

P.E.R.C. NO. 2011-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),

Respondent,

-and-

Docket No. CO-2006-155

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),

Respondent,

-and-

Docket No. CO-2007-152

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1037

SYNOPSIS

The Public Employment Relations Commission adopts the decision of a Hearing Examiner dismissing the Complaint issued in a consolidated unfair practice case filed by the Communications Workers of America against the State of New Jersey Office of the Public Defender. The charges allege that the OPD violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it disciplined a CWA shop steward in retaliation for filing grievances and other protected activity. The Commission rejects CWA's exceptions and holds that the OPD proved it had legitimate business justifications for the discipline and that such discipline would have been imposed regardless of any protected activity.

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.

P.E.R.C. NO. 2011-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),

Respondent,

-and-

Docket No. CO-2006-155

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),

Respondent,

-and-

Docket No. CO-2007-152

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO, LOCAL 1037

Appearances:

For the Respondent, Paula T. Dow, Attorney General
(Geri Benedetto, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, LLC (Ann
Marie Pinarski, of counsel)

DECISION

This case comes to us by way of exceptions to a Hearing
Examiner's report and recommended decision filed by the

Communications Workers of America, AFL-CIO and Communications Workers of America, Local 1037 (collectively "CWA").^{1/}

On December 13, 2005 and November 14, 2006, respectively, CWA and CWA, Local 1037 filed unfair practice charges against the State of New Jersey (Office of the Public Defender) ("OPD") alleging that OPD violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5)^{2/} when it refused to process grievances filed by Denise Cole, a CWA shop steward; refused to grant Cole's request for representation during a January 20, 2005 meeting; harassed Cole over filing paperwork in support of her disability; and suspended Cole for one day and then five days in retaliation for her protected activity.

On May 8, 2007, the Director of Unfair Practices issued an Order Consolidating the two charges for hearing. The Director

^{1/} We deny CWA's request for oral argument. The issues have been completely briefed by the parties.

^{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 . . . (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. . . [and] (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

refused to issue a Complaint on the 5.4a(5) allegations of the charges finding that insufficient facts were alleged to support those allegations. Hearing Examiner Deirdre K. Hartman conducted ten days of hearing between November 19, 2008 and July 7, 2009 during which the parties examined witnesses and introduced exhibits. The parties filed post-hearing briefs by January 15, 2010 and on April 29, the Hearing Examiner issued her report and recommended decision. H.E. No. 2010-9, 6 NJPER 169 (¶63 2010).

The Hearing Examiner found that the OPD did not violate 5.4a(1) or (3) of the Act and recommended that the Complaint be dismissed. On May 28, 2010, after an extension of time, CWA filed exceptions^{3/} to the Hearing Examiner's decision arguing that: the Hearing Examiner erred in finding that it was Cole's improper behavior and not union hostility that motivated the five-day suspension; the Hearing Examiner erred in her credibility determinations; and the Hearing Examiner's determination that the imposition of the one-day suspension was not in retaliation for protected activity is not supported by the record.

On June 24, 2010, the OPD filed a response contending that the discipline imposed was for Cole's poor workplace conduct that

^{3/} By letter dated June 2, 2010, Cole filed her own exceptions. After being advised by the Commission that only attorneys of record may file papers, Cole's counsel requested we accept the submission. We have included the June 2, 2010 letter in the record for our review.

is supported by the record and not in retaliation for protected activity.

We have reviewed the record. After consideration of CWA's exceptions, including the exceptions submitted by Cole through her counsel, we find that Cole was disciplined for poor workplace conduct and dismiss the Complaint. We adopt the Hearing Examiner's findings of fact and incorporate them here. (H.E. at 3-34). An overview of the facts follows.

Denise Cole commenced employment with the OPD in 2000 and worked at the times relevant to the charges as an investigator assigned to the Alternative Commitment Unit, currently the Special Treatment Unit located in the Newark OPD Office. Cole reported to John Stanton, the Chief of Investigators. Richard Friedman was the managing attorney for the Newark office and he managed both the secretarial staff and the attorneys for the ACU and the Mental Health Unit.

Most of the OPD attorneys, investigators and administrative clerical staff are members of a statewide CWA professional bargaining unit. Cole was represented by CWA Local 1037 and became the shop steward in 2002.

