

P.E.R.C. NO. 91-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-H-88-213

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO, Local 1040 against the State of New Jersey (Department of Human Services). The charge, as amended, alleges that the employer violated the New Jersey Employer-Employee Relations Act when it reprimanded a shop steward in retaliation for protected activity. The Commission finds that the employer's action was not discriminatorily motivated.

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Charging Party.

Appearances:

For the Respondent, Robert Del Tufo, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, attorney

DECISION AND ORDER

On February 22, 1988, the Communications Workers of America, AFL-CIO, Local 1040 filed an unfair practice charge against the State of New Jersey (Department of Human Services). The charge, as later amended, alleges that the State as employer violated subsections 5.4(a)(1), (2), (3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The

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

charge specifically alleges that shop steward Robert Shaub testified in a Commission compliance proceeding about a notice posting; that Employee Relations Officer Harold Young refused to tell Shaub where the notice had been posted; that head nurse Nancy Wagner told Shaub that the Director of Nurses had rescinded an agreement concerning approval of time off for Wagner; that the Medical Director of the North Princeton Developmental Center ("Center") called Shaub a union agitator and the Center's superintendent agreed with the Director that Shaub was dangerous; and that Shaub was subjected to reprisal through a disciplinary action signed by supervisor of nurses Nancy Garvey.

On August 3, 1988, a Complaint and Notice of Hearing issued. The Answer denies the allegations of retaliation and anti-union statements; asserts that Shaub had been disciplined for legitimate business reasons, and asserts that the statements alleged, even if made, were not coercive or otherwise illegal.

On March 9 and 10, May 11 and 22, and July 22, 1989, Hearing Examiner Susan A. Weinberg conducted a hearing. The parties examined witnesses, introduced exhibits, and submitted post-hearing briefs by November 20, 1989.

On May 30, 1990, the Hearing Examiner issued her report and recommendations. H.E. No. 90-54, 16 NJPER ____ (¶____ 1990). While she found that Garvey had not acted discriminatorily in recommending that Shaub be counselled for unexcused absences on February 13 and 14, 1988, she concluded that subsections 5.4(a)(1),

(3) and (4) were violated when Young substituted an official reprimand for the counselling recommendation and when he denied Shaub vacation leave for the two days off. She recommended that the employer be ordered to rescind the reprimand, to restore the counselling penalty, and to post a notice of its violation. She recommended dismissal of the Complaint's remaining allegations.

On September 13, 1990, the employer filed exceptions. It asserts that the Hearing Examiner erred in making certain findings of fact; in concluding that Young discriminatorily denied Shaub two vacation days; and in concluding that Young discriminatorily substituted an official reprimand for counselling.^{2/}

CWA's response urges adoption of the Hearing Examiner's recommendations. CWA did not file cross-exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-25) are mostly accurate. We adopt and incorporate them, with the following additions and modifications.

We add to finding no. 3 that on weekends only one head nurse works on each shift (TB91-TB92; TE54). When a nurse reports that a patient needs help, the head nurse decides whether to call a treating physician (TB39). Nurses can dispense prescribed medication, but doctors must make the prescriptions (TB40).

^{2/} The exceptions also assert that the Complaint should be dismissed because the charge accused only Garvey of discriminatorily disciplining Shaub. We reject this contention. Young's role in the disciplinary determination has been fairly and fully litigated. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

We modify finding no. 6 to reflect that Young apparently hears non-contractual grievances as well as contractual grievances at the first step of the grievance procedure (R-7; TC122).

We modify finding no. 8 to reflect that Harvey decided where to post the notice (TE8). We accept, however, the Hearing Examiner's finding that Harvey consulted with Young, even though Harvey did not recall consulting with Young (TE8).

We elaborate upon finding no. 10. We accept the Hearing Examiner's determination to credit Shaub's testimony about his conversation with Young. When Shaub asked Young where the notice had been posted, Young responded: "We put it up where we complied with the letter of the law." Shaub asked him where, adding: "That could be the back of the toilet someplace." Young responded: "We complied with the letter of the law, that is all I'm going to tell you." (TA61; TB50).

We add to finding no. 14 that Shaub's certification (CP-23) did not mention his conversation with Young.

We add to finding no. 15 that the Chairman issued his directive after finding that there appeared to be "a good faith difference of opinion" as to whether the notice was posted in "all places where notices to employees are customarily posted." (CP-1). Harvey had told the Chairman that he would accept a decision to repost the notice on the six bulletin boards (TE11) and the Chairman decided that reposting the notice for 14 days would be sufficient (TE12).

We modify finding no. 21. It is not clear that Young would not speak with Shaub about the Wagner matter. According to Shaub, Young told her he couldn't talk now because he was busy (TA66). According to Young, Shaub was so upset with the Director of Nurses that Young couldn't speak to him and suggested that perhaps Shaub should have CWA representative Fralinger call Young, a suggestion Shaub accepted (TD21-TD22). Young then wrote a memorandum according with the parties' agreement (CP-2; TB74; TD22-TD24).

We modify finding no. 26. At the morning meeting in January 1988, Thompson did not accuse Shaub of being "a union agitator" or "dangerous" (TA49; TA55-TA56). At most, Thompson related that an unspecified someone had made such statements at a higher-level staff meeting (TA24; TA33). Kim's testimony was vague (TA34).

We add to finding no. 34 Young's explanation of why he called Shaub's request for vacation leave "audacious." At the hearing on Shaub's appeal of his reprimand, Young made audacity the theme of his summation. Young testified (TD55-TD56):

I felt that the actions of Mr. Shaub insisting that his supervisor grant him a vacation day at the last minute on the 12th, which was a holiday, when he knew from his own experience that the supervisor wasn't going to have anybody out there that she could reach out there to get to work for him, when he knew what the procedure was for getting coverage, that weekends were only one out of seven days, one out of seven weekends a month or a period even more than a month, when he was saying that it was an emergency that he have a vacation day granted on the 12th, when he knew that he had responsibilities towards his children much further in advance than the 12th. He never asked for a vacation day before the 12th and he knew he had children before the 12th.

He had an offer from Mrs. Stenger to work that weekend with an understanding that he would work a weekend two months later on down the road, so he had an opportunity to say, fine, Mrs. Stenger, I will work for you two months down the road, and that statement was not available. He had two months to figure out a new strategy.

So with all these factors into consideration and because of the fact that one of the head nurses heard him say, well, that's all right, I'm just going to call off anyway, I felt those actions were audacious and I felt that was a good description and a good concept to get across to the hearing officer.

In his summation at the hearing on Shaub's grievances, Young similarly explained why he said that "Mr. Shaub feels the sun rises and sets on him." In particular, he asserted that Shaub had turned down Stenger's offer to switch weekend duties because Shaub wanted Stenger to cover for him without his giving up a weekend in return (TD56).

We modify finding no. 37. Shaub testified that his supervisor had "very frequently" and "about weekly" recommended that he be disciplined (TB5-TB6), but the record does not specifically support this assertion. On July 27, 1987, Garvey gave Shaub a notice of a request for disciplinary action (CP-13). The notice stated that Shaub had not responded to a request for emergency restraints for a client. It appears that an official form requesting discipline was not filled out or submitted to Young for his review (TD45). On January 14, 1988, Garvey submitted an official form (CP-12)^{3/}

^{3/} This form has a blank for the date of offense. Handwritten in that blank is "1-14-87". But the date stamp of receipt in the Employee Relations Office is "Jan. 19 1988" and the supervisor and the Director of Nurses signed the form on "1-14-88" and "1-15-88" respectively.

requesting that Shaub receive a penalty of counselling for not working overtime without a reasonable excuse. Young denied this request because Shaub and others had not been given a chance to explain why they could not work overtime (TD45). Young received no other requests for disciplining Shaub (TD46).

We add to finding no. 39 that the Director of Nurses and Garvey told Young that the memorandum (R-22) applied to Shaub's situation and that Shaub had been told he would have to find a replacement (TD46; TD106-TD107).

