P.E.R.C. NO. 2001-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-H-99-299

AFSCME COUNCIL 52, LOCAL 888, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that Rutgers, the State University violated the New Jersey Employer-Employee Relations Act when it retaliated against an employee represented by AFSCME Council 52, Local 888, AFL-CIO, for exercising her right to use the negotiated grievance procedure. AFSCME filed an unfair practice charge against Rutgers alleging in particular that the employee, who was given a promotion after prevailing in the grievance procedure, was demoted after only three days in the provisional period, in retaliation for having filed the grievance. The Commission does not believe that Rutgers proved that it would have treated another employee the same had that employee received a position through the grievance procedure. The Commission orders the employer to place the employee back on a provisional period comparable to what other employees would receive.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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AFSCME COUNCIL 52, LOCAL 888, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Office of University Counsel (Wayne Richardson, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein, Watters & Blader, P.C. (Stuart A. Tucker, of counsel)

DECISION

On March 18, 1999, AFSCME Council 52, Local 888, AFL-CIO filed an unfair practice charge against Rutgers, the State University. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (4),[1/] by retaliating against

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

Footnote Continued on Next Page

union member Diane Walton for exercising her right to use the negotiated grievance procedure. It asserts in particular that Walton prevailed on a grievance, was given a promotional position subject to a 90-day trial period, and was then demoted after only three days in the promotional period, in retaliation for having filed the initial grievance.

On June 23, 1999, a Complaint and Notice of Hearing issued. On August 3, the employer filed an Answer. It asserts that it removed Walton from a promotional position of custodial group leader because she was unable to perform the duties of the higher title. It denies it did so because she filed a grievance seeking that position.

On November 18, 1999, Hearing Examiner Regina A. Muccifori conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On August 18, 2000, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2001-6, 26 NJPER 442 (¶31175 2000). She found that the University was not hostile to Walton for using the grievance procedure and that it had a legitimate business justification for demoting her.

1/ Footnote Continued From Previous Page

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

On October 3, 2000, after an extension of time, AFSCME filed exceptions. It argues that the decision to demote Walton, after only three days as a custodial group leader, demonstrates that the University was hostile toward her for filing a grievance. It further argues that the employer's asserted reasons for demoting Walton from the position were pretextual.

On October 30, 2000, after an extension of time, Rutgers filed an answering brief. It argues that AFSCME's exceptions do not comply with our rules and that the recommendation to dismiss the Complaint should be adopted.

We have reviewed the record. In the absence of any specific exceptions to the Hearing Examiner's findings of fact, see In re Maywood Bd. of Ed., we adopt and incorporate those findings (H.E. at 3-19).

The Complaint alleges that the employer retaliated against Walton for exercising her right to file a grievance under the parties' collective negotiations agreement. Such allegations are governed by the standards established in In re Bridgewater Tp., 95 N.J. 235 (1984).

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 motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The first two parts of the three-part test have been met. Walton filed a grievance, which is protected activity under the Act. The employer knew of the grievance and, in fact, it agreed to award Walton the promotion at step three of the grievance procedure. The remaining question is whether the employer was hostile toward Walton for pursuing that grievance.

AFSCME argues that hostility can be inferred from three facts: (1) Walton's supervisor greeted Walton with hostility and did not offer her any instructions on her new position; (2) the

supervisor refused to allow another custodian to help Walton lift a couch; and (3) the employer removed Walton from the promotional position after only three days. We now review the pertinent facts.

Diane Walton submitted a bid for a vacant custodian group leader position. After interviewing Walton and another custodian with less seniority, Carolyn Harris, who was a custodial foreperson and Walton's supervisor, recommended the junior custodian for the promotion. Walton then filed a grievance under a contractual provision requiring that promotions be given to the senior employee, unless there is an appreciable difference in ability or the senior employee does not have the ability to perform the particular job. After a step three grievance meeting, the department reversed its position and awarded the promotion to Walton, subject to a 90-day probationary period.

In its step three grievance response, the employer's employee relations specialist specified that Walton should be provided with a detailed job description, advised of the department's expectations for acceptable performance standards, given/explained job specific "do's and don'ts," and provided with the opportunities to demonstrate that she has the ability to perform the key job duties. Once on the job, Walton's supervisor was to provide her with accurate and regular feedback. If she was not doing well, the supervisor would have to clearly communicate this to her orally and in writing. Lastly, the department would evaluate her performance to determine if she should be retained in the job or sent back to her former title.

When Walton reported to Harris's office on her first day, she awaited instructions. Another group leader gave Walton some keys and told her to come to the group leader office to wait for Harris. Harris gave Walton a safety belt, a group leader booklet, and a detailed job description. She told Walton to read the information and that she would return later. Walton was not given the keys to the supply cabinet. Those keys were held by the employee who had been initially given the promotion. Walton was not advised of any performance standards or of what she should or should not do.

Because of an immediate need to shampoo carpets while the students were on break, Harris did not assign Walton any duties the first day. Since Walton had not shampooed carpets before, Harris simply wanted Walton to observe her shampooing carpets. Harris, however, did not explain that to Walton.

When Walton saw Harris with the rug shampooer, she followed Harris. Harris did not instruct her to do so. They went to the supply closet and Walton picked up some supplies, but she still did not know where she was going.