One-Day Suspension

The crux of the unfair practice charges relate to one-day and five-day suspensions imposed on Cole. The one-day suspension was issued after a meeting between Cole, Friedman, Libertad

Matos, Assistant Chief of Investigators and Gina Hunt, an attorney with the OPD. The purpose of the meeting was to advise Cole on how she would handle instructions from Hunt while testifying pursuant to a subpoena issued by the Kearny Municipal Court regarding information Cole held about an incident between two OPD clients. The OPD was concerned with issues of attorney-client privilege and wanted Cole to take direction from Hunt while on the witness stand. Cole requested and was denied a union representative at the meeting.^{4/} The Hearing Examiner did not credit Cole or Hunt's version of the meeting. Cole testified that as she had a dialogue with Hunt, she raised herself from her chair and moved to the back of the small office where she stood with her arms crossed. Once her discussion with Hunt was over, Cole testified she left the office. Hunt's version of the meeting is that she and Cole went "back and forth" at the meeting in a loud, but not argumentative tone and that Friedman was argumentative with Cole.

According to Friedman, when he was attempting to advise Cole that she would be taking direction from Hunt while testifying,

^{4/} Charging Party's allegation that Cole was denied union representation during an investigatory interview under NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975), was summarily dismissed by the Hearing Examiner upon a dispositive motion by OPD at the conclusion of the Charging Party's case. The motion, Charging Party's response and the Hearing Examiner's findings of facts and conclusions of law on that issue are set forth in the March 12, 2009 transcript (T4).

Cole interrupted, stating that she would not. Friedman testified that Cole stated that she did not have to listen to Hunt. Then Cole became loud, stating that the rules did not apply to her because she was not an attorney. Friedman further testified that when Hunt began to open the Rules of Professional Conduct, Cole became louder and angrier, stating that she was not going to listen to Hunt and that she was not going to lie and was going to answer whatever questions were asked. Friedman stated that he reassured Cole that no one was asking her to lie, and that Hunt expressed concern over the OPD clients.

According to Friedman, Cole replied that the only person she had to listen to was Reilly. Cole then stood up and started to take steps toward Hunt. As a result, Matos repeatedly advised Cole to stop, but Cole was very loud to the point that no one else could be heard. Friedman testified that he tried to speak softly and calmly to de-escalate the potentially volatile situation. However, Friedman stated that Cole again asked for a union representative, and that she then placed her hands over her ears and began loudly chanting "lawyer, lawyer, lawyer."

According to Friedman, Hunt appeared to be frightened and shaken.

Friedman told Cole she could leave. Before she left, Cole stated she was going to call her lawyer and have her lawyer call Friedman. An attorney called Friedman on Cole's behalf shortly thereafter.

After Cole left, Friedman called the OPD Trenton office to explain what had occurred. Upon the advice of Patrick DiMattia of OPD human resources, Friedman and Matos wrote separate, independent memorandum that day, reiterating the events that had occurred. On February 4, 2005, Cole received a Preliminary Notice of Disciplinary Action seeking a one-day suspension for insubordination and conduct unbecoming a public employee as a result of her actions at the meeting.

Five-Day Suspension

The five-day suspension resulted from an incident between Friedman and Cole at the copy machine on June 12, 2006. The Hearing Examiner did not credit Cole's version of the incident. Cole testified that she had taken a call that morning from a co-worker who was reporting to Essex County Hospital instead of the office and she had forgotten to list the call in the log book designated to assist staff in locating co-workers when they were starting their day on an assignment out of the office. Cole testified that she was standing at the photocopy machine and Friedman approached her and twice asked Cole the whereabouts of the employee. Cole testified that she had spoken to Friedman earlier in the morning when he called the office and advised him that the employee was reporting directly to Essex County Hospital. According to Cole, Friedman was "agitated" and stated

that Cole had taken the call but she had not logged it into the book.

Cole testified that she reminded Friedman that she had spoken to him earlier about the employee's whereabouts. Friedman told Cole she did not write it in the log book and he was looking for the log book. Cole testified she again told Friedman that the employee was at the Essex County Hospital, and that Cole obviously forgot to log it in but would do so upon finishing with the copier. Cole testified she told Friedman she was uncomfortable with him speaking to her in a loud tone at the copier where everyone could observe, as there were several employees present in the immediate area.