We modify finding no. 45. When Shaub noted the difficulty of getting a babysitter to come at 6:00 a.m., Garvey suggested that Shaub ask the night shift nurse to stay over late, as often happens in bad weather (TE31-TE32). Shaub did not contradict Garvey's testimony on this point.

We correct finding no. 46 to reflect that one nurse offered to switch with Shaub, but he said no. Gaye Stenger, an RN and head nurse, submitted a statement (R-20) to Garvey during the investigation of Shaub's absences. It stated:

On 2/11/88, I offered to work 7-3 shift on 2/13 + 14/88 to Mr. Shaub if he would work for me on 4/2 +3/88. He denied my offer.

As you know, Mr. Shaub did not work his shifts on 2/13 + 14/88. I was called and I worked 7-3 on 2/14/88. Since I had made my offer to him and he denied it, I fully expect for him to work for me on 4/3/88. That's a Sunday for a Sunday.

Handwritten at the bottom of this memorandum was a note to the Assistant Director of Nurses: "Harry - He better be put on the schedule for 3-11 on 4/3/88 - I will not be here!!" Garvey and

Young considered Stenger's statement in deciding what penalty to impose (TD31-TD33; TD37-TD38). Stenger testified about her offer at the disciplinary appeal hearing and the hearing officer accepted that testimony (R-4). At that hearing, Shaub conceded that Stenger had made this offer, but stated that he was already scheduled to work the two days in April (R-4).

We add to finding no. 46 that Sandra Suntato, an RN and head nurse, also submitted a statement (R-21) to Garvey. It stated that Shaub had asked Mrs. Whalen if she would switch weekends with him and she said she had plans and could not. Garvey and Young considered Suntato's statement in deciding what penalty to impose (TD33-TD34). Suntato testified about this conversation at the disciplinary appeal hearing; the hearing officer's report does not indicate that Shaub contradicted her account (R-4).

We also modify footnote 15 in finding no. 46 by stating that the employer proved that a policy on replacement responsibility (R-22) had been circulated to all head nurses and that Garvey, Ryan and Young believed this policy covered Shaub's situation.

We modify finding no. 48. February 12, 1988 was a holiday and Garvey was the only RN on duty. When Shaub called at 9:30 a.m. and requested emergency vacation leave for the next two days, Garvey rejected that request as "unacceptable" (TE3; CP-21). Garvey was upset: she told Shaub she was not going to be stuck and he had to get his own coverage (TA77-TA78). At 10:15 a.m., Shaub called back. He left a message that he had fulfilled his obligation by calling Mrs. Whalen's husband and informing him that someone needed

to replace Shaub the next two days (CP-21; TE34). At 11:00 a.m. Garvey notified the Assistant Director of Nursing Services of the situation (CP-21). At 11:05 a.m., Garvey called Shaub and notified him that he must find a replacement (CP-21). Garvey did not believe that leaving a message with a nurse's spouse complied with the obligation to go through the rotation of nurses until a replacement was found (TE35). Shaub did not find a replacement, call back, or come in.

We modify footnote 17 in finding no. 50. We do not believe it was illogical for Young to change the A2 specification to an A1 specification or to add an E1 specification.

An A1 specification applies if an employee is absent without permission and without giving proper notice. Shaub was absent on February 13 and 14, 1988 without permission. Shaub knew two weeks before that he had a conflict and that he had been told to find a replacement, but he did not submit a written request for vacation leave. Instead he called in the day before, the first day of a four-day holiday weekend when it is harder than usual to fill staffing needs (TE44). As a result of the three phone calls that morning, he knew his request for emergency vacation leave had been denied as unacceptable; that he had to find a replacement; and that calling Whalen's husband had been found unsatisfactory. As a result of those phone calls, Garvey expected and told Young that she expected that Shaub would either cover the 7-3 shift the next two days or find a replacement (TD38-TD39; TD96). Shaub did not keep

trying to find a replacement or inform management that he had given up. These circumstances support, rather than rule out, an A1 specification.

An E1 specification is called for if an employee violates a rule, regulation, policy, procedure, order or administrative decision. The Hearing Examiner reasoned that Young could not logically believe that R-22's coverage arrangements were encompassed by E1 or applicable to Shaub's situation. We disagree. We further find that Young could logically conclude that Shaub had not complied with R-22. From Young's perspective, Shaub had rejected Stenger's offer to change shifts; Shaub knew that Mrs. Whalen could not cover his shift; Shaub had been told that his attempt to comply with R-22 by calling Whalen's husband was unsatisfactory; Shaub had been told repeatedly to find a replacement or come into work, and Shaub did not find a replacement or come into work on either February 13 or 14 (TD36-TD39). These circumstances support, rather than rule out, adding an E1 specification.^{4/}

We add to finding no. 52 that Hearing Officer Knoth concluded that Shaub did not follow the proper procedure for requesting vacation time and that he could have switched shifts with Stenger, giving him two more months to arrange for child care (R-4). Shaub asked the Merit System Board to exercise its discretionary authority to accept an appeal, but the Board declined (R-5). It stated:

^{4/} We will reserve for our analysis our findings on Young's motivation for changing the penalty.

While appellant's personal problems were presented during the departmental hearing and on appeal, such matters must be balanced with the institution's need to maintain mandated coverage of the facility and ensure needed attendance standards.

We add to finding nos. 53-59 that we do not know enough about the other incidents of emergency vacation leave to tell whether they are comparable to Shaub's situation. In particular, we do not know whether these employees had encountered truly unforeseeable emergencies; whether their requests for emergency vacation leaves were denied in the first instance; whether they would have been the only head nurses on duty that shift; whether they had been told to find replacements, or whether they had found replacements. Young played no role in determining whether any employees besides Titus should receive emergency vacation leave (TD104-TD106). As a grievance hearing officer, he found that Titus should not have been given unexcused absences since her supervisor had not told her that her request for leave had been denied (TD60). Young did not know that Shaub had submitted a written request for vacation leave (CP-8) until Shaub's disciplinary appeal hearing (TD42-TD43).

We first consider whether Shaub was discriminatorily denied two days of vacation leave. We apply the standards set forth in In re Bridgewater Tp., 95 N.J. 235, 240-246 (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 towards the exercise of protected rights. If the charging party proves that anti-union animus was a motivating or substantial factor in the personnel decision, then the employer will have committed a violation unless it proves, by a preponderance of the evidence on the entire record, that the adverse action would have taken place even absent the protected conduct. See also UMDNJ-Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

Garvey, not Young, denied Shaub's request for emergency vacation leave. We agree with the Hearing Examiner that Garvey's decision was not discriminatorily motivated. We therefore find that charging Shaub with two days of unexcused absences was not an unfair practice.^{5/}

We next consider whether Young discriminatorily found that Shaub should be reprimanded, instead of counselled, for these absences. Under all the circumstances, we hold that the charging party has not proved that Shaub's protected activity was a substantial or motivating factor in reprimanding Shaub.

^{5/} In her recommended conclusions (H.E. at 33-34) the Hearing Examiner stated that Young illegally denied this vacation leave. This conclusion is unsupported by the record, which shows that Garvey denied the leave, and inconsistent with the Hearing Examiner's recommended order, which does not refer to the vacation leave issue.

Garvey initially recommended that Shaub be counselled. This recommendation was not discriminatorily motivated. Young's duties included reviewing disciplinary recommendations to make sure they conformed to administrative order 408, the department's disciplinary action program. Under that program, the penalty for being absent without permission and proper notice ranges from a written warning to an official reprimand while the penalty for violating a rule, regulation, policy, procedure, order or administrative decision ranges from counselling to removal. We have explained why Young could logically find, based on the information before him, that these infractions occurred. We therefore decline to infer a discriminatory motive from Young's reasons. This inference was a main premise for the Hearing Examiner's finding of discrimination.