When Walton and Harris arrived at the bottom of a staircase, Harris placed the 110 pound shampooer next to the stairs. Walton guessed that she was supposed to lift the machine up the stairs. Harris did not speak to her. Although Harris does not consider herself a "big talker," she did tell Walton how to work the shampooer (finding 8). Walton testified that she watched Harris

shampoo a couple of rugs and then Harris let Walton try the machine (T49-50). Harris was asked whether she went through two days without speaking to Walton. She responded that she "told her how to run the machine and stuff like that (T103)."

When Walton and Harris began to carry the shampooer up the stairs, Walton lifted the machine with one hand and held the railing with the other. The machine hit the stairs, which could have damaged the machine. Harris did not try to change Walton's method of carrying the machine. Harris was asked at hearing:

> Q Is that the proper way for the machine to move up the stairs?
>
> A No.
>
> Q Noticing that it was not the proper way for it to be moving up the stairs, and noticing that she was moving up with one hand, and given your responsibilities to train her, did you suggest to her that she use two hands?
>
> A Well, I ask her if she could manage to carry the machine upstairs and she said yes.
>
> Q I see. And you let this go on for two days without trying to change anything?
>
> A You can't change people carrying stuff sometime. [T121-T122]

A University Housing Department periodical entitled "Housing Headlines" contained a graphic of employees lifting. It states, "If it feels too heavy, get help." It was included in the newsletter to remind employees how to perform their job.

When Harris and Walton had to move a three-seat sofa, Harris lifted one end and asked Walton to lift the other. When

Walton tried to lift the sofa, it felt too heavy for her. A fellow custodian asked if he could help. Harris refused to allow it, responding that it was Walton's job. Harris was asked at hearing:

> Q Is there a proper way that you were trained in how to lift things
>
> A Yes, we bend down and we pick up, with our knees, and pick up.
>
> Q That is part of the training program that everyone goes through that has to lift at the University?
>
> A Yes.
>
> Q Was Ms. Walton doing things that way?
>
> A I don't know. I wasn't paying much mind. If she was lifting on Bush [Busch campus], she should have been trained already. [T122]

Harris was later asked:

> Q And one of the reasons that you said she couldn't do the job was because she couldn't lift this furniture, correct?
>
> A Yes.
>
> Q And you're testifying that you didn't notice how she lifted it?
>
> A We bend down the same time. We pick up at the same time.
>
> Q Do you see your job in any way to train Ms. Walton or other group leaders who come under your supervision?
>
> A Repeat that again.
>
> Q Do you see as any part of your responsibility to train group leaders who come under your supervision?

A Yes.

Q But the manner in which Ms. Walton lifted or as you put it, didn't lift, you saw no responsibility to see if she was doing it correctly?

A Well, both of us went down at the same time, as we came up at the same time.

Q Would you answer my question? Would you answer my question please. You saw no responsibility to observe how she lifted if, in fact, she couldn't get up, get the furniture up?

A No. [T123-T124]

The second day, Harris and Walton continued to carry the shampooer up flights of stairs. Walton continued to use one hand and Harris did not suggest that Walton use both hands to carry it. As Walton was carrying the machine, she strained her arm, but she kept working. She iced it at lunch, but it started swelling. She called her shop steward and did not go directly to Harris because she felt intimidated by her.

Walton was treated by the University's health services. The doctor indicated that Walton was unfit to fully perform her duties for the remainder of the day, and that she should be examined the next morning before returning to work. Later that day, Harris spoke to the Assistant Director of Housing for Administration. She reported that Walton had hurt herself and that she thought Walton could be dangerous to work with because she had trouble lifting. The Assistant Director then spoke to members of the employer's Office of Employee Relations. A decision was made to return Walton to her prior position.

The essential facts are not in dispute. Our task is to determine whether an inference should be drawn that Harris's conduct evidences hostility to Walton's right to grieve the initial promotion denial. We cannot put ourselves into Harris's mind. We can only judge her by her actions. And we believe those actions show hostility to her filing this grievance and shift the burden to the employer to prove that it would have demoted Walton, even absent her filing the grievance.

We accept the fact that Harris is not a "big talker." But she said practically nothing to Walton, the person she did not recommend for the job and the person who only got the job because she had filed a grievance. Harris saw Walton carrying the shampooer in a way that could injure her, and in fact did injure her, and in a way that could damage the machine. Yet she said nothing. She did not suggest a better or safer way to carry it. She instead let Walton fail. She knew that Walton was having trouble lifting the sofa, but she did not bother to see if she was lifting correctly, and she would not let another custodian help, even though a University publication urges employees to do so. It is possible that Harris is simply a poor supervisor who would not give any probationary employee instructions
or guidance. But the record does not include any information about how she supervises others. Instead we are presented with a scenario where a successful grievant was promised instruction, feedback and an opportunity to demonstrate that she can perform the duties of the

promotional position. Instead, she was basically ignored and then considered a failure after just two days. Given the University's commitment and given Harris's failure to live up to that commitment, we believe it proper to draw the inference that Harris was hostile to Walton because she filed a grievance and ultimately received the promotional position that Harris had recommended she not receive.