Upon leaving the copier, Cole went to her office and wrote a memorandum to Reilly, Stanton and DiMattia regarding the above incident. Specifically, Cole asserted that Friedman treated her differently and harassed her. Cole never heard from Reilly, Stanton or DiMattia about the memorandum. According to Cole, a few days after sending the memorandum, Friedman came to Cole's office and told her he had received a copy of her memorandum and that, because Cole had chosen to document the incident, he would take necessary action.

Friedman testified that on June 12, 2006, he had been looking for an employee who was not in the office. He asked the clerical staff who advised him that Cole had taken a call from

the employee. Friedman went over to the photocopier where Cole was making copies and asked if she knew where the employee was and why it wasn't recorded. Cole was immediately belligerent and shouted "why are you treating me like this. You know I'm not perfect. I make mistakes. You can't treat me like this". Friedman had to repeatedly ask Cole to tell him the whereabouts of the employee. Cole answered 4 to 6 times "she is where she is supposed to be," before telling Friedman her actual location.

Later that day Friedman drafted a memorandum to Dale Jones, the First Assistant Public Defender, about Cole's conduct that morning. The e-mail also advises Jones of an e-mail Cole sent on June 8, 2006 in which she accuses Friedman of acting unethically. Friedman states that the accusation is factually untrue and advises that it addresses temporary staff. Friedman ends the e-mail: "I believe Denise Cole was insubordinate and that an appropriate response should be taken by management".

Based upon Friedman's statement about the photocopier incident, DiMattia and Jones determined that disciplinary action was warranted. Friedman denied having any further conversations with Cole about the incident. He specifically denied stating that because Cole chose to document the photocopier confrontation he was going to have to take the appropriate action. On June 20, 2006, Cole received a Preliminary Notice of Disciplinary Action seeking a five-day suspension for insubordination and conduct

unbecoming a public employee based her behavior on June 12, 2006 at the photocopy machine. By letter dated June 26, 2006, from Cole to DiMattia, she provided notice of her intent to appeal the disciplinary action and asserted that the discipline was in retaliation for the previous memorandum wherein she asserted differential treatment and harassment against her by Friedman.

Retaliation

In addition to the suspensions, Cole alleges that she was retaliated against when her previously approved medical accommodations were removed and she was placed on an approved medical leave of absence. Cole filed a grievance asserting retaliation against her by Reilly, Matos and Friedman. The Department of the Treasury at that time had taken over the human resources functions of the OPD and on July 28, 2006, Cole received a letter from Deborahann Westwood, Manager of Human Resources for the Department of the Treasury. The letter stated that, according to the OPD management, it was not possible to provide an accommodation to Cole's restrictions, and, therefore, she was being immediately placed on an approved medical leave of absence. Cole called Reilly who stated he did not know what the letter was referring to, but that he would contact Westwood.

Westwood testified that when the Department of Treasury took over in July of 2006, the Leave Management Unit reviewed all the OPD medical files to ensure there were no outstanding or

incomplete medical matters. The LMU then brought to Westwood any unresolved issues. The review of Cole's medical file revealed very stringent workplace restrictions, with no indication that the documentation had been acted upon.

When Westwood received and reviewed Cole's restrictions, she contacted Friedman, as Cole's supervisor. Westwood advised Friedman of Cole's restrictions, inquired about her work duties and discussed whether the restrictions could be accommodated. Friedman advised Westwood that Cole's duties required her to visit various off-site facilities. Westwood recollected that Friedman told her there was an informal arrangement in place to accommodate Cole. Westwood asked whether they could continue the informal arrangement for 90 days. Friedman told her there was not enough work to support a full-time job in the office for the next three months and that there was not sufficient staff to rearrange workloads so that Cole could go off-site with other investigators. Since Cole's restriction was that she could not drive and since her duties required she visit facilities, they could not accommodate her for the next 90 days.

Westwood then reached out to Reilly and he confirmed the accuracy of the information she had received from Friedman. Since the OPD asserted it could not accommodate Cole's restrictions, Westwood notified Cole by letter that she was being placed on a medical leave of absence. As a result of Westwood's

letter, Cole spoke with Westwood by telephone. Westwood attempted to explain to Cole the process as to why she was placed on a medical leave. According to Westwood, Cole was extremely loud and very argumentative.