The rest of the evidence does not persuade us that the reprimand was motivated by a desire to retaliate against Shaub for his role in the dispute over the posting of the notice. Young was not found guilty of any unfair practices in the first proceeding and was not named in the notice, order, or Shaub's certification. Harvey consulted with Young, but Harvey decided where to post the notice. Young was involved, but not as a lead actor, in the ensuing "good faith difference of opinion." After the compliance question arose and just a month before Shaub's unexcused absences, Young rejected a recommendation that Shaub be disciplined for refusing to work overtime. Young's comments during the disciplinary appeal and grievance proceedings were a legitimate attempt to persuade the

hearing officer to sustain the reprimand, rather than a demonstration of anti-union animus. Young's other statements were not connected to the incident of the unexcused absences. Given the record as a whole, we are not persuaded that the reprimand was motivated by hostility towards Shaub's protected activity.

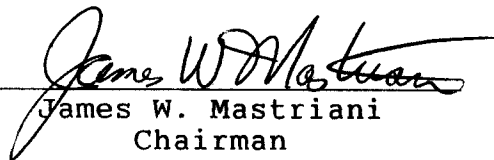
We next consider whether Young's handling of the Wagner matter was discriminatorily motivated or an indication of hostility against Shaub. We agree with the Hearing Examiner (H.E. at 30) that it was not. Young's memorandum conformed to the parties' agreement.

We next consider whether the statements made by Young and other administrators violated subsection 5.4(a)(1). We agree with the Hearing Examiner (H.E. at 31-34) that they did not. Kim's testimony was too vague to warrant a finding that Thompson or Burke made the statements alleged and Young's comments during the grievance and disciplinary appeal proceedings were within the employer's right of free speech.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Smith abstained.

DATED: Trenton, New Jersey
October 26, 1990
ISSUED: October 26, 1990

H.E. NO. 90-54

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Charging Party.

SYNOPSIS

A Hearing Examiner finds that the State of New Jersey (Department of Human Services) violated subsections 5.4(a)(4), (3) and (1) (derivatively) when it increased the discipline of an employee from a counselling to an official reprimand in retaliation for protected activities, including giving information and submitting an affidavit in a Commission compliance proceeding. The Hearing Examiner dismissed the alleged violations of subsections 5.4(a)(2) and (1) (independently).

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.

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Appearances:

For the Respondent, Hon. Robert Del Tufo, Attorney General
(Michael L. Diller, D.A.G.)

For the Charging Party, Michelle Dunham Guerra, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 22, 1988, the Communications Workers of America, AFL-CIO, Local 1040 ("CWA") filed an unfair practice charge against the State of New Jersey, Department of Human Services ("State"), alleging violations of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4 et seq., subsections (a)(1) and (2).^{1/} The charge alleges that discipline was imposed,

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

derogatory statements were made and certain other actions were taken against North Princeton Developmental Center employee Robert Shaub in retaliation for his protected activities as a union shop steward.

A Complaint and Notice of Hearing issued on August 3, 1988. On September 23, 1988, CWA amended the charge to state that subsections (a)(3) and (4) were also violated.^{2/} On November 22, 1988, the State filed an Answer to the entire charge denying it violated the Act.

After many postponements and delays requested by both parties, I conducted a hearing on March 9, 10, May 11, 22 and July 25, 1989 at which the parties examined and cross-examined witnesses, presented evidence and argued orally. After extensions, both parties filed post-hearing briefs by November 20, 1989.

Upon review of the entire record, I make the following:

FINDINGS OF FACT

1. The State is a public employer within the meaning of the Act and CWA is a public employee representative within the meaning of the Act.

^{2/} These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees 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."

2. Robert Shaub is an RN (Registered Nurse) and head nurse at the North Princeton Developmental Center ("NPDC") and has held that position since August, 1986. He is also the shop steward for CWA's primary level supervisor's unit (representing head nurses, dietitians, cottage training supervisors and head cottage training supervisors) and has held that position since January, 1987 (TA57-58, TB41, TC8).^{3/}

3. As head nurse, Shaub is the first level of supervision for four LPN's (Licensed Practical Nurses) located in the Dodds, Strecker and Moderate Security Unit Buildings. Head nurses are responsible for the medical care of clients in NPDC's facilities (TB37-39).

4. At the time of the incidents described in the charge, Shaub reported to Nancy Garvey, Supervisor of Nursing Services. Garvey was in the Higher Level supervisor's unit represented by CWA. Garvey reported to Harry Moss, Assistant Director of Nurses. Moss reported to Thelma Ryan, Director of Nurses. The Director of Nurses reported to the Director of Professional Residential Services (TB42-44).

5. Harold Young has been employed by NPDC for approximately eleven years, the last five in his current position of

^{3/} Transcript citations are as follows: TA refers to the transcript of the proceedings on March 9, 1989; TB - March 10, 1989; TC - May 11, 1989; TD - May 22, 1989 and TE - July 25, 1989. The number(s) following the transcript reference is the page designation(s).

Acting Employee Relations Officer. Prior to that he held the positions of Supervisor of Professional and Residential Services and Director of Residential Living. Before coming to NPDC, Young worked at the Woodbridge State School as Assistant Supervisor of Resident Living.

6. In his capacity as Acting Employee Relations Officer, Young has three primary functions: 1) he enforces Administrative Order 408, the Department of Human Services Disciplinary Action Program (i.e. sees that all supervisor recommendations for discipline are consistent with that Order); 2) he acts as primary hearing officer for first step contractual grievances, and 3) he acts as a consultant and liaison to other management personnel and the Department of Human Services Office of Employee Relations. These duties involve members of all three unions at NPDC: CWA (300 employees), AFSCME (650 employees) and IFPTE (200 employees). Young only hears contractual grievances at the first step. If the grievance is appealed, he represents management at all subsequent levels. In disciplinary appeals, Young represents management up to the Office of Administrative Law (OAL) hearing level where the matter is then turned over to a deputy attorney general, with whom Young works to prepare management's case (TC118-126).

POSTING INCIDENT

7. On July 14, 1987, the Commission issued a decision and order in State of New Jersey, Department of Human Services, P.E.R.C. No. 88-8, 13 NJPER 612 (¶10242 1987)(R-1)("Klein" case). The case

involved certain coercive statements made by administrators in the psychology department of NPDC. As a result of that decision, a Notice was to be posted for 60 consecutive days (R-17).

8. The Commission forwarded the Notice to NPDC's Superintendent Robert Burke, who in turn forwarded it to Young. Young received and posted the Notice on August 30, 1987. After consulting with Robert Harvey, Assistant to the Director of Employee Relations at the Human Services Department, Young placed the Notice next to the door in the Director of Psychology's office. Young removed the Notice on November 4, 1987 (TC126-128, TD4-7, TD78-79, TD114, TE7-8).

9. Shaub was not involved in the Klein case (TB13). In September, 1987, Shaub read an article in a CWA newspaper regarding the Commission's decision and order in that case (TA59, TB45, 49). As a result of that article, Shaub looked for but did not find the Klein posting on the official NPDC employee bulletin boards (TA59, TB49, TB52, TC13).

10. While in Young's office on another matter, Shaub asked Young where the Notice was posted. Young replied that it was posted in a place which "complied with the letter of the law," and when pressed, refused to give Shaub any more specific information.^{4/} (TA61, TB50, TC130, TD79).

^{4/} Young testified that when asked, he told Shaub "the matter had been posted" and that the conversation then ended (TC130-131, TD79). Although there is little relevant difference between the two versions, I credit Shaub's testimony on this incident. His demeanor while on the witness stand appeared more forthright and candid than did Young's.

11. When Shaub could not find the posting at NPDC, he telephoned George White, CWA representative at Local 1040. White asked Shaub to make a conscious effort to look for the Klein posting on NPDC's locked bulletin boards (TA62, TB53-54).

12. Sometime after Young's conversation with Shaub, Young told Harvey that Shaub asked him where the Klein Notice was posted (TE8-9). Approximately one month later, Harvey received a copy of a letter from CWA attorney Tara Levy, stating that CWA was contesting the sufficiency of the posting (TE9, TE18-19). Harvey then telephoned Young to reconfirm the dates and placement of the posting and also to inform Young that CWA had complained about it. Harvey did not specify whom at CWA made the complaint. No other person except Shaub asked Young about the posting (TD80-81, TE18).