Our conclusion on this part of the Bridgewater test shifts the burden to the employer to prove, by a preponderance of the evidence, that it would have demoted Walton, even absent her protected activity. The Hearing Examiner found that, even assuming hostility, the employer had a legitimate business reason for its action. She based her conclusion in part on her finding that Walton could not perform the lifting required of a custodian group leader. Perhaps that is so, but we are not convinced, given the lack of instruction on proper lifting techniques. On this record, we do not believe that the University proved that it would have treated another employee the same had that employee not received the position through the grievance procedure. The University did not present any evidence about how similarly situated employees have been treated; or any evidence that other employees were given just two days without instruction before they were removed from a trial period. Walton's treatment was inconsistent with the University's commitments outlined in its Step 3 grievance response.

Under these circumstances, we will order the employer to place Walton back on a trial period comparable to the trial period other employees would receive. We will not award back pay at this time because we cannot assume that Walton would have successfully completed the trial period. Should Walton complete her trial period and be given a permanent promotion, she will be entitled to backpay retroactive to January 4, 1999, plus interest. The University retains the right to return Walton to her former position should she be unable to meet its standards, but she must be given the same opportunity to succeed that any other employee would receive.

In the absence of exceptions, we dismiss the 5.4a(2) and (4) allegations.

ORDER

Rutgers, the State University is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by retaliating against Diane Walton for exercising her right to use the negotiated grievance procedure.

2. 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 the Act, particularly by retaliating against Diane Walton for exercising her right to use the negotiated grievance procedure.

B. Take this action:

1. Place Walton back on a trial period for custodial group leader comparable to the trial period other employees would normally receive.

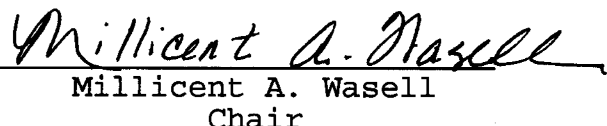
2. If Walton passes her trial period, provide backpay equal to the difference between her regular salary and the group leader salary, retroactive to January 4, 1999, plus interest pursuant to R. 4:42.11.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice 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.

4. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: January 25, 2001
Trenton, New Jersey
ISSUED: January 26, 2001

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 employees in the exercise of the rights guaranteed to them by the Act, particularly by retaliating against Diane Walton for exercising her right to use the negotiated grievance procedure.

WE WILL cease and desist from 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 the Act, particularly by retaliating against Diane Walton for exercising her right to use the negotiated grievance procedure.

WE WILL place Diane Walton back on a trial period for custodial group leader comparable to the trial period other employees would normally receive.

WE WILL, if Diane Walton passes her trial period, provide backpay equal to the difference between her regular salary and the group leader salary, retroactive to January 4, 1999, plus interest pursuant to R. 4:42.11.

Docket No. CO-H-99-299

RUTGERS, THE STATE UNIVERSITY
(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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 2001-6

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

In the Matter of

RUTGERS UNIVERSITY,

Respondent,

-and-

Docket No. CO-H-99-299

AFSCME COUNCIL 52, LOCAL 888,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission dismiss the unfair practice charge filed by AFSCME against Rutgers, the State University. The Hearing Examiner finds that the University did not retaliate against Walton for utilizing the grievance procedure and that the University had a legitimate business justification for demoting Walton.

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. 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.

H.E. NO. 2001-6

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

In the Matter of

RUTGERS UNIVERSITY,

Respondent,

-and-

Docket No. CO-H-99-299

AFSCME COUNCIL 52, LOCAL 888,

Charging Party.

Appearances:

For the Respondent, Rutgers University, Office of University Counsel
(Wayne Richardson, of counsel)

For the Charging Party, Szaferman, Lakind, Blumstein, Watters & Blader, P.C.
(Stuart A. Tucker, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 18, 1999, AFSCME Council 52, Local 888, AFL-CIO (AFSCME) filed an unfair practice charge (C-1)[1/] against Rutgers University (University) alleging that the University violated provisions 5.4a(1), (2), (3) and (4) of the New Jersey

1/ "C" refers to Commission exhibits received into evidence at the hearing in this matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the hearing is referred to as "T".

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq (Act),[2/] by retaliating against union member Diane Walton for exercising her rights under the collective negotiations agreement. AFSCME claims that in August 1998, Walton, a custodian, was passed over for a promotion to custodian group leader while less senior employee Curtis Morris was promoted, in violation of clear contract language. AFSCME successfully grieved the action and Walton received the promotion effective January 4, 1999; however, 3 days into the contractual 90 day probationary period, AFSCME claims the University arbitrarily decided that Walton was unqualified for the higher title and returned her to her prior custodian title. AFSCME contends the University took this action in retaliation for Walton utilizing the grievance procedure.

On June 23, 1999, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 3, 1999, the University filed an Answer (C-2). The University claims that while Walton's Step 3 grievance was pending, the Division of Housing voluntarily

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2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

changed its decision to promote Morris and instead promoted Walton to the custodian group leader position, effective January 4, 1999. The University admits that it removed Walton from the custodian group leader position and transferred her back to her previous custodian position 3 days later; however, it denies that it took this action in retaliation for her exercising any rights under the parties' agreement or the Act. Rather, the University claims it returned Walton to her prior position because she was unable to satisfactorily perform the duties of the higher title. Specifically, it asserts that Walton could not lift heavy items and in fact on January 5, 1999, she injured herself while lifting a rug shampoo machine. Thus, Walton was returned to her prior position because the University concluded she presented an immediate risk of injury to herself and her fellow employees. According to the University, it has an absolute right under the agreement to remove any probationary employee during the 90 day probationary period if, in its judgment, the employee has not satisfactorily performed his or her duties.