The next day Westwood received revised medical documentation from Cole's physician which permitted limited driving. Westwood again spoke to Friedman and Reilly, advised them of the modification and both concurred that they could assign Cole duties that were consistent with the modified driving restriction. On August 1, 2006, Westwood wrote to Cole, notifying her of the accommodation.

On August 1, 2006, Cole filed a grievance asserting retaliation against her by Reilly, Matos and Friedman based upon the letter she received from Westwood. The grievance arose from Cole's telephone conversation with Westwood wherein Westwood stated that she had recently become the personnel officer, that she did not have Cole's file or a job description for her title, but she had spoken to Reilly, Friedman and Matos who all stated that Cole could not be accommodated and needed to be out on leave. Cole had already been working for two months with her restrictions which had been previously approved by Matos and Friedman. Therefore, Cole believed that Reilly, Matos and Friedman were using Westwood to try and intimidate her. Cole testified that nothing happened as a result of the grievance.

The Hearing Examiner found that the grievance resulted in a meeting on September 22, 2006.

In July 2006, the Department of Treasury also assumed all human resource responsibility for the OPD including pending grievances and discipline. Christopher Possessky, Employee Relations Coordinator for the Department of Treasury, received Cole's August 1 grievance asserting that Human Resources Manager Deborahann Westwood was being used to intimidate Cole "into filing false papers requesting a medical leave of absence". As part of Possessky's procedure for processing grievances, he reached out to the CWA representative to try and schedule a step one meeting.

Possessky sent a letter to Cole on August 16, 2006 advising her that a step one meeting was scheduled for September 22 concerning her August 1 grievance. Cole responded to Possessky's letter on August 19. Cole's letter requests that all correspondence be sent to her union, and that her union then will notify her of future hearings. Possessky responded, indicating that he agreed because Cole is represented by the CWA, it would be inappropriate for him to respond to her directly.

Cole's five-day disciplinary matter was also transferred to Possessky, who reviewed it and took steps to have it scheduled. Possessky spoke with CWA representative Lori Taylor about the matter, and it was decided a meeting would be scheduled rather

than a hearing. The Hearing Examiner found that under Article 5 of the parties' contract, a departmental disciplinary review may be conducted as a meeting and that if a hearing is not requested, the review will be conducted as a meeting. She further found that Cole's request to Possessky to appeal her discipline did not specify a request for a departmental hearing.

On September 22, 2006, Cole attended the meeting with Taylor, her CWA staff representative, and Michele Walker, a long-time friend of Cole's. When they arrived at the conference room, Possessky and Friedman were already present. Possessky advised Walker that she could not remain at the meeting because it was a disciplinary meeting and only the CWA representative could be present. According to Cole, she asked Possessky who he was, to which he responded he was the hearing officer. Cole testified that Possessky also stated he was the management representative. Cole then questioned Possessky how the meeting was a disciplinary hearing when Possessky's August 16, 2006 letter to her indicated it was a grievance hearing. According to Cole, Possessky reaffirmed he was management's representative and the hearing officer, but that Friedman would be writing the decision on the one and five day discipline. Cole then excused herself and went into the hallway to call her attorney. Thereafter, Cole returned and told Possessky she thought something illegal was taking place, that she would not answer any

questions and would not participate in a grievance or disciplinary action because she was not notified in advance. Thereafter, the meeting was terminated and Cole returned to her office and drafted a memorandum about what had occurred.

The Hearing Examiner did not credit Cole's version of events and explicitly credited Possessky's account of the meeting. Possessky testified he had several conversations with Taylor and that it was decided that Cole's five-day disciplinary matter would proceed as a meeting, not a hearing, and that it would be conducted on the same day as the previously scheduled grievance meeting. Consistent with Possessky's business practice, he confirmed this agreement by a letter to Cole on August 28, 2006, with a copy to Friedman and to Taylor.

Possessky testified that he attended the September 22, 2006 meeting with Friedman. Possessky began to recite his standard introduction, outlining the procedure for the meeting. Possessky testified that before he could finish, Cole "exploded." She "went ballistic," stating that she was never notified that this was a disciplinary meeting. Cole got up, stated she was going to call her lawyer and went into the hallway and began talking on the phone. Cole returned and stated repeatedly that "this is illegal".