13. On February 4, 1988, at approximately 1:00 p.m., Commission Chairman James Mastriani convened a meeting regarding the sufficiency of the posting. In attendance were Shaub, Harvey, Young, CWA representatives Bob Yeager and Bruce Fralinger, Don Klein (the employee involved in the underlying charge) and attorneys Maureen Adams, D.A.G., (spokesperson representing the State) and Tara Levy (spokesperson representing CWA) (TA60, TB55-56). The meeting was informal, with all parties seated around a table (TC131). No stenographic transcription was taken (TB55).

14. Shaub spoke at the meeting about his conversation with Young regarding the posting and his search of NPDC's bulletin boards (TA62, TB62, CP-23, TD81). On October 5, 1987, in preparation for

the conference with Chairman Mastriani, Shaub executed a certification outlining his inability to find the Klein posting (CP-23, TC20). This certification was submitted to the Chairman and State representatives prior to the conference, and was referred to during the meeting (TC11, TC20, TD81). At times during the meeting, the parties met separately out of Shaub's presence (TB65, TC22, TC132-133).

15. No settlement was reached at the February 4 meeting (TB64). By letter dated February 23, 1988, Chairman Mastriani directed the State to post either his letter or the original July 14, 1987 Notice on six employee bulletin boards at NPDC for not less than fourteen days and to provide confirmation of compliance (CP-1). By letter dated March 3, 1988, Adams informed Chairman Mastriani that the original Notice would be posted as directed for the period March 4 to March 18, 1988 (R-2).

WAGNER DISCIPLINE

16. Nancy Wagner McCoy^{5/} is a head nurse at NPDC (TC36). Shaub is her shop steward (TA63). In February, 1988, Wagner was given a one-day suspension for abuse of sick leave (TC36). The majority of Wagner's absences were due to her daughter's chronic, severe illness (TC42). These absences were without pay because Wagner had exhausted her allotted sick leave (TC48).

^{5/} Subsequent to the incidents described Wagner married. She will be referred to herein as "Wagner."

17. Wagner appealed her one-day suspension. On the afternoon of February 3, 1988, a disciplinary appeal hearing was scheduled (TA64, TD11, TD18). Prior to the beginning of the hearing, Young and Fralinger met to discuss a settlement of Wagner's case (TA64, TC14, TD12). They tentatively agreed that in return for Wagner dropping the appeal of her discipline, Ryan would try to work with Wagner by adjusting Wagner's schedule to accommodate her need to attend her sick child. In addition, Wagner would be required to supply medical documentation each time she was out due to her child's illness and a prognosis of her child's condition (TA64, TB69, TC13-14, TC22, TC24-25, TC34, TD13-14).

18. After Fralinger and Young met, Young discussed the proposal with Ryan, while Fralinger spoke with Shaub (TC24, TD16). Fralinger asked Shaub to speak with Wagner and encourage her to accept the settlement (TC24). Shaub met with Wagner and then all three (Shaub, Wagner and Fralinger) met to further discuss the proposal (TC25). After each side caucused, all parties (Ryan, Young, Shaub, Fralinger and Wagner) met together in the hearing room with the hearing officer waiting outside. More discussion regarding the settlement agreement ensued. Both Fralinger and Shaub spoke on Wagner's behalf. The settlement was agreed to by all parties. Wagner signed the withdrawal of her appeal and Ryan promised to try to alter Wagner's schedule to accommodate Wagner's child's illness (TA64, TB68-69, TC25, TD16).

19. On February 4, 1988, Ryan called Wagner into her office and told Wagner that she was rescinding the previous day's agreement. Ryan explained that she had subsequently spoken with the other nurses in Wagner's unit and that they were unwilling to accommodate Wagner's schedule because Wagner was undependable (TC37-38, TD19).

20. On the same day, Ryan telephoned Young to tell him why she did not think she could live up to the previous day's agreement. This conversation occurred in the morning (TD20). Young suggested that Ryan give Wagner the opportunity to document her need for the schedule accommodation, and that, if necessary, they would deal with her peers' complaints at a later date (TD20).

21. After her conversation with Ryan, Wagner telephoned Shaub and told him that Ryan had rescinded the agreement (TA65, TC38). Shaub called Young. Young would not speak with Shaub about the matter, but instead suggested that Shaub have Fralinger telephone him (TA66, TD21-22). When Fralinger telephoned Young, Young related Ryan's concerns about the agreement. Fralinger expressed his displeasure with Ryan's decision to reverse an agreement made the day before and asked Young if something could be done. Young suggested that Wagner provide the medical documentation requested and that he would deal with the other nurses before accommodating Wagner. Fralinger asked Young to reduce their understanding to writing (TD22).

22. After his conversation with Fralinger, Young called Ryan and related what he had agreed to do. Young told Ryan he was going to draft a memo and Ryan agreed to its substance. Young then hung up, wrote the memo (CP-2) and left for the afternoon meeting with Chairman Mastriani regarding the Klein matter (TD23).

23. CP-2 is dated February 3, 1988.^{6/} In its entirety it states:

As you know on February 3, 1988, Ms. Wagner withdrew her appeal of a one day suspension for excessive absenteeism. Prior to the hearing, Mr. Bruce Fralinger, Ms. Wagner, Mr. Shaub, you and the writer discussed possibilities to help Ms. Wagner avoid future discipline.

You indicated a positive acceptance to a suggestion from her union representative that if Ms. Wagner provided you with acceptable medical justification regarding her need to be with her sick child, you would attempt to accomodate this by allowing her to adjust her schedule.

On February 4, 1988, you contacted the writer and stated that you may have over-committed yourself. You were concerned that Ms. Wagner's absenteeism if it continued would have untoward effects on her co-workers. This is a legitimate concern.

The writer recommends that you have Ms. Wagner supply you with medical documentation that she is medically required to attend to her sick child. If she supplies acceptable justification of a special need, the writer

^{6/} Young testified that the date on the memo was an error and that it was actually written on February 4, 1988 (TD21). Shaub testified that he received two different copies of CP-2 -- one with the date February 3 and one with February 4 (TC70). Since there is nothing in the record to contradict Young's testimony and since the memo speaks to events which took place on February 4 (which Young obviously could not have known until then), I credit Young's testimony on the date the memo was written and find CP-2's date to be an error.

recommends that you attempt to accomodate this need as best you can.

Please keep this office advised. Thank you.

Both Shaub and Young agree that CP-2 reflects the terms of the February 3 agreement (TB74, TD24).

24. On September 9, 1988, Wagner was again suspended without pay for excessive absenteeism. The Preliminary Notice of Disciplinary Action alleged that Wagner was absent sixteen days without pay between April 6, 1988 and May 26, 1988. Young investigated Wagner's absences after the disciplinary request was submitted in light of the February, 1988 agreement. He found that most of the absences cited in the disciplinary request were for Wagner's personal illness or for when she had a doctor's appointment for her child that was not during her shift. He also found that Wagner had not supplied the requested medical documentation. Accordingly, he decided to go ahead with the discipline (TD27).

A ten-day suspension was imposed which Wagner served during October and November, 1988. Wagner attempted to appeal the suspension but the appeal was filed too late to be considered (R-15, TA-16, TA67-68, TB75-76, TC39-40, R-19, TD25-26).

THOMPSON'S STATEMENTS

25. Dr. Frank Kim is a Staff Physician Specialist I at NPDC (TA21). Head nurse Shaub reports to Kim regarding medical matters in his unit (TA22). Kim has direct authority over Shaub as to aspects of patients' medical treatments but has no administrative supervisory authority over him (TA31).