A hearing was held in this matter on November 18, 1999. The parties submitted post-hearing briefs by February 10, 2000. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. The University and AFSCME jointly stipulated to the following:

a. The University and AFSCME were parties to a collective negotiations agreement for the period July 1, 1995 through June 30, 1999. The agreement remains in effect while the parties negotiate a successor agreement (T11; J-1).

b. Diane Walton is employed by the University as a custodian - housing in the Rutgers University Division of Housing (T11).

c. On August 19, 1998, the University posted a notice of vacancy for the position of custodian group leader - housing (T11).

d. On August 24, 1998, Walton submitted a bid for the vacant position (T11).

e. Walton's immediate supervisor was custodian foreperson Carolyn L. Harris (T11).

f. On January 7, 1999, the University returned Walton to her previous position (T11-T12).

2. Diane Walton has been employed by the University as a custodian for 10 1/2 years in the Bush Housing Department (T47).

Carolyn Harris has been employed by the University for 22 years and is Walton's supervisor. She has been a custodial foreperson for about 16 years. Harris has 16 employees under her; 2 of the 16 are group leaders (T86-T87).

Before becoming custodial foreperson, Harris held the title of custodial group leader groundsman (T85-T86). When Harris was in this title, she was a member of AFSCME and held the office of shop steward (T159).

Harris' current duties include ensuring that the buildings are clean for the students and performing maintenance (T86). In the course of her duties, Harris reads and signs documents. She is responsible for turning in the absence sheet and for monitoring the vacation and sick time of the employees under her. She also completes supply order forms (T160-T161).

3. Walton applied for the position of custodian group leader on August 24, 1998 (T47). Harris and her supervisor, George Falkowski, interviewed Walton for the promotion. Harris informed Walton that she would be responsible for shampooing carpets. Harris had the shampooer in her office during the interview. Harris explained to Walton what her duties would be throughout the day. Walton stated that she could handle the duties and did not indicate she had any trouble with strength or lifting (T100-T101; R-5). However, several years earlier, as a custodian, Walton had injured herself while lifting on the job (T71).

Harris also interviewed custodian Curtis Morris for the promotion. She and Falkowski recommended Morris for the promotion instead of Walton (T126-T129). Accordingly, Morris received the promotion (T47-T48).

4. Walton thought it was unfair that she, a 9 1/2 year University employee, did not receive the promotion while Morris, who had been employed by the University for only 10-11 months, did (T47-T48). Thus, as a result of being denied the promotion, Walton filed a grievance (T47-T48).

The parties' agreement contains a 4 step grievance procedure, with arbitration as the final step (T32). At the Step 1 grievance hearing, Walton was represented by an AFSCME shop steward, with her immediate supervisor hearing the grievance. Walton's grievance was denied (T32).

John Lemongelli, President of Local 888, then filed a Step 2 grievance. The grievance was again denied, this time by the Division Director Dawn Burns Smith who acted as the hearing officer (T32; J-7).

Arthur Delo, Associate Director of AFSCME, then filed a Step 3 Grievance on November 2, 1998. He represented Walton at the November 19, 1998 Step 3 hearing which took place at the Office of Employee Relations (OER) (T31-T32; J-6).

Article IX of the agreement, (J-1), provides in pertinent part:

> Rutgers shall promote the employee in the seniority unit with the greatest Rutgers seniority from among those employees who bid and meet the posted requirements unless, as between or among such employees there is an appreciable difference in their ability to perform the particular job or unless the senior employee does not have the ability to perform the particular job.

During the first 3 steps of the grievance procedure, the University argued that it had the right to select the best possible employee for promotion under Article IX. On the other hand, AFSCME argued that under Article IX, the University was required to select the most senior employee unless there was an appreciable difference between the applicants (T31-T33).

It became apparent to the University during the course of the grievance proceeding that its interpretation of the agreement was probably incorrect. While the University felt Morris was the most qualified candidate for the position, it was made evident to the University that, under the agreement, it was required to take the most senior candidate (T133-T134).

5. On December 7, 1998, the University gave AFSCME its Step 3 answer, deciding to voluntarily award the promotion to Walton (T34-T35; J-5). The University's answer, J-5, specifies:

> The department is commended for reversing its original decision and to provide Ms. Walton with an opportunity to prove that she can satisfactorily perform in the new job. As soon as Ms. Walton is moved to the new job, her supervisor should:
>
> -- provide her with a copy of the detailed job description
> -- advise her of the department's expectations for acceptable performance standards
> -- give/explain job specific "do's and don'ts"
> -- provide Ms. Walton with the opportunities to demonstrate that she has the ability to perform the key job duties
>
> Once on the job, Ms. Walton's supervisor should provide her with accurate feedback on a regular basis to let her know how she is doing; if she is not doing well, the supervisor should clearly communicate this to her both orally and in writing. Lastly, the department should evaluate her performance to determine if she should be retained in the job or sent back to her former title.

The agreement further provides that an employee promoted shall be placed on a 90 day probationary period (J-1).

6. Walton began her tenure in the custodian group leader position on January 4, 1999. On her first day, Walton reported to Harris' office and waited for her instructions. Harris' other custodian group leader, Geneva Johnson, gave Walton some keys and told her to come with her to the group leader office to wait for Harris. Harris came to the office and gave Walton a safety belt, a group leader booklet, and a detailed job description to read. Harris told Walton to read the information and then indicated she would return later (T48-T49, T87, T108).

