entitled "Employee Warning Record," which stated that she had been informed by her supervisor not to discuss her disciplinary action of May 24th on the nurses unit with co-workers. But, however, she had discussed her two-day suspension with other personnel on the nurses unit, supra. The "Warning" stated further that Retz was not only "disruptive to nursing operations, but was in proximity to resident rooms." [F/F No. 9].

Recall that this meeting had been convened to process Retz's May 26, 1993 grievance, regarding her two-day suspension of May 24th (CP-1). However, the meeting focused on the twin matters of: (1) threatened additional discipline (see the "Employee Warning" above); and (2) the statement of Marchionda to Marketti, who had complained about the lack of progressive discipline as to Retz. Marchionda's response was: "You want progressive discipline, I'll give you progressive discipline." He then "shoved" the disciplinary notice (CP-2) toward Marketti, who read it.

Based upon the record references above, it would be difficult to conclude other than that the Respondent's representatives, especially Marchionda, manifested egregious hostility and/or animus toward Retz, which originated with Marchionda's conduct at the April 23rd meeting, supra. From that point on, events moved inexorably toward the final act of discipline which was meted out to Retz at the June 8th meeting, supra. The Employee Warning, issued on that date, constituted the final interference with Retz's rights under Section 5.4(a)(1) of the Act.

One final aspect of Retz's exercise of protected activity is deserving of mention. This deals with her having filed a grievance on May 26th (CP-1), regarding her two-day suspension, which resulted, in part, in the convening of the June 8th meeting, supra. [F/F No. 9]. Since the filing of a grievance is in itself a protected activity under our Act, a logical inference can be drawn that part of what transpired at the June 8th meeting vis-a-vis the

discipline imposed by the "Warning" was in retaliation for Retz having filed her May 26th grievance.[13/]

Since the overall conduct of the County's representatives clearly tended to interfere with Retz's statutory rights, and since it was totally lacking as to any legitimate, substantial business justification, CWA has proven an independent violation of §5.4(a)(1) of the Act.

* * * *

In summary, since CWA has proven an independent violation of §5.4(a)(1) and has also satisfied the first three requisites of proof of a §5.4(a)(3) violation under Bridgewater, I am persuaded that this case presents a classic example of employer "pretext" or "sham" rather than the more common "dual motive" defense. It is, therefore, totally appropriate to cite and quote from Wright Line, supra, where the NLRB succinctly set forth the distinction between a "pretext" case and a "dual motive" case:

> "In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however,

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13/ The Commission has held on many occasions that the filing of grievances is a protected activity: see Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); and Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988).

> that the asserted justification is a sham and that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive." (Emphasis supplied (105 LRRM at 1170). (Emphasis supplied).

The County's conduct in this case, particularly its "hostility and/or animus" toward Retz, as manifested by Marchionda throughout, fits squarely into the twin pigeonholes of "pretext" and "sham" as defined by the Board in Wright Line. The County's alleged justification for disciplining Retz was totally lacking in legitimacy and was, therefore, pretextual. The County's defense is, therefore, rejected as a sham.

* * * *

Based upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent County independently violated N.J.S.A. 34:13A-5.4(a)(1) by the egregious conduct of its Administrator, Carmine Marchionda, on and after April 23, 1993, which conduct tended to interfere with the rights of Alice Retz, which are guaranteed by the above section of the Act.

2. The Respondent County violated N.J.S.A. 34:13A-5.4(a)(3) by the same conduct of its Administrator as that found under §5.4(a)(1) since the Charging Party has fully met the requisites of Bridgewater Tp. v. Bridgewater Public Works Assn. in having proven,

inter alia, that the Administrator's conduct toward Retz was motivated by hostility and/or animus to Retz's exercise of protected rights.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent County cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of its Administrator, who has, since at least April 23, 1993, tended to interfere with the rights of Alice Retz under the Act, namely, restricting her right to communicate with co-employees where the rights of patients were unaffected and there was no interference with the "Homestead's" operations; also, restricting her right to communicate with certain Freeholders; and finally, disciplining her for filing grievances.

2. Discriminating in regard to any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of its Administrator, who has, at least since April 23, 1993, manifested animus and hostility toward Alice Retz and, additionally, who has retaliated against her for her exercise of protected activities, supra, all of which was known to the County.

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

1. Cease and desist from permitting its Administrator to engage in the activities set forth above under paragraphs A.1 and A.2.

2. Forthwith withdraw the "Employee Warning Record," which was served upon Retz on June 8, 1993. Any other related documents in her personnel file are to be expunged.

3. The "Notice of Minor Disciplinary Action," which was issued to Retz on May 24, 1993, and which contained a two-day suspension (May 25 & June 2, 1993), is tainted by the conduct of Marchionda, which began on April 23, 1993. To restore the status quo ante, the County is directed to make Retz whole for the two-days' loss of pay unless, of course, the suspension was never served and Retz suffered no financial loss.

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

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Alan R. Howe
Hearing Examiner

DATED: May 12, 1994
Trenton, New Jersey

Appendix

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT.

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of our Administrator, who has since at least April 23, 1993, tended to interfere with the rights of Alice Retz under the Act, namely, restricting her right to communicate with co-employees where the rights of patients were unaffected and there was no interference with the "Homestead's" operations; also, restricting her right to communicate with certain Freeholders; and finally, disciplining her for filing grievances.

WE WILL NOT discriminate in regard to any term or condition of employment to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to check the conduct of our Administrator, who has, at least since April 23, 1993, manifested animus and hostility toward Alice Retz and, additionally, who has retaliated against her for her exercise of protected activities in the manner described above, all of which was known to the County.

WE WILL forthwith withdraw the "Employee Warning Record," which was served upon Retz on June 8, 1993, and any other related documents in her personnel file will be expunged.

WE WILL restore the status quo ante by making Alice Retz whole for the two-days' loss of pay as of May 24, 1993, unless the suspension was never served and Retz suffered no financial loss.

Docket No. CO-H-93-447 _____ County of Sussex _____
(Public Employer)

Dated _____ **By** _____
(Title)

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

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