26. In January, 1988, Kim attended a daily morning meeting with other staff physicians, Ryan, some head nurses and other staff chaired by NPDC's Medical Director, William Thompson (TA22).^{7/} At the end of that meeting, Thompson told those assembled that Shaub was a "union agitator" and was "dangerous" (TA24).^{8/9/}

27. Kim did not know Shaub was a union representative (TA27, TA39).

28. Two days after the morning meeting, Kim told Shaub about Thompson's statements (TA28, TA133-134). Kim decided to tell Shaub so that Shaub might "restrain" himself and retain what Kim thought was Shaub's good reputation among his colleagues (TA28, TA38).

29. Other NPDC employees, including head nurses, also told Shaub that they had heard about Thompson's statements (TC16-18).

30. As a result of Thompson's statements, Shaub was very cautious in his role as shop steward in speaking out against things

^{7/} The Medical Director is responsible for all health services at NPDC including physician care, physiotherapy, occupational therapy, x-rays and laboratories. He has no direct supervisory authority over nurses (TA30).

^{8/} Thompson made no threats against Shaub nor did he solicit Kim to intimidate or take action against Shaub for his union activity (TA35, TA42).

^{9/} Kim testified that it was his "impression" that these statements had been made earlier at a higher level staff meeting which included NPDC's Superintendent Burke. Staff meetings were among employees at the Director's level and above. Kim was not present at that meeting (TA24). Young testified that Burke denied making the statement that Shaub was dangerous (TD68), TA24, TA25, TA33-34, TA48-49, TA52).

he felt were unfair. The statements, however, did not affect Shaub's decisions to file necessary grievances on behalf of unit members (TB77-78).^{10/}

OTHER STATEMENTS

31. On February 17, 1988, Shaub filed five grievances relating to his February 13 and 14, 1988 absences (See Findings of Fact 42 et seq., infra, R-10, R-11, R-12, R-13, R-14). On February 29, 1988, Shaub filed a grievance alleging harassment and discrimination based on union activity (R-9). All six grievances hearings were held in consecutive order on the afternoon of April 26, 1988 (TA149, TD53, R-4).

32. During his summation to the hearing officer following his presentation of management's case in the grievance hearings, Young stated that Shaub "felt that the world revolved around him" and that "the sun rose and set on him" (TA150, TA154, TA156, TD56). Young also stated, "Shaub gets up in the morning and says, 'How can I nail my supervisors today?'" (TA151, TA154).

33. As a result of his February 13 and 14, 1988 absences, Shaub received an official reprimand (see Findings of Fact 42 et seq., infra for more detail). On the morning of April 26, 1988, Shaub had his disciplinary action appeal hearing before Hearing Officer Barry Knoth. Young presented management's case and Fralinger represented Shaub (R-4). As the hearing began, Young said

^{10/} Shaub was an active shop steward during this period (TC32-33).

to Knoth, "We have six grievances to hear yet." Fralinger replied, "We won't get through all those today." Young then said, "Oh yes we will," and, pointing at Shaub continued angrily, "this guy filed six grievances a day" (TA149, TA154, TD113).

34. During his summation in the disciplinary appeal hearing, Young referred to Shaub's actions as "audacious" (TA151, TD54-56).

35. On May 19, 1988, Shaub represented another employee during an investigation by Young. After the investigation, the employee left and Shaub and Young discussed general matters. During the discussion Young stated, "My father was right, the worst thing that ever happened to the State was the unions" (TA156-158).^{11/}

36. In late September or early October, 1987, Young called Shaub regarding an LPN grievance form which stated that Robert Shaub was the representative. LPN's are in an AFSCME unit and are not represented by Shaub. Young accused Shaub of interference with other units. Shaub suggested that maybe there was a mistake and that the employee in question meant to name Shaub's wife, who was active in AFSCME as the representative. In response Young stated,

^{11/} Young strenuously denies making this statement. He argues that the statement does not make sense since his father was a member of the IBEW and a number of his siblings are members of CWA (TD57). While that may be true, I do not find it inconceivable that such a remark could be made. Moreover, as stated earlier, I credit Shaub's testimony over Young's as Shaub appeared more candid and forthright on the stand.

"What are the Shaub's trying to take over the institution?"

(TA158-159). 12/13/

37. Prior to February, 1988, Shaub was never disciplined (TA169, TB5). His supervisor, however, frequently recommended discipline that was not approved (TB5-6, CP-12, CP-13).

POLICIES AND PROCEDURES

38. The policy concerning Requested Absences from Work for the nursing service in effect at NPDC in February, 1988 was as follows:

1. All call-offs should be made at least 1 hour prior to shift starting time, whenever possible.
2. Call-offs are to be made to:
 - 2.1 Radio Nurse for VNS
 - 2.2 SON or her designee at Garrison, extension 591 for Garrison call-offs
3. Request for time to be used must be given at the time of the call-off, i.e., Administrative Leave, Vacation Day, Compensatory time, day without pay.
4. Weather/Snow call-offs:
 - 4.1 Call should be made as in No. 2 above.
 - 4.2 Request for time to be used as in No. 3 above.
 - 4.3 Authorized person receiving the call should:
 - 4.31 Suggest the employee try to come in about 2 hours later.

12/ Young does not recall making this statement (TD56). Again, for the reasons previously stated, I credit Shaub's testimony.

13/ There were other statements in the record regarding Shaub's protected activity. However, since these were not plead as independent violations and since they fell outside the six-month statute of limitations, I did not consider them.

4.32 Ask what kind of time is to be used if unable to get in.

5. Administrative Leave, Sick Time, Vacation Time, Compensatory Time will be temporarily granted by the authorized person receiving the call. All such time must be verified with the Timekeeper before it can be paid for.
6. Sick Time will be granted for sick calls only - this will include personnel illness, accident or exposure to contagious diseases, death in immediate family, or attendance upon a member of the immediate family who is seriously ill, whose spouse is hospitalized due to pregnancy.
 - 6.1 Written, signed documentation by a physician will be required within 5 days when sick leave is requested for:
 - 6.11 exposure to a contagious disease
 - 6.12 attendance upon a family member who is serious ill.
 - 6.13 hospitalization of pregnant spouse, except for day of delivery.
7. Administrative Leave requests and Compensatory Time off requests should be submitted at least 4 weeks prior to the time requested, except in emergency cases.
8. Administrative Leave, Compensatory Time and Vacation Time will be granted according to the needs of the Nursing Department.
9. Vacation Time:
 - 9.1 Vacation time requests are to be submitted between March 1 and March 15 of the current year.
 - 9.2 Employees will be notified by April 15 whether the request is granted or not.
 - 9.3 Requests for vacation time prior to April 15 will be submitted by December 1 of the preceding year.
 - 9.4 Employee should receive response by December 22 for requests prior to April 15.

9.5 Conflict between vacation times will be resolved according to state seniority.

9.6 Where the vacation schedule is established, but there is a need to adjust the schedule due to unforeseen pressure of work or an emergency - after voluntary changes are made, the employees named and required to make a change will be in inverse order of their state seniority, except that consideration will be given to a substantial committment made by the employee involved.

(TA79, TD93, CP-3).

39. By memo dated January 15, 1987, to Day Tour Head Nurses--VNS from Ryan, the following "agreement" was set forth for weekend coverage of day tour head nurses:

1. The RN will assume her scheduled weekend assignment.
2. On a mandatory basis there will be a back-up nurse scheduled to be available every weekend.
3. The back-up nurse will be the nurse scheduled for the next weekend.
4. When the scheduled nurse calls off sick, she will:
 - a. Call the back-up nurse.
 - b. Call the HN on duty to report her call-off, and coverage for the tour.
5. In the event the back-up nurse is unable to cover the weekend -- follow the rotation schedule for the second back-up nurse.
6. The original assigned Head Nurse who called off duty during her weekend to work will work the next weekend -- thus maintaining the rotation schedule.

Each day tour head nurse was aware of this "agreement" which was in effect in February, 1988 (TD107, TE28).