Harris did not advise Walton then of the department's expectation of acceptable performance standards or explain what she should or should not do. Harris was rushing to complete her work, specifically, shampooing carpets, before the students returned from winter break. Shampooing carpets is a regular duty of the custodian group leader position. Custodians are only able to enter into the student buildings or quads to perform heavy cleaning and carpet shampooing when the students are not there--3 weeks in January and the summer. Therefore, according to Harris, if a custodian is promoted to group leader at these times, it may be more important to complete this heavy cleaning rather than to first thoroughly train the new group leader (T66, T108-T109, T142-T143).

Walton did not know what training to expect when she began her new position. She thought she would work with a co-worker who would show her what to do. She also believed she would be introduced to people and shown her work area, as this was her prior experience when working with other forepersons (T67).

Walton was not introduced to the group that she was supposed to be leading or given the keys to the supply cabinets; she had only been given the keys to the custodian group leader office. Morris, who held the custodian group leader title before Walton was finally awarded it, still had the keys to the supply cabinet. Walton asked Morris to open the door to the supply room which he did (T51-T52).

7. On January 4, 1999, upon viewing Harris with the rug shampooer, Walton left the office and pursued Harris (T49; R-5). Harris went to the supply closet for a bucket and some supplies; she then proceeded to one of the student houses. Walton took some supplies and followed Harris, without knowing exactly where she was going. Walton never asked Harris questions because she thought Harris would explain her work area to her (T49, T67).

Harris did not assign Walton any duties on her first day. Harris simply wanted Walton to observe her shampooing carpets because Harris knew from her initial interview of Walton that Walton had never shampooed carpets before. Thus, the most important thing Harris wanted to teach Walton that day was to shampoo carpets. Harris, however, did not explain that to Walton (T65-T66, T87-T88, T123).

8. Harris and Walton were to shampoo carpets in quad 3 of the residence hall complex at the University's Livingston campus that day. Johnson was shampooing carpets in quad 2 of the complex (T87-T88).

Harris and Walton arrived at the bottom staircase in the basement of House 28 in the complex. The complex has 5 floors and no elevators. Harris placed the shampooer, which weighs about 110 pounds without water, next to the stairs (T89-T90, T95; R-5). Walton and Harris shampooed the basement carpet. Walton guessed that she was supposed to lift the machine up the stairs, however, Harris did not speak to Walton. While Harris does not consider herself a "big talker", Harris did tell Walton how to work the shampooer (T49-T50, T90, T103).

Walton and Harris then began to carry the machine up the stairs. Walton took the front end which contained the motor while Harris took the back end. Walton believed her end was the heavier one. Harris, however, does not believe one end is more difficult to carry than the other. Walton was not able to fully lift and carry the machine upstairs. She lifted the machine with one hand and held the railing with the other. Harris, however, carried the machine with both hands as she walked upstairs. Johnson, the group leader in quad 3, also carries the machine with both hands (T50, T62-T64, T95, T99, T120).

Because of the way Walton held the machine, Harris and Walton could not balance it; thus, the machine bounced on each step. This is not the proper way for the machine to move up the stairs; the bouncing bends the rods on the wheels (T96-T97, T121).

Harris asked Walton if she had any trouble lifting the machine; Walton responded no (T97, T121-T122). Harris did not try

to change Walton's method of carrying the machine because she did not think she could; everyone has their own method of lifting. Also, Harris herself interchanges her way of carrying; sometimes she uses one hand and other times she uses two hands (T120-T122).

9. Harris and Walton then went to the ground floor which contains a furnished lounge and hallways with student rooms. There is a 2-seat sofa, a 3-seat sofa, and a chair in all of the lounges in the quads (T91-T92; R-6).

Each lounge contains a kitchen area with a tile floor. Harris always moves the furniture on to the tile floor before she shampoos the lounge carpet. Harris does not slide the furniture to the tile floor because sliding would damage the tile (T91, T94; R-6). Walton frequently lifted furniture in her previous custodian position and often would slide heavy furniture as a method of moving it (T51, T59).

Harris and Walton then attempted to move the 3-seat sofa three feet to the tile floor in order to shampoo the carpet. Harris lifted one end and asked Walton to lift the other; Walton, however, had trouble lifting her end of the sofa, it was too heavy for her (T53, T60-T61, T93). The sofa was typical of the kind found in dormitories in the Division of Housing; it was exceptionally heavy so it could take the wear and tear of students (T59, T61). In some of the apartments where Walton had previously worked, the couches were not that heavy (T61).

10. Every month the University Housing Department publishes a periodical entitled "Housing Headlines" (T54, T134; CP-1). The University characterizes the publication as a monthly "feel good" newsletter that provides safety tips and some information about employees; it is not intended to specify any employee's duties (T134-T136).

The last page of the November 1999 issue contains a graphic of individuals lifting and reads "If it feels too heavy, get help." According to the University, this is a valid instruction to employees in the Housing Department. It was included in the newsletter to remind employees how to properly perform their job (T139-T140; CP-1).