Possessky testified that he tried to continue to explain the process but Cole repeatedly made loud interruptions. Possessky

then became concerned that perhaps Cole had erroneously not received his August 28, 2006 letter. Taylor did not say anything regarding her agreement that this was a disciplinary meeting. According to Possessky, the parties began a substantive discussion about both the grievance and disciplinary issues. During the discussion, Cole again went "semi-ballistic" when Possessky mentioned that, as was the usual procedure, Friedman would write the step 1 decision. During the discussion Taylor expressed that she understood the five-day suspension was going to be resolved, but Possessky advised her that was not his understanding.

On September 27, 2006, a step 1 decision on Cole's August 1 grievance was issued and sent to Cole and Taylor. A step 2 hearing on the grievance was subsequently scheduled by Possessky and Taylor for November 2006. However, primarily because of scheduling difficulties, a step 2 meeting was never held. On October 3, Cole received a Final Notice of Disciplinary Action sustaining the recommended five-day suspension.

The final allegation of retaliation in the charge concerns Cole's request in October 2006 to attend a conference at the Public Employment Relations Commission (Commission) on an unfair practice charge filed against the OPD. Cole had submitted a request to take time to attend the conference. Cole testified that Friedman told her he had checked with personnel who advised

him that Cole did not need to be present at the conference if her attorney was present, and that if she attended, she would be disciplined. Thereafter, Cole called William Schimmel, an attorney for CWA. Cole testified that Friedman subsequently advised her that she could attend the conference at the Commission, and that if she did, she would not be disciplined.

According to Friedman, Cole was serving a five-day suspension on Wednesdays. She wanted to attend a Commission exploratory conference on a different day and asked if the suspension could be changed. Friedman testified that he was told by human resources that if she used too many non-paid days, she could be subject to "action." Friedman testified he wanted Cole to be aware of this, so she was not further penalized. The Hearing Examiner credited Friedman's version of the events concerning the conference at the Commission.

Analysis

Under In re Bridgewater Tp., 95 N.J. 235 (1984), 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 Hearing Examiner found that the evidence did not support that the OPD was hostile to Cole's protected activity nor did it support the allegation that the one-day suspension was motivated by hostility to Cole's protected activity. The Hearing Examiner further found that the OPD did not refuse to process Cole's grievances or that it harassed her over filing paperwork related to her medical grievances. The Hearing Examiner found that the

evidence supports a finding that Cole was issued the one-day suspension because of her unbecoming and insubordinate conduct at the meeting held on January 20, 2005.^{5/}

The Hearing Examiner did find that OPD demonstrated hostility to Cole's protected activity when it contemplated disciplining her for her conduct which resulted in the five-day suspension. The factual specifications for Cole's five-day suspension state that Cole's protected activity, i.e. an e-mail by Cole to DiMattia, Friedman, Reilly and Stanton about a temporary employee was, in part, a basis upon which discipline was sought and is direct evidence of hostility. The Final Notice of Disciplinary Action did not contain any factual specifications so there was no direct evidence as to whether discipline was actually imposed based upon that e-mail. The Hearing Examiner concluded it was not, as there was ample credible evidence in the record to support a finding that the five-day suspension was primarily and substantially the result of Cole's poor conduct on June 12, 2006 at the photocopy machine. The Hearing Examiner found Cole's behavior to be disrespectful, obstinate and unprofessional. We find that it was not deserving of protection under the Act. See State of New Jersey (Dep't of Human Services, P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001) (reprimand of a

^{5/} This was not a grievance meeting nor was it held in connection with any disciplinary action.

shop steward for loud and intimidating conduct did not violate the Act).

We will now review CWA's exceptions. We note that this case turned on witness credibility and that the Hearing Examiner thoroughly addresses each of the CWA's arguments in her decision which we adopt.

Exception One

CWA asserts that the Hearing Examiner erred by concluding that even though OPD exhibited hostility toward Cole's protected activity, OPD did not violate the Act when it issued the five-day suspension. It asserts that the Hearing Examiner misapplied Bridgewater because once it established hostility, the burden shifts to the employer to establish that the same action - i.e. the five-day suspension, as opposed to a lesser penalty or no penalty would have been imposed and that there was no evidence in the record that the employer would have imposed a five-day suspension absent both the protected activity (e-mail) and the alleged workplace misconduct.