40. In relevant part, the New Jersey Department of Human Services' Disciplinary Action Program (Administrative Order 4:08), in effect from January 1, 1981 to the present, states:

TABLE OF OFFENSES AND PENALTIES

Infraction Types of Offenses	1st Infraction		2nd Infraction		3rd Infraction		4th Infraction		5th	
	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.	Min.	Max.
A ATTENDANCE										
1. Absent from work as scheduled without permission and without giving proper notice of intended absence.	WW	OR	OR	R		R				
2. Absent from work as scheduled without permission but with giving proper notice of intended absence.	C	WW	WW	OR	OR	R		R		
E GENERAL										
1. Violation of a rule, regulation, policy, procedure, order or administrative decision.	C	R	5d	R		R				

KEY: C = Counselling
OW = Oral Warning
WW = Written Warning

OR = Official Reprimand
d = Number of Working Days Suspension
D = Demotion
R = Removal

(R-18).

FEBRUARY 13 AND 14 ABSENCES

41. Shaub's normal work hours are 7:00 a.m. to 3:00 p.m., Monday through Friday and occasional weekends as assigned on a rotating basis. The weekend rotation schedule had been in effect since Shaub started at NPDC. The supervisors of each tour of nurses draft the monthly schedules which are submitted to the Director of Nurses for final approval. Tour supervisors have authority to make changes in the schedule (TA70, TB89-90).

42. Shaub's wife is an LPN in the Garrison Building at NPDC. In April 1987, she began working the same shift as her husband. This caused a conflict when their weekend rotation assignments coincided because of the unavailability of care for their two young children. The Shaubs worked out an arrangement with Moss and Mrs. Shaub's supervisor, Jody Mount, which attempted to avoid weekend scheduling conflicts (TA71-73).

43. On January 26, 1988, at noon, the RN's schedule for February was posted on the bulletin board. Shaub received a copy of the schedule at 3:00 p.m. Normally schedules are posted on the 15th of the preceding month (TA74).

44. Both Shaub and his wife were scheduled to work the weekend of February 13 and 14, 1988. On the morning of January 28, 1988, Shaub spoke with Ryan and Garvey about the conflict. He explained that since his wife used her time last year when there was a weekend scheduling conflict, it was his turn this year and therefore he would not be able to work that weekend (TA74-75, TB95-96, TE30-31).

45. Ryan did not offer to change Shaub's schedule.^{14/} Ryan suggested Shaub find a babysitter. Shaub explained that normally his or his wife's parents would take care of his children but on the weekend in question both were going to be away. Shaub

^{14/} Garvey testified that Ryan told Shaub he could work nights to avoid the problem (TE31). No other testimony in the record corroborates that statement. Since the State did not offer Ryan as a witness, I do not rely on it.

asked Ryan if she knew of anyone who would babysit at 6:00 a.m. as that was the time both he and his wife had to leave for work. Ryan did not respond to Shaub (TA75-76, TB96-97, TC6-7, TC18, TE-31-32).

46. Shaub tried to find a replacement for the weekend. He spoke with all other RN's in the Visiting Nurses Service and none were able to switch weekends with him.^{15/} (TA75, TB95, TC18).

47. Between January 28 and February 12, 1988, Shaub spoke with Ryan at least two other times and told her he would not be able to work on February 13 and 14, 1988. Shaub asked Ryan if she could find coverage for that weekend. Ryan did not respond (TA76, TB98).

48. On February 12, 1988, at 9:30 a.m., Shaub telephoned NPDC and spoke with Garvey. He stated he was "calling off" for his shifts on February 13 and 14 and was requesting emergency vacation for those days.^{16/} Garvey denied the vacation request as unacceptable because Shaub was the only one scheduled and because she was unable to replace him at that time (TE4). At 10:15 a.m. that day, Shaub called back and said he had fulfilled his obligation

^{15/} Despite his efforts, Shaub testified that he believed it was not his responsibility to find coverage for the weekend (TA81). He cites a memo written by him to Patrick Crowley, Personnel Director, dated April 28, 1988, allegedly confirming a conversation with Crowley wherein Crowley stated that if an employee requests time off it is not their responsibility to get a replacement (CP-4). Although I have found Shaub to be a forthright witness, I do not give much weight to this document because of its self-serving nature. Neither party has proven the existence of a policy regarding replacement responsibility.

^{16/} On February 16, Shaub put his vacation request in writing. No response was received (CP-8, TB101-102).

to get a replacement by leaving a message with the husband of the next RN on the rotation list. Garvey told Shaub it was his responsibility to find a replacement (TA76-78, TB99-100, TC7-8, TE32-35, CP-21). Shaub did not work and was not paid for February 13 and 14, 1988 (CP-9, TA102).

49. On February 16, 1988, Garvey served Shaub with a form "105," Request for Administrative Action, stemming from his weekend absences (CP-5, TA90-94, TB101-103, TE36-37). On the form, Garvey reiterated the sequence of events surrounding Shaub's absence, beginning with his phone call on February 12. Along with form 105, Garvey filled out a form "106," Request for Corrective or Disciplinary Action, and submitted both forms to Young. Form 106 specifies the offense as Code A-2, "absent from work as scheduled without permission but with giving proper notice of intended absence." The requested penalty was "counselling" (CP-6, TA95-97, TB103, TD36-37, TE39). Form 106 was also signed by Ryan indicating her agreement with its specifications (TA96, TE40).

50. On February 19, 1988, Young completed a Review of Recommended Corrective or Disciplinary Action form regarding Shaub's absences. In pertinent part it stated:

Approved charge (offense/cause): Absence from work as scheduled without permission and without giving proper notice of intended absence (A1) and violation of procedure (E1).

Approved specification: On February 12, 1988 you telephoned the SNS stating you would be unable to work your scheduled rotation weekend of 2/13 and 2/14, 1988. You stated you had a babysitting problem. Your request for leave was denied. You were informed that it was your

responsibility to come to duty as scheduled or arrange for a replacement. You failed to find a replacement and did not arrive for duty.

The approved action was an official reprimand (CP-7). Shaub was served with the Notice of Official Reprimand on February 26, 1988 (R-3). 17/

17/ Young claims he changed the charge from "with giving proper notice" to "without giving proper notice" because when Garvey spoke with Shaub on the 12th, she indicated that his emergency vacation request had been denied. Therefore, Young reasons, she expected Shaub to come to work and since he was expected to come to work and did not, he could not have given proper notice (TD38-39). I do not credit this explanation. It makes no logical sense. Garvey knew Shaub was not coming to work on the 13th and 14th; he had been telling everyone that for weeks. He called in twenty-one hours before his shift, which is clearly more than the one hour stated in the Requested Absences from Work policy. Under Young's theory, the only way notice could be proper is if the absence is approved. The first part of the offense, "absent from work without permission," already contemplates the approval aspect. Accordingly, since I do not credit Young's explanation of the change from A2 to A1, and since there is substantial evidence in the record from which to infer anti-union animus on Young's part (see Analysis, infra), I find that hostility toward Shaub's exercise of his protected rights was the reason Young increased Garvey's recommended charge and penalty.

In addition, I discredit Young's explanation of why he added an E1 (violation of procedure) charge to Shaub's discipline. Young testified that this charge was added because Garvey told him there was a policy in effect which stated that if a head nurse needed to call off for their weekend rotation, that nurse was responsible to get someone to cover for them. Since Shaub did not get his own coverage, he allegedly violated E1 (TD38). Again, this explanation does not make sense. The "policy" that Young refers to is no more than an agreement between the day tour head nurses. The only reference to calling off from the weekend rotation is when a nurse calls off sick. That was not the situation in this case. Even if the sick call off procedure applies, the agreement states that

51. Prior to completing CP-7, Young reviewed documents submitted by Garvey along with CP-5 and CP-6 and spoke with Garvey about the incident (TD37). Included in the packet of documents were the call-off log for February 12, 1988, (CP-21) and two handwritten memos to Garvey from Gay Stenger and Sandra Suntato, both RNs (R-20 and R-21, respectively). Stenger stated that she had offered to work for Shaub if he would work for her on April 2 and 3, 1988, but that Shaub declined this offer. Suntato stated that she witnessed Shaub ask Whalen to work that weekend but that Whalen said she could not. Suntato also mentioned that Shaub had asked her to work for him but that she was unable to do so. Young interviewed Stenger and Suntato but did not question Shaub regarding the incident (TD112).