When Walton tried to lift the couch in the lounge on January 4, 1999, it felt too heavy to her. Fellow custodian Ron Gonzalez came in the lounge and asked if he could help. Harris, however, refused to allow it, responding "no, that it was Walton's job" (T53, T56, T118, T125-T126).

As part of the University training program, University employees are trained to lift by bending down, and picking up with their knees. Harris did not notice if Walton was lifting this way because if she was lifting at her prior position, she should have been trained already. Harris did not believe it was her responsibility to observe how Walton lifted (T122-T125).

11. On January 5, 1999, Walton's second day in her new title, Walton and Harris continued to shampoo carpets and,

accordingly, carry the shampooer up flights of stairs. Walton continued to carry the machine with one hand on the railing and the other on the machine and again, Harris did not suggest that Walton use both hands to carry it. As Walton was carrying the machine, she strained her arm; nevertheless, she kept working. At lunchtime, she went home and put ice on it. Walton came back to work but immediately noticed that her arm had started swelling. She promptly called AFSCME Shop Steward Bob Peterson and told him about her injury. Peterson told Walton to tell Harris; Walton asked Peterson if he would call Harris (T57-T58, T67-T68, T97-T99, T120-T121).

Walton did not go directly to Harris and tell her she was injured because Harris intimidated her. She felt that Harris did not want her as custodial group leader because she had initially chosen Morris for the position and that Walton had only received it after fighting for it (T68).

Peterson informed Harris that Walton had hurt herself. Harris took Walton to her office and gave her some paperwork to complete. Walton told Harris that she had hurt her wrist lifting the machine. Walton completed the paperwork; Harris then sent her to see Dr. Kathryn Gaioni, M.D., Director of Occupational Health for the University at the Occupational Health Services Office (T20, T57-T58, T67-T68, T97-T98; R-1, R-5).

12. Dr. Gaioni treated Walton for a muscle strain of her right forearm. Walton explained to Gaioni that she strained her forearm while helping her supervisor carry a shampooer down a flight

of stairs; Walton felt immediate pain and a "pop" in her right forearm. Dr. Gaioni prescribed simple over-the-counter medication, ice and heat (T21-T22; R-1).

Dr. Gaioni completed an Occupational Health Treatment form on January 5, 1999 memorializing her examination and consultation of Walton (T24; R-1). The form, in part, indicated: "Employee states she was helping supervisor carry shampooer down steps when she felt a pop and pain in right forearm. Went home to ice arm" . . . still hurts, no old injury, notes soreness over forearm, dorsally, just distal to the elbow and also over the ventral aspect of the distal forearm. Admitted to some tingling of her fingers. Denies any previous injury or problem with right arm." (T25; R-1).

The diagnosis on the form reads: "muscle strain forearm" and states that Dr. Gaioni advised ice and using an ace bandage. The form further indicated that Walton was unfit to fully perform all her duties the remainder of January 5 but that she could perform duties which only required the use of one hand and that she was to be examined the next morning prior to returning to work (T26; R-1).

Dr. Gaioni also completed a Standard Work Ability Report Form on January 5, 1999. The form is completed in the presence of the employee; one copy is given to the employee, one copy is given to the employee's supervisor and one copy is kept by Dr. Gaioni (T27; R-2). The diagnosis on the form was right forearm strain. Dr. Gaioni indicated that Walton was unfit to work that day. On the "return to work" section of the form, Gaioni indicated that Walton may perform strict one-arm work such as vacuuming (T27-T28; R-2).

13. Later on January 5, 1999, Harris spoke to Dawn Burns Smith, Assistant Director of Housing for Administration, about Walton. Smith is responsible for the personnel and employee relations issues for the Division of Housing. Harris told Smith that Walton had hurt herself and that she thought Walton could be dangerous to work with because Walton had trouble lifting. Harris was concerned because Walton had been injured performing what Harris considered to be a major component of the job - lifting (T101, T123, T132-T133, T146-T147).

As a result of her conversation with Harris, Smith spoke to members of OER for advice about the situation. Smith and the OER members were concerned--they were afraid Walton would hurt herself and her fellow employees if she continued in the custodian group leader title. Thus, a decision was made to return her to her prior position (T102, T133).

Both Walton's injury and the fact that she could not lift the sofa factored into Smith's decision. Harris believed Walton could not perform a major component of the job. Smith acknowledges that lifting is not listed as a major component of the custodian group leader position in the job description. However, the job description states that the group leader must perform "all duties of the custodian" and this includes lifting (T142, T147, T154-T155, T157; J-3).

Smith made the decision to return Walton to custodian solely based on the information she received from Harris not because

of her AFSCME membership on the group leader grievance. She did not meet with Walton before making the decision (T133, T141-T142).

Smith then told Harris to return Walton to her prior position. Walton was, thereafter, returned to custodian and Morris again became a group leader under Harris (T102-T103, T129, T133).

Smith noted that other employees have been demoted when they could not meet the specific functions of the position. For example, the University demoted a grounds worker custodian who did not have a driver's license because a license is a major component of the job (T148).

14. Dr. Gaioni reexamined Walton on January 6, 1999 and completed a second Standard Work Ability Form for her (2T28; R-3). On the form, Gaioni indicated that Walton could perform strict one-handed work such as dusting, answering the phone, and vacuuming and that she would recheck her the following Monday (2T22-2T23, 2T28; R-3).