We reject this exception. Under Bridgewater, once hostility is found, 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. Conflicting proofs concerning the employer's

motives are for us to resolve. The Hearing Examiner engaged in an exhaustive analysis of the facts and specifically found that Cole's behavior at the photocopy machine was disrespectful, obstinate and unprofessional rising to the level of insubordination and conduct unbecoming a public employee. The CWA does not point to any credible evidence in the record to support its argument that the e-mail was the substantial motivation for the five-day discipline. We also reject the argument that a lesser penalty may have been imposed absent the protected activity and question its veracity after a one-day suspension was previously imposed for similar conduct.

Exception Two

CWA asserts the Hearing Examiner failed to consider the totality of the evidence that it presented to support its assertion that the five-day suspension was issued in retaliation for union activity in that she accepted Friedman's account of the copy machine incident without considering the timing of the discipline; accepted Possessky's testimony related to the disciplinary meeting despite his recollection of how long the meeting lasted conflicting with Friedman's recollection; and was logically flawed when she relied on Possessky's testimony because he described Cole's behavior to be "loud, argumentative and disruptive" which comports with the Hearing Examiner's finding of her behavior during the photocopier incident and the subpoena

meeting. Relying on N.J.R.E. 404(b), CWA asserts that evidence of prior bad acts should not have been accepted by the Hearing Examiner as a predisposition to Cole's future behavior.

We reject this exception. The record supports the Hearing Examiner's finding that OPD has proven it would have disciplined Cole absent her protected activity. Many of the Hearing Examiner's findings related to this exception were based on witness credibility. The Hearing Examiner repeatedly discredited Cole. As to the photocopier incident, she explicitly credited Friedman's testimony and his memorandum about the incident and did not find that Friedman harassed or demeaned Cole in the middle of the office. She determined that Friedman was attempting to determine the whereabouts of an employee and Cole became loud and refused to answer. We will not disturb those findings. We may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006) (absent compelling contrary evidence, Commission will not substitute its reading of the transcript for the Hearing Examiner's credibility

determinations). There is abundant evidence in the record to support the Hearing Examiner's conclusion. Possessky's recollection years after the fact regarding how long a meeting took place is not sufficient evidence to overturn the determination of the Hearing Examiner who was able to observe each witness and review the evidence during a ten day hearing.

Exception Three

CWA asserts that the Hearing Examiner's determinations regarding the imposition of the one-day suspension are belied by the record because the timing of the suspension - coming one-day after a grievance meeting between Cole and management - is evidence that the Hearing Examiner should have sustained the Union's allegations. CWA further asserts that the Hearing Examiner should not have credited the testimony of Friedman and Matos regarding the January 20 subpoena meeting nor should she have relied upon Matos' memorandum because it was not produced until the hearing. Finally, CWA asserts that the Hearing Examiner should have credited the testimony of Gina Hunt because she is a former employee with no agenda.

We reject this exception. The Hearing Examiner appropriately addressed CWA's timing argument and dismissed it. As to the CWA's exception to the Hearing Examiner's credibility determinations, assessing credibility is an essential role of the Hearing Examiner. The Hearing Examiner explicitly credited the

testimony of Friedman and Matos because it is consistent with one another, consistent with their contemporaneous, independent memorandum, and consistent with their demeanor and presentation on the witness stand. The Hearing Examiner did not credit the testimony of Cole or Hunt. She found Hunt's demeanor was at times tentative and at other times defensive and resentful and Cole's demeanor showed that she was uncooperative and argumentative at the January 20, 2005 meeting. On cross-examination, Cole was frequently non-responsive and at times evasive. Further, Friedman did not personally recommend discipline for Cole based upon the January 20, 2005 meeting. Consistent with the practice of the OPD, Dale Jones, the Assistant Public Defender, and DiMattia reviewed the statements of Friedman and Matos and determined disciplinary action was warranted.

We may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

N.J.S.A. 52:14B-10(c); Warren Hills Reg. Bd. of Ed.

There is ample evidence to support the Hearing Examiner's conclusions and CWA has not provided compelling contrary evidence to disturb them.

We accept the Hearing Examiner's recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Eaton recused herself.

ISSUED: March 31, 2011

Trenton, New Jersey