52. On February 26, 1988, Shaub appealed the official reprimand (TB105, R-4). A departmental hearing was held on April 26, 1988, before Barry Knoth, Hearing Officer. Knoth issued his decision on May 12, 1988, sustaining the charges and the penalty imposed (R-4). Shaub appealed that decision to the Merit System

17/ Footnote Continued From Previous Page

the nurse's duty is to telephone the back-up nurse and then report the absence and the coverage to the supervisor on duty. Shaub telephoned the back-up nurse, was unable to reach her and left a message. He then called in and told this to Garvey. At the time he called in, it was not clear whether the back up nurse was unable to cover the weekend or not. Accordingly, I discredit Young's explanation of why he added an E1 violation to Shaub's discipline charges. Since there is other evidence to prove Young's anti-union animus (see Analysis, *infra*), I find that Young added the E1 charge based on his hostility toward Shaub's exercise of his protected rights.

Board (TB113). On August 2, 1988, Eugene McCaffrey, Sr., Commissioner of the Department of Personnel, determined that Shaub's appeal did not meet the Board's standard for reviewing final departmental determinations of minor disciplinary actions and therefore denied further hearings (R-5).

OTHER LEAVE SITUATIONS

53. On April 21, 1987, at 8:00 p.m., Head Nurse Vivian Titus called off requesting vacation days for a family emergency. Her shift was 7:00 a.m.--3:00 p.m. and she expected to return to work on April 28. Jonetta Tabor took the call (CP-15, TB25). Titus was not disciplined for this absence (TB35).

54. On June 15, 1987, at 2:35 p.m., Head Nurse Gilbert called off requesting that her vacation be moved up to start for her 8:00 a.m.--4:00 p.m. shift on June 16, 1987. Nancy Garvey took the call (CP-16, TB26). Gilbert subsequently used a sick day to cover this absence (TD60). Gilbert was not disciplined for this absence (TB35).

55. On June 23, 1987, at 1:50 a.m., Titus called off saying that she had no power in her house due to a storm and requesting that a vacation day be used to cover her absence on the 7:00 a.m.--3:00 p.m. and 3:00 p.m.--11:00 p.m. shift. Fenwick, RN, took the call (CP-17, TB26). On June 24, 1987, Titus submitted a written request for a vacation day to cover her absence on June 23 (CP-27). Initially, Titus was given an unauthorized absence. She filed a grievance and Young was the hearing officer. During the

hearing, Young determined that when Titus called in, the supervisor did not indicate whether or not vacation time would be approved. Accordingly, Young overruled the supervisor and directed that Titus be given a vacation day (TD60, CP-26). Titus was not disciplined for this absence (TB35).

56. On September 29, 1987, at 5:45 p.m., Fenwick called off requesting vacation time to cover her 11:00 p.m.--7:00 a.m. shift. Stenger took the call (CP-18, TB27). Fenwick was not disciplined for this absence (TB35).

57. On December 15, 1987, at 5:15 a.m., Head Nurse McClendon called off requesting an emergency vacation day to cover her 7:00 a.m.--3:00 p.m. shift. Fenwick took the call (CP-19, TB27-28). McClendon was not disciplined for this absence (TB35).

58. On January 11, 1988, at 8:45 p.m., Stenger called off requesting an emergency vacation day to cover her 3:00 p.m.--11:00 a.m. shift on January 13. Suntato took the call (CP-20, TB28). Stenger was not disciplined for this absence (TB35).

59. On March 24, 1988, at 9:25 a.m., Tabor called off requesting an emergency vacation day to cover her 3:00 p.m.--11:00 p.m. shift. Garvey took the call and informed Tabor that she was the only one scheduled and that therefore she could not approve the request or agree to schedule it as excused (CP-22, TB29). The emergency vacation day was subsequently approved by Tabor's superiors (CP-24, CP-25, TD59). Tabor was not disciplined for this absence (TB35, TD102).

ANALYSIS

CWA asserts that the State reneged on the Wagner settlement and disciplined Shaub in retaliation for Shaub's protected activity and participation in a Commission compliance conference. CWA also contends certain statements made by higher level management and Young interfered with, restrained and coerced Shaub in the exercise of his rights.^{18/}

THE (a)(3), (4) and (1), DERIVATIVELY, VIOLATIONS

Whether an employer illegally discriminates in retaliation for protected activity requires a charging party prove that protected activity was a substantial or motivating factor for the employment action. In re Bridgewater Tp., 95 N.J. 235, 244 (1984). The charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise of protected rights. If the charging party proves that hostility toward exercise of protected rights was a substantial or motivating factor in the employer's action, the burden shifts to the employer to show the action would have occurred absent protected activity. The employer's affirmative defenses 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 action.

^{18/} CWA's evidence was directed only to its charge that the State violated subsections 5.4(a)(3), (a)(4) and (a)(1) (derivatively and independently) of the Act. It did not present facts to prove a 5.4(a)(2) violation. I therefore recommend dismissal of the Complaint as it relates to that subsection.

Shaub was an active shop steward for two years. He filed many grievances and represented other employees in matters before management, particularly involving Young as Acting Employee Relations Officer. In addition, Shaub actively participated in a Commission compliance conference concerning an unfair practice committed by NPDC. This included providing relevant information and submitting an affidavit. Accordingly, I find that Shaub generally engaged in protected activity, and specifically engaged in the type of activity contemplated by subsection (a)(4) of the Act. I also find that the employer knew about Shaub's activity.

Shaub claims that anti-union animus was the substantial or motivating factor behind the official reprimand and docking he received for his February 13 and 14 absences. Garvey charged Shaub with being absent from work as scheduled without permission but with giving proper notice of intended absence. The initial discipline recommended by Garvey, and approved by Director of Nurses Ryan, was a counselling. Shaub was docked because he did not work the two days, and Garvey did not permit him to use vacation time. I find that the charging party failed to prove that anti-union animus was the motivating factor behind Garvey's discipline recommendation or denial of vacation. There is no nexus between Shaub's protected activity and Garvey's action. She was not involved in the Klein posting incident nor are there any statements in the record attributed to her which indicate an anti-union attitude. While Garvey is a supervisor and Shaub is a shop steward, this is not

enough to prove illegal hostility. In addition, in a leave situation similar to Shaub's, Garvey also denied Jonetta Tabor emergency vacation leave when Tabor was the only RN scheduled. It was the higher level supervisors, not Garvey, who eventually granted Tabor's request and who failed to discipline her or charge her with giving improper notice of intended absence.

Garvey's recommended discipline was submitted to Young. Young increased the severity of the charge to allege that Shaub was absent from work as scheduled without permission and without giving proper notice of intended absence. He also added the charge of violation of procedure and imposed the greater penalty of an official reprimand. As I have already found, Young's explanation for the increase was unsupported and illogical.

Ten days before his absences, on February 4, Shaub spoke out against NPDC, and specifically Young, at a Commission inquiry into the sufficiency of NPDC's posting in another hotly-contested unfair practice. In fact, it was Shaub who, a few months earlier, had initiated the CWA's compliance complaint when he could not find the posting on official bulletin boards. Young and others in management knew Shaub was the only one asking about the posting. Young clearly exhibited his unhappiness and hostility toward Shaub when Shaub asked him about the posting location.

Young also exhibited hostility toward Shaub in numerous statements about Shaub's activities. Young said Shaub felt "that the world revolved around him," and "that the sun rose and set on

him"; that "Shaub gets up in the morning and says, 'How can I nail my supervisors today?"; that Shaub's actions were "audacious"; and that "the words thing that ever happened to the State was the unions." Young also questioned both Shaub and his wife's activities as union representatives by asking, "What are the Shaubs trying to take over the institution?"