Dr. Gaioni did not see Walton the following Monday as she expected. She spoke to the Housing Department on January 11, 1999 and learned that Walton was absent due to a nonoccupational reason. Dr. Gaioni reevaluated Walton on January 20, 1999; Gaioni determined Walton was able to fully perform her job duties at this point, that no treatment was needed, and Walton was discharged (T23, T29-T30; R-4).

15. Harris did not treat Walton differently than any other new group leader starting the position. There is no formal training

program for new group leaders. Harris trains all custodians and her group leaders. Harris' training of new group leaders depends on how busy she is. If she is really busy she trains them at the end, when the students return to school. Harris was there to train Walton during her probationary period; however, Walton was only trained on shampooing carpets (T103-T106, T110).

Harris considers herself a "hands-on" foreperson since she also performs custodial duties. Group leaders are also responsible for performing custodial duties. There is one group leader for every 10 or more custodians. Specifically, group leaders are responsible for cleaning the bathrooms, one main lounge, two study rooms and hallways. Also, sometimes they have to "pull" the garbage (T104, T106, T123). If a custodian has a question on the job, he or she speaks to the group leader (T74).

16. The job description for custodian group leader provides that the title "leads, oversees, and trains a small group of custodians" (T137; J-3). Walton was never given any of these responsibilities during her probationary period (T110-T111). Group leaders lead or instruct custodians only when Harris is unavailable (T74). Harris never gave Walton an opportunity to lead or oversee a group of custodians because custodians are simply assigned their own area to clean (T111). Further, Walton did not receive a chance to lead or oversee because she and Harris were shampooing carpets - a task that took priority because it had to be completed while the students were away. It was also a task that Walton did not know how to do (T105-T112).

Walton was never introduced to or never worked with a group of custodians during her probationary period (T52). She introduced herself to some fellow employees and spoke to them during her break time (T53). She was never instructed on what she was supposed to be doing and how she was supposed to be overseeing (T53). No one ever explained to Walton what she was doing right or wrong during her probationary period (T53-T54). Although the Step 3 grievance response, J-5, provides that Walton is to be trained in her new job "as soon as Walton is moved to her new job", nobody ever explained to Walton the key parts of the job or, what they expected of her in the position (T54, T110, T144-T145). According to Harris, the key part of the group leader job is to "get the work done" (T110).

AFSCME Associate Director Delo and Local 888 President Lemongelli believe the main difference between the custodian and custodian group leader titles is that leadership is required of the group leader. Specifically, the custodian group leader job description states that the title is responsible for leading, overseeing and training a small group of custodians (T36-T37, T73-T74, T142; J-3, J-4).

Delo, however, acknowledges that there are several other differences in the job descriptions for custodian and custodian group leader (T38-T40). Specifically, he acknowledges that under the custodian job description lifting and carrying furniture is one of the regular functions of the title and that the group leader job description provides that the title "performs all duties of the custodian as required" (T44-T45; J-3, J-4).

18. In Delo's opinion, Walton received the custodian group leader position purely as a result of the grievance procedure. He bases his conclusion on the fact that Walton did not receive the promotion until months after she applied for it and only after exhausting 3 steps of the grievance procedure (T37, T45). Delo, however, acknowledges that there is nothing wrong with the parties resolving a dispute at any time during the course of the grievance procedure, including after the use of 3 steps (T46).

ANALYSIS

The University Did Not Violate 5.4a(2) of the Act.

N.J.S.A. 34:13A-5.4a(2) prohibits public employers from dominating or interfering with the formation, existence or administration of any organization. This provision is designed to protect bonafide employee organizations representing groups of public employees from improper employer activity which threatens the formation, existence or administration of the organization. Borough of Shrewsbury, D.U.P. No. 79-12, 5 NJPER 13 (¶10007 1978) aff'd. P.E.R.C. No. 79-42, 5 NJPER 45 (¶10030 1979) aff'd. 174 N.J.Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129 (1980).

Here, AFSCME fails to present facts establishing a violation of 5.4a(2). There is simply no evidence of any improper employer activity which threatens the formation, existence, or administration of AFSCME Council 52, Local 888. Shrewsbury. Accordingly, I recommend that allegation be dismissed.

The University Did Not Retaliate Against
Walton in Violation of 5.4a(3) of the Act

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

In this case, I find there is insufficient direct evidence that the University demoted Walton based on anti-union animus. Consequently, I must look at the circumstantial evidence to determine whether the Act was violated.

AFSCME has proven the first two Bridgewater elements--that Walton engaged in protected activity and the employer knew of this--since Walton utilized the contractual grievance procedure to be awarded the promotion. However, AFSCME failed to prove that the University was hostile toward the exercise of Walton's protected rights.

AFSCME argues that hostility is proven based on the fact that: 1) Foreperson Harris greeted Walton with hostility and Walton did not receive any instructions or explanation when she began her tenure as custodian group leader; 2) Harris refused to allow another custodian to assist Walton in lifting a couch despite the fact it was common practice for custodians to aid each other in lifting; and 3) the University removed Walton from the custodian group leader title after only 3 days in the position without allowing sufficient time to evaluate whether or not Walton could perform the essential functions of the title.

I disagree with AFSCME. First, I do not find hostility in the manner in which Harris greeted Walton or in the lack of instructions or explanation Walton received. While Harris does not

consider herself a "big talker", she did explain how to work the rug shampoo machine and shampoo carpets. In Harris' estimation, this was the most important task to train Walton at the outset of Walton's tenure in the position since it was imperative that the task be completed while the students were not at school. Further, Harris knew from her interview of Walton that she had never shampooed carpets before and that she had to be trained on this essential duty of the custodian group leader title. Moreover, Walton was given a group leader booklet and a detailed job description on her first day of work.

I believe Harris did not allow a fellow custodian to assist Walton in lifting the couch simply because she believed that it was Walton's job to lift it.

Finally, the University did not remove Walton from the position after only 3 days based on hostility or anti-union animus. Rather, the University believed that Walton was a danger to herself and to fellow employees and that she could not perform the essential functions of the job.

In any event, even assuming Walton has established her required Bridgewater elements, I find that the University had a legitimate business reason for its action. Lifting is a regular function of the custodian group leader title. On Walton's first day of employment, she had trouble lifting and carrying the rug shampoo machine up the stairs in the quad. As custodian group leader, Walton must be able to do this, because there are no elevators in

the building and the building contains several floors. Because Walton could not adequately lift her end of the machine, the machine bounced on each step, causing stress to the machine's rods. Further, upon arrival at the lounge, Walton could not lift her end of a sofa that needed to be moved in order to shampoo the carpet. The sofa was typical of the kind Walton would be required to lift in the custodian group leader title.

Moreover, Walton continued to exhibit difficulty lifting on her second day and in fact injured herself doing so. The injury required medical treatment and prevented her from fully performing her job.

Thereafter, Walton's supervisor, Carolyn Harris, spoke to Assistant Director of Housing for Administration Dawn Burns Smith about Walton. Harris explained that Walton had hurt herself performing a major component of the job lifting and that Walton would be dangerous to work with because of her difficulty with lifting. Harris and Smith were concerned. Smith sought advice from OER about the situation. The OER members were worried and fearful that Walton would again hurt herself and perhaps her fellow employees. Thus, a decision was made to return her to her prior position. The University took this action for legitimate business reasons and was not motivated by union animus.

In its brief, AFSCME argues that the University's reasons for demoting Walton--1) her inability to satisfactorily and safely lift and; 2) because of this inability, she created a risk of harm

to herself and others--are merely pretextual and do not constitute legitimate business justifications. AFSCME points out that Walton had performed lifting in her prior title for approximately 11 years, and that the University did not present any evidence showing that Walton's job performance in this capacity had been unsatisfactory or that she had previous problems lifting. According to AFSCME, Walton's January 5, 1999 injury, standing alone, is insufficient to support the University's position that Walton was unable to safely and satisfactorily lift or that she posed a risk to herself or other employees.

Further, according to AFSCME, the University's assertion that Walton was returned to her prior position to avoid any further risk of injury to herself and others is absurd. AFSCME notes that under its job description, the custodian is required to lift more than a custodian group leader. Thus, AFSCME claims it was not logical for the University to remove Walton from the group leader title and return her to custodian because it is much more likely that Walton would injure herself or other employees performing the duties of custodian. AFSCME also notes that the University did not present any evidence that Walton's purported inability to lift, a duty which she had been performing during her entire tenure as a University employee, had previously resulted in any injury to fellow employees.

I, however, disagree with AFSCME's position that the University's reasons for demoting Walton are either pretextual or

absurd. Rather, the evidence supports the University's reasons for demoting Walton. The record shows that Walton could not safely and satisfactorily perform the lifting required in the custodian group leader title. AFSCME Associate Director Delo acknowledged the lifting requirement. While Walton had previously lifted as a custodian, she did not lift the type of items she was required to lift as a group leader. She had never lifted a rug shampoo machine before because she had not shampooed carpets in her prior title. This was a machine she was surely required to lift as a group leader and the evidence shows that she could not safely and satisfactorily performing that function. Her inability to properly lift the machine resulted in damage to the machine and, more significantly, injury to herself which required medical treatment and rendered her unable to fully perform her duties. Moreover, she could not lift the sofa in the quad, the type of sofa she would be required to lift in the group leader position. While it is true that Walton is still required to lift in the custodian title, that lifting did not include the heavier items associated with the group leader title.

Accordingly, I do not find that the University's reasons for Walton's demotion--her inability to safely and satisfactorily lift and the University's assessment that Walton posed a risk to harm herself and others because of this inability--were pretextual.

Based on the above, I find that the University did not violate 5.4a(3) and derivatively 5.4a(1) of the Act. The University did not return Walton to her prior custodian position because she

utilized the grievance procedure or engaged in any other protected activity. Rather, it did so because it reasonably believed Walton could not safely and satisfactorily perform a major component of the group leader position. That action was not motivated by union animus.

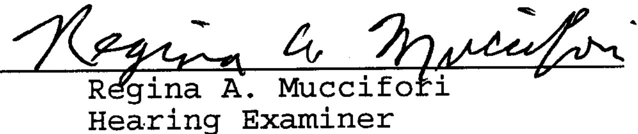
Finally, there was insufficient evidence to support a finding that the University violated 5.4a(4) of the Act.

CONCLUSIONS OF LAW

The University did not violate 5.4a(2), (3), (4) or, derivatively, a(1) of the Act with respect to its decision to return Walton to her prior custodian position.

RECOMMENDED ORDER

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



Regina A. Muccifori
Hearing Examiner

Dated: August 18, 2000
Trenton, New Jersey