Under all of the circumstances in this case, I find that Young's increased discipline of Shaub was motivated by anti-union animus. Prior to the posting incident, Young never approved discipline for Shaub. In the Klein matter, Shaub went out of his way to become involved in a situation he had nothing to do with and this annoyed Young. It was Shaub's investigation that caused Young and other NPDC management representatives to have to appear before the Commission to explain their actions. I find that this event, coming just two weeks before Shaub's absences, motivated Young to discriminate against Shaub in issuing his harsher discipline.

Further, I find that Young's statements evidence his anti-union attitude. While it is true that these statements were made after he increased Shaub's discipline, I nevertheless infer from all of the circumstances that this attitude existed when the action was taken. Standing alone the bulk of Young's statements are no more than personal attacks or unflattering remarks about Shaub. However, when viewed together with the totality of the evidence, I believe they show a pervasive anti-union attitude that motivated Young to arbitrarily increase Shaub's discipline.

I find that anti-union animus was not, however, the motivating factor in Young's alleged revocation of the Wagner settlement. It does not appear that Young actually reneged on the initial agreement. The substance of his conversation with Fralinger and the follow-up memo essentially contain the same terms as were agreed to at the grievance hearing. While Young acknowledges Ryan's concerns, he continues to assure the union that they will try to accommodate Wagner's schedule if she supplies the needed medical documentation. Accordingly, I do not find that Young took any action which would be construed as discrimination. Even if Young did alter the agreement, I do not find any nexus between that action and Shaub's protected activity. Shaub's connection to the Wagner grievance was tenuous at best. Most of the discussions about this incident took place between Young and Fralinger. Shaub was only peripherally involved. Moreover, his testimony at the Commission compliance conference did not occur until after the Wagner discussions. I recommend that the Commission dismiss that portion of the Complaint which alleges NPDC violated the Act when it rescinded the Wagner agreement.

Having found that the charging party proved anti-union motivation in the increase of Shaub's discipline, the burden shifts to NPDC to show that action would have occurred absent Shaub's protected activity. As I have already stated (See footnote 17), Young's explanations for the additional charges and increased penalty are inadequate. I find no sustainable justification for

Young's determination that Shaub's notice of intended absence was improper or that Shaub violated the weekend rotation call-off "procedure." Based on the proximity of the action to the protected activity, and on statements which indicate a general anti-union attitude, I find Young's motives illegal. Accordingly, I find Young would not have taken that action absent Shaub's protected activity.

I also recommend that the Commission find Young violated subsection (a)(4) of the Act. As I have already found, Young's discrimination against Shaub was based in large part on Shaub's participation (giving information and submitting a formal affidavit) in a Commission compliance conference.

THE INDEPENDENT (a)(1) VIOLATIONS

An employer independently violates subsection 5.4(a)(1) if it engages in activities which tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). CWA contends that the statements made at an administrative staff meeting in January, 1988, as well as the statements made by Young during the processing of the appeal and grievance related to Shaub's discipline had a tendency to interfere with Shaub's protected rights.

I find that the statements related by Thompson at the January meeting that Shaub was a "union agitator" and was "dangerous" did not violate (a)(1). It is not clear who actually

uttered those statements, that is, whether they were made by Thompson or whether he was merely passing along what someone else had said. More importantly, the statements were not made directly to Shaub or in the presence of any other bargaining unit representative. The only way Shaub found out about them was because someone who was at the meeting and who was not Shaub's supervisor decided to tell him several days late. In making the statements, Thompson did not issue threats against Shaub nor did he solicit Kim to intimidate or take action against Shaub because of his union activity. When Kim related the statements to Shaub, he also did not issue threats. While the statements may have made Shaub more cautious in speaking out against things he felt were unfair, there is nothing to indicate that he stopped being an active shop steward. In fact, Shaub testified that the statements did not affect his decisions to file necessary grievances on behalf of unit members. It appears to me, based on all the facts in the record, that Shaub is a savvy and confident union representative who is not easily intimidated. Accordingly, I find that the remarks made by Thompson at the January meeting did not have a tendency to interfere with Shaub in the exercise of his protected rights.

I also find that the statements made by Young during the grievance hearing and appeal of Shaub's discipline did not violate subsection (a)(1). A public employer is within its rights to comment upon those activities or attitudes of an employee representative that it believes are inconsistent with good labor

relations. Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶17223 1981). Young addressed his remarks to a hearing officer in an effort to convince him of management's position in the hearing. While Shaub was in the room, the remarks were not made directly to him. Further, the remarks contained no threats. As CWA acknowledges in its post-hearing brief, taken alone, the statements "may not be viewed as overly coercive." (Post-hearing brief p. 37).

I specifically reject CWA's arguments that these merely unflattering statements become violative of the Act because they were said in a grievance hearing. Most of the remarks were no more than personal attacks on Shaub which addressed why he was absent on February 13 and 14. This was the subject of the grievance hearing. The remarks did not comment on Shaub's filing of the grievances or his right to pursue them. They did not intimate that some action would be taken against Shaub in the future if he were to file more grievances. There is nothing in the record to suggest that these remarks affected Shaub in any way (other than to get him angry). Quite the contrary, he continued to be a zealous shop steward who vigorously represented his bargaining unit members. Accordingly, I find no independent (a)(1) violations and recommend that the Commission dismiss that portion of the Complaint.

CONCLUSIONS OF LAW

1. The State of New Jersey violated subsections 5.4(a)(3), (4) and (1), derivatively, of the Act when Acting

Employee Relations Officer Harold Young increased Head Nurse Robert Shaub's discipline for his February 13 and 14, 1988, unauthorized absences from a counselling to an official reprimand, and when he denied Shaub use of vacation leave for those days.

2. The State of New Jersey did not violate subsection 5.4(a)(1), independently, when certain statements were made by Young and Medical Director William Thompson.

RECOMMENDED ORDER

I recommend that the Commission ORDER the State of New Jersey to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by the Act by increasing the discipline of employees such as Robert Shaub in retaliation for protected activities, including participation in Commission proceedings.

B. Discriminating in regard to terms and conditions of employment to discourage employees in the exercise of the rights guaranteed them by the Act, in particular by increasing the discipline of employees such as Robert Shaub in retaliation for protected activities, including participation in Commission proceedings.

C. Discriminating against employees such as Robert Shaub because they signed and filed an affidavit and gave information in Commission proceedings.

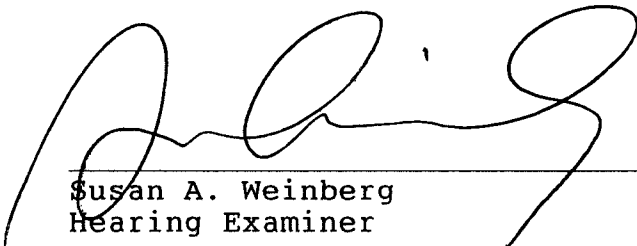
II. Take these actions:

A. Rescind the official reprimand of Robert Shaub and restore the penalty of counselling for Shaub's unauthorized absences on February 13 and 14, 1988.

B. 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.

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

I recommend that the Commission DISMISS the remaining allegations in the complaint.



Susan A. Weinberg
Hearing Examiner

Dated: May 30, 1990
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them by the Act by increasing the discipline of employees such as Robert Shaub in retaliation for protected activities, including participation in Commission proceedings.

WE WILL cease and desist from discriminating in regard to terms and conditions of employment to discourage our employees in the exercise of the rights guaranteed them by the Act, in particular by increasing the discipline of employees such as Robert Shaub in retaliation for protected activities, including participation in Commission proceedings.

WE WILL cease and desist from discriminating against our employees such as Robert Shaub because they signed and filed an affidavit and gave information in Commission proceedings.

WE WILL rescind the official reprimand of Robert Shaub and restore the penalty of counselling for his unauthorized absences on February 13 and 14, 1988.

Docket No. CO-H-88-213

State of New Jersey (Dept. of Human Services)
(Public Employer)

Dated _____

By _____
(Title)

